

Complaint

66 F.T.C.

sion and to the terms, conditions and prohibitions of this Order as it applies to WEAR-EVER ALUMINUM, INC., or to prior intervening successors to the aforementioned business of selling aluminum stock pots and pans.

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

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IN THE MATTER OF

PROSPECT BRACELET COMPANY, INC., ET AL.

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

*Docket 8611. Complaint, Dec. 27, 1963—Decision, Oct. 3, 1964*

Order requiring a New York City distributor of watches and watchbands to cease failing to disclose adequately the foreign origin of its imported watchbands and preticketing said product with excessive prices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Prospect Bracelet Company, Inc., a corporation, and Sheldon Parker, 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 Prospect Bracelet Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 188 West 4th Street in the city of New York, State of New York.

Respondent Sheldon Parker 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 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

watchbands to manufacturers and distributors of watches as well as to retailers for resale to the public.

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

PAR. 4. Said watchbands consist in whole or in substantial part of components which were manufactured, in and imported from, Hong Kong and Japan. When offered for sale or sold by respondents, said watchbands do not bear disclosure showing that they are substantially of foreign origin.

PAR. 5. By the aforesaid practices, respondents place in the hands of watch manufacturers, distributors and retailers, means and instrumentalities by and through which they may mislead the public as to the place of origin of said watchbands or the substantial components thereof.

PAR. 6. In the absence of an adequate disclosure that a product, including watchbands, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise, or, substantial components thereof, is, therefore, to the prejudice of the purchasing public.

PAR. 7. Respondents, for the purpose of inducing the purchase of their watchbands, have engaged in the practice of using fictitious prices by attaching or causing to be attached to their watchbands, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said amounts are the usual and regular retail prices of said watchbands. In truth and in fact, said amounts are not the usual and regular retail prices of said watchbands, but are in excess of prices at which said watchbands generally sell at retail in some of the trade areas where the representations are made.

PAR. 8. By the aforesaid practices, respondents place in the hands of watch manufacturers, distributors and retailers, means and instru-

Initial Decision

66 F.T.C.

mentalities by and through which they may mislead the public as to the usual and regular price of said watchbands.

PAR. 9. 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 metal expansion watchbands of the same general kind and nature as that sold by the respondents.

PAR. 10. The use by respondents of the false, misleading and deceptive representations and practices hereinabove set forth, and the failure to disclose the foreign origin of their watchbands or of substantial components of their watchbands, have had, now have, the capacity and tendency to mislead and deceive purchasers or members of the buying public in the manner aforesaid, and thereby to induce them to purchase respondents' watchbands.

PAR. 11. 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.

*Mr. Herbert L. Blume* for the Commission.

*Mr. B. Paul Noble* of Washington, D.C., for the respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

AUGUST 25, 1964

The complaint in this proceeding charges respondents with failing to disclose adequately the foreign origin of watchbands imported in a finished state, or as components, and sold by them in interstate commerce. Respondents are further charged with deceptive pricing practices.

Respondents' failure to disclose adequately the foreign origin of their watchbands and components is alleged in the complaint to constitute a violation of Section 5 of the Federal Trade Commission Act because "\* \* \* a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise, or, substantial components thereof, is, therefore, to the prejudice of the purchasing public."

Respondents, for the purpose of inducing the purchase of their watchbands, have engaged in the practice of using fictitious prices by attaching or causing to be attached to their watchbands, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said amounts are the usual and regular retail prices of said watchbands. In truth and in fact, said amounts are not the usual and regular retail prices of said watchbands, but are in excess of prices at which said watchbands generally sell at retail in some of the trade areas where the representations are made.

The complaint asserts that respondents' said practices "\* \* \* place in the hands of watch manufacturers, distributors and retailers, means and instrumentalities by and through which they may mislead the public as to the place of origin of said watchbands or the substantial components thereof \* \* \*" and "\* \* \* through which they may mislead the public as to the usual and regular price of said watchbands."

Respondents' acts and practices are asserted to 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." 15 U.S.C.A., Sec. 41, *et seq.*

After the instant complaint was released for service, the Federal Trade Commission issued a new set of Guides Against Deceptive Pricing, effective January 8, 1964. Commissioner Everette MacIntyre then issued a separate statement commenting upon the new Guides, in which he stated, *inter alia*:

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

On February 17, 1964, the Commission, as a result of the new Guides, took action in *Clinton Watch Company*, Docket No. 7434 [64 F.T.C. 1443], and Commissioner MacIntyre issued a separate statement at that time. After the United States Courts of Appeals had sustained the Commission's position in appeals from its pricing orders in *The Regina Corporation*, 322 F. 2d 765 (C.A. 3, 1963), and *Giant Food, Inc.*, 322 F. 2d 977 (C.A.D.C., 1963), the Commission conducted post-appeal proceedings in which the Commission modified its prior orders. On April 7, 1964, the Commission amended its *Regina* order (Docket No. S323) [65 F.T.C. 246], and on August 5, 1964 [p. 476 herein], the Commission amended its *Giant Food* order. Attached as an appendix are the pertinent portions of the amended orders.

After this hearing record was closed, respondents moved to dismiss on the grounds that Federal Trade Commission Administrative Bulletin No. 64-10, dated May 6, 1964, represented a change in the "foreign origin" policy of the Commission and that had such policy been in effect at the time the complaint issued, the instant complaint would not have issued. The hearing examiner determined that such motion should be acted upon only by the Federal Trade Commission itself, and certified respondents' motion to the Commission. On July 30, 1964, respondents' motion to dismiss based upon Administrative Bulletin 64-10 was denied by the Commission.

Several prehearing conferences were conducted. Pursuant to leave granted, respondents, on March 26, 1964, filed an amended answer in substitution for their original answer. Respondents' counsel represented at a prehearing conference convened on March 19, 1964 "The amended answer will admit everything, every substantial allegation in the complaint except public interest and will set up abandonment as a defense." Said amended answer filed March 26, 1964, in fact put in contest as many issues as the original answer. Sheldon Parker, respondent, sole stockholder of corporate respondent Prospect Bracelet Company, Inc., and policy maker for the corporation, was the only witness. He testified for both sides. Documentary evidence and physical exhibits have been received. Additional hearings, originally set for May 28, 1964, conditioned upon prior Federal Trade Commission approval, were cancelled because they were not requested by counsel.

Complaint counsel filed his proposed findings, conclusions and brief on June 29, 1964. Respondents' counsel moved on three separate occasions for extensions of time within which to file proposed findings, conclusions and brief. All such requested extensions were granted. However, as this initial decision is being written, respondents' counsel has not filed any proposed findings, conclusions or brief as he represented he would do.

Findings of fact not made herein in the form suggested, or in substantially that form, hereby are rejected. All motions heretofore made, which have not previously been specifically ruled upon, hereby are overruled and denied. Based upon the entire record, including the testimony, exhibits and proceedings of record, the examiner makes the following:

#### FINDINGS OF FACT

1. Corporate respondent Prospect Bracelet Company, Inc., was a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 188 West 4th Street, New York, New York.

2. Individual respondent Sheldon Parker was principal stockholder and an officer of the corporate respondent. Parker formulated, directed and controlled the acts and practices of the corporate respondent. Parker's address was the same as that of the corporate respondent.

3. Up to and including April 30, 1963, respondents had been engaged in advertising, offering for sale, selling and distributing watchbands to manufacturers, assemblers, and distributors of watches. Respondents also sold their watchbands to retailers for resale to the public for replacement of watchbands then being worn by retail customers.

4. In the course and conduct of their business, respondents caused their products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintained, and at all times relevant to this proceeding, maintained a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this complaint. This proceeding is in the public interest.

6. In the conduct of their business, and at all times pertinent to this proceeding, respondents were in competition, in commerce, with firms and individuals in the sale of metal expansion watchbands of the same general kind and nature as those watchbands sold by respondents.

7. In the absence of adequate disclosure that a product, including watchbands, is of foreign origin, the public believes and understands that such product is of domestic origin.

8. The watchbands which respondents sold in interstate commerce consisted of substantial components which were manufactured in, and imported from Hong Kong and Japan. When offered for sale or sold by respondents the watchbands did not bear adequate disclosure showing that they were of foreign origin. Through their failure adequately to disclose the foreign origin of components or substantial parts of their watchbands, respondents placed in the hands of watch manufacturers, or assemblers, distributors and retailers, the means and instrumentalities by and through which such watch manufacturers, or assemblers, distributors and retailers, were able to mislead the public as to the place of origin of said watchbands and substantial component parts of the watchbands.

9. Respondents' counsel asserts Prospect Bracelet Company, Inc., ceased doing business as a corporation, and liquidated its inventory as of April 30, 1963. The best evidence of such fact would have been

a certification to that effect by the Secretary of State of New York. However, other evidence in the record supports the finding, and the examiner finds, that Prospect Bracelet Company, Inc., as of April 30, 1963, ceased to sell watchbands in interstate commerce. Although Prospect may have ceased to transact business, and may, as of now, be legally dissolved under the laws of the State of its incorporation, New York, the hearing examiner has taken and hereby takes official notice of public records which show that respondent Parker continues to conduct an importing business, as a partnership known as the W.M.R. Watch Case Company, and as a New York corporation, W.M.R. Watch Case Corp. (see Federal Trade Commission Docket No. 8573 [64 F.T.C. 1386] and Court of Appeals for the District of Columbia Docket No. 18670) [7 S.&D. 1098]. Parker testified on April 23, 1964:

\* \* \* I am currently importing bracelets and they are properly marked. They are not being carded. They are being sold in bulk to the trade. They are sold to the watch assembler and what he does after I sell it, or it's sold to him legally as far as the Federal Trade Commission is concerned, or as far as I'm concerned morally, I don't care that [what] he does with it. He can throw them out the window. As long as I sell them and make my profit. I'm not concerned with it. (Tr. 66.)

Such defenses, therefore, as abandonment, or lack of public interest in this particular proceeding, which may have been asserted directly, or inferentially, on behalf of the respondents are rejected as being contrary to the evidence and the rulings of the Federal Trade Commission. Parker was the moving force behind Prospect and used the particular corporation, Prospect Bracelet Company, Inc., for the purpose of promoting his business interests and gain. If it suits his purpose Parker could revive Prospect Bracelet Company, or import watchbands into the United States through one of his other business enterprises. It is essential, therefore, that if a cease and desist order issues, it should bind Sheldon Parker, irrespective of the type of business organization (*i.e.*, a sole proprietorship, a partnership, or a corporation) which he may utilize to carry on his importing business.

10. Mr. Parker testified (Tr. 8, *et seq.*) that he lives at 84-55 Daniels Street, Briarwood 35, Queens, New York; is an importer; has been in the importing business about 14 years; that his business address is 62 W. 47th Street, New York, New York, and that he has been engaged in the importing business with Prospect Bracelet Company, Inc., and W.M.R. Watch Case Corporation.<sup>1</sup> Both companies were organized

<sup>1</sup> W.M.R. Watch Case Corporation and Sheldon Parker are respondents in Docket No. 8573, in which an order to cease and desist was issued by the Federal Trade Commission on March 24, 1964 [64 F.T.C. 1386]. Petition to review filed in the District of Columbia Circuit on June 5, 1964, No. 18670 [7 S.&D. 1098].

under the laws of the State of New York. Mr. Parker started in the watch business in 1938, and went into military service in January 1942. He resumed his importing business in 1946 (Tr. 11 and 12). From 1946 until the date of his testimony "I have been in the watch business and also in the importing business for the components" (Tr. 12). Parker is the sole owner of Prospect Bracelet Company, Inc. (Tr. 34).

11. Parker stated and the examiner finds that a watch consists of the movement, the case, and the strap or watchband. Most of the movements used to manufacture or assemble watches in the United States are imported from Switzerland. Some are imported from Japan, France and Germany. Some movements are imported inside the case; others are imported separately and must be placed in a case. Domestic watch "manufacturers" and assemblers also import completed watches.<sup>2</sup>

12. Parker stated "If I took the so-called bracelet off, the whole thing is called a head. \* \* \* So that the head of a wrist watch, \* \* \* would be everything other than the bracelet or watchband" (Tr. 17). Ordinarily, the manufacturer, in addition to providing a movement, inside a case, with a band or bracelet attached, also provides a box or package in which the watch is offered for sale. The bands or bracelets are made of metal, or a combination of metal and leather. If made of leather, they are referred to as straps. Domestic manufacturers and importers of watchbands sell such bands to (A) watch assemblers or manufacturers for attachment to the head and (B) to retailers for resale as replacement bands. Some businessmen import completed watchbands which they sell as such to manufacturers and retailers. They also import component parts of the bands, assemble them in the United States, and sell them as completed bands to manufacturers and to retailers (Tr. 20). Prospect imported its watchbands as a complete bracelet, and also as components.

13. Ninety-eight percent of the bracelets that Prospect imported were resold to watch manufacturers and assemblers. Only two percent were sold for resale as retail replacements (Tr. 21). This two percent was usually sold to wholesalers who resold to retailers. The retailers wanted the watchbands mounted on cards. Prospect sometimes mounted the bracelets on a card, but frequently the watchbands were mounted by the wholesaler on cards which Prospect supplied to the wholesalers at the time it delivered the watchbands. Samples of the watchbands sold by respondents in interstate commerce are in evidence as CX 1-11, inclusive.

<sup>2</sup> See the testimony of General Omar Bradley before the Special Subcommittee of the Senate Armed Services Committee on August 17, 1964.



14. Commission exhibits in evidence (CX 1-CX 11, inclusive) are watchbands which respondents imported. All are marked with the name "Prospect". Some show; others do not show, country of origin.

15. According to Parker, prior to July 1960, the United States Customs authorities permitted an importer to bring in component parts of watchbands, without showing the country of origin on the components, if further manufacturing were done in the United States (Tr. 35). Respondents imported such components, assembled them here and sold them in commerce without showing the country of origin. After July 1, 1960, the United States Customs required the components to be marked with the country of origin.

16. Parker's records indicated that his instructions to the foreign suppliers of his components were that the first link should be blank, the second was to bear the country of origin, the third link was to be blank and the fourth link was to have "Prospect" on it. Foreign origin was indicated only once—on the second link. "Prospect" was to appear on the other links (Tr. 51).

17. The display cards to which respondents attached their bracelets by a transparent plastic bubble usually had the word "Prospect" and a retail price preticketed upon the cards. Such preticketed prices were either \$4.95 or \$5.95 (see CX 1-CX 11, inclusive). Respondents imported watchbands for ladies' and men's watches.

18. Respondents' watchbands were so affixed to the cardboard upon which they were displayed that a prospective purchaser was unable to see any foreign origin if it were stamped on the inside of the links. The purchaser would have to remove the bracelet from the plastic bubble and examine it carefully to see the foreign origin notation. Respondents printed in the United States the cards to which the watchbands were affixed, and it would involve no great additional trouble or expense for respondents to print the foreign origin on the display card where it would have been easily visible to a prospective purchaser. Respondents' failure so to do constituted a deceptive act and practice in violation of the Federal Trade Commission Act. *Brite Manufacturing Company*, Docket 8325, Order of June 18, 1964 [65 F.T.C. 1067].

19. Components which respondents imported were assembled into completed watch bracelets on the premises at 188 West 4th Street, New York, New York. They were then sold to watch assemblers, to watch jobbers and general jewelry jobbers. Parker testified that general jewelry jobbers handle watches, gold jewelry and diamonds, among other things. (Tr. 49, *et seq.*) The watch bracelets in evidence

are typical of those which respondents sold in commerce prior to April 30, 1963 (Tr. 31).

20. Parker was not familiar with the prices at which his watchbands were resold at retail (Tr. 32). The prices which respondents printed on the cardboards to which their watchbands were affixed did not represent the prices at which respondents' watchbands were usually and customarily sold in the trade areas involved. Parker testified:

Now, with your description, you, of course have noticed that with respect to this series of exhibits C-X 1 through 11, that most of these consist of Prospect bracelets, which are placed on a card and on that card appears a dollar sign and the price of either \$4.95 or \$5.95. Am I correct?

A. You are correct.

Q. Now, let me ask you these qualifying questions, as far as your knowledge of the retail markets.

At the time you offered these for sale through your jobbers and distributors, there's no question you were familiar with the retail market at the time you sold these as to prices, prevailing prices.

Mr. NOBLE. I object.

The WITNESS. I'll answer that. I don't know, no, sir.

Mr. NOBLE. I withdraw my objection.

By Mr. BLUME:

Q. Now, is that unfamiliarity as to all markets?

A. You asked for retail prices and I'm not familiar with retail prices.

Q. Not at all?

A. Not at all, no, sir.

Q. When you say you're not familiar with it, does that mean that you are not familiar with retail prices in the markets in which your merchandise was retailed?

A. The merchandise I was selling, I was familiar with, but not the markets. You see, when you say markets, I assume you are referring to Jacoby-Bender, Spiedel, Chrysler and other people who are selling merchandise in the retail market. It's a big market with 40 people selling into it, so I didn't—if you were referring to Prospect, I—

Q. Prospect exclusively.

A. Prospect itself, these items were priced after discussion with a number of people that wanted these things priced and that's how the price was arrived at, competitive price.

Q. Would you want to explain that a little better? Did I understand that these prices that were put on the merchandise at the factory were prices which the customers requested? Just so there's so [no] misunderstanding.

A. That's correct.

Q. So that to this day, it would be a fair and honest statement that you have no conception of what that merchandise was sold for?

A. Absolutely, that's correct. I wouldn't. I wouldn't know if they gave it away.

HEARING EXAMINER GROSS. If they gave it away?

The WITNESS. That's right. I'm not concerned with it once they have it.

HEARING EXAMINER GROSS. By the same token, you don't know whether they did or did not sell it at the price it was tagged with.

The WITNESS. That's right, sir. (Tr. 31. *et seq.*)

Initial Decision

66 F.T.C.

21. The January 8, 1964, Guides Against Deceptive Pricing, *inter alia*, provide:

\* \* \* \* \*

On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. \* \* \*

\* \* \* \* \*

It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. For instance, a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions.

22. Federal Trade Commission investigators obtained from Yumark Watch Company of New York City the names and addresses of sixty-two (62) retail establishments to which Yumark sold respondents' bracelets (Tr. 43). The Federal Trade Commission wrote a letter<sup>3</sup> to these various retailers with a random geographical spread and purchased the various Prospect watchbands at the prices indicated (Tr. 45):

Place of purchase	Pre-ticketed price	Price paid
Dave's Hole-in-the-Wall, Hot Springs, Ark. (CX 2).....	\$5.95	\$1.25
Martin A. Taylor Co., Philadelphia, Pa. (CX 3).....	(1)	1.00
Alamo Loan & Jewelry Co., Corpus Christi, Tex. (CX 4).....	5.95	1.39
Lenoir, N.C. (CX 5).....	5.95	3.00
Ypsilanti, Mich. (CX 6).....	5.95	1.30
Oklahoma City, Okla. (CX 7).....	5.95	2.50
A personal over-the-counter purchase by an F.T.C. investigator was made in New Britain, Conn. (CX 8).....	5.95	2.98
St. George, Maine (CX 9).....	5.95	2.95
Pottineau, N. Dak. (CX 10).....	5.95	1.50
Wilkes Barre, Pa. (CX 11).....	5.95	1.50

<sup>1</sup> \$4.95 in one instance and \$5.95.

23. The evidence in this record bearing upon the deception in respondents' pricing practices would have been more helpful had it shown, among other things: (1) the cost of the watchbands to respondents, (2) respondents' selling price to the replacement trade, (3) the industry pricing pattern, (4) whether the \$4.95 and \$5.95 prices which were pre-printed upon respondents' display cards were in fact the

<sup>3</sup> RX 3 A and B is a carbon copy of the original two-page letter on Federal Trade Commission letterhead which was used to buy the watchbands.

prices at which they were sold in any given trade area, and (5) whether the \$4.95 and \$5.95 preticketed price bear any relation to the usual and customary retail selling price in the trade areas involved of other imported watch bracelets of like grade and quality to those sold by respondents. This examiner understands that the Federal Trade Commission intends that manufacturers or importers situated similarly to respondents shall not preticket a retail price upon an article in total disregard of, or in ignorance of, or in total indifference to, the prices at which such articles are sold at retail in any given trade area. Manufacturers or distributors below the retail level may not furnish the means and instrumentality by which a retail seller deceives a retail buyer as to the savings effected in purchasing a preticketed item below the preticketed price. Where, as here, respondents were preticketing a retail price upon their display cards they had a legal responsibility to find out the price at which their watch bracelets were usually and customarily sold in the regular course of business by retailers in any given trade area. It was their further responsibility to decline to preticket their watchbands at any preticketed price substantially above the price at which watchbands were being ordinarily sold in the usual course of business in any given trade area. Parker's testimony (see Finding 20, *supra*) reflects complete indifference to and total unconcern about the actual prices at which his preticketed watchbands were usually sold at retail in the ordinary course of business in any trade area.

The hearing examiner makes the following:

#### CONCLUSIONS OF LAW

A. Complaint counsel has sustained the burden of proof imposed upon him with reference to the allegations in the complaint filed herein. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this complaint. This proceeding is in the public interest.

B. Respondents have failed adequately to disclose the foreign origin of merchandise imported by them from foreign countries. They have thereby led the purchasing public to believe, contrary to the fact, that such merchandise is of domestic origin when such merchandise, of foreign origin, may be of a character as to which the purchasing public in the United States prefers goods of domestic manufacture. This constitutes a deceptive act or practice and unfair method of competition proscribed by the Federal Trade Commission Act.

C. Respondents have furnished an instrumentality to their retail sellers by which the retail buyers may be deceived as to the savings,

if any, effected by purchasing respondents' watch bracelets at less than the \$4.95 and \$5.95 preticketed upon respondents' retail display cards. This constitutes a deceptive act and practice and an unfair method of competition prohibited by the Federal Trade Commission Act and interpretations thereof.

D. Although the corporate respondent Prospect Bracelet Company, Inc., may have ceased to function as a business, its sole owner, Sheldon Parker, is currently in the importing business, and unless enjoined from continuing the deceptive acts and practices in which he has engaged, individually, and through the medium of his various business enterprises in the past, may continue to do so in the future.

Now, therefore,

ORDER

*It is ordered.* That respondents Prospect Bracelet Company, Inc., a corporation, and its officers, and Sheldon Parker, individually, and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or any other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any imported article or product imported as a completed item, or as principal components thereof, including but not limited to watchbands, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said article or product in packages or containers in such a manner that the name of the country or place of origin on the article or product is concealed without clearly disclosing the country or place of origin of the article or product in a conspicuous place on the package or container.

2. Offering for sale, selling or distributing said article or product mounted on, or affixed to cards in such manner as to conceal the name of the country or place of origin without disclosing on such cards the name of the country or place of origin.

*It is further ordered.* That respondents Prospect Bracelet Company, Inc., a corporation, and its officers, and Sheldon Parker, 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 any article or product in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to imported watchbands, and the principal components thereof, do forthwith cease and desist from:

1. Supplying to or placing in the hands of any distributor or retailer of any such article or product any preticketed display card, or any other device, which furnishes the means by which such retail seller of any such article or product may misrepresent to any retail buyer the price at which said item is usually and customarily sold at retail in the trade area in which said display card or other instrumentality is used.

#### APPENDIX

##### Original REGINA Order:

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

##### Amended REGINA Order:

"Advertising or disseminating any list or preticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area."

##### Original GIANT Order:

(2) Using the words "manufacturer's list price," "suggested list price," "factory suggested retail price," or words of similar import, to refer to any amount which is in excess of the price or prices at which such merchandise is usually and customarily sold in the trade area where the representation is made; or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area:

(3) Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business.

## Amended GIANT Order:

"2. Using the words 'manufacturer's list price,' 'suggested list price,' 'factory suggested retail price,' or words of similar import, unless the merchandise so described is regularly offered for sale at this or a higher price by a substantial number of the principal retail outlets in the trade area; provided, however, that this order shall not apply to point-of-sale offering and display of merchandise which is preticketed by the manufacturer or distributor thereof and the obliteration or removal of which preticketed price is impossible or impractical.

"3. Representing in any manner that by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated price and any other price used for comparison with that price, unless a substantial number of the principal retail outlets in the trade area regularly offer the merchandise for sale at the compared price or some higher price or unless respondent has offered such merchandise for sale at the compared price in good faith for a reasonably substantial period of time in the regular recent course of its business."

## FINAL ORDER

On August 25, 1964, the hearing examiner filed his initial decision in the above-captioned proceeding. No appeal from the initial decision has been filed. Upon consideration of the matter, the Commission has determined that the findings and conclusions in the initial decision are appropriate, but that the order contained therein should be amended in certain respects.

Accordingly, *It is ordered*, That the order contained in the initial decision be amended to read as follows:

*It is ordered*, That respondents Prospect Bracelet Company, Inc., a corporation, and its officers, and Sheldon Parker, 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any imported article or product imported as a completed item, or as principal components thereof, including but not limited to watchbands, do forthwith cease and desist from:

1. Offering for sale, selling or distributing any such products which are substantially, or which contain a substantial

part or parts, of foreign origin or fabrication without affirmatively disclosing the country or place of foreign origin or fabrication thereof on the products themselves, by marking or stamping on an exposed surface, or on a label or tag affixed thereto, of such degree of permanency as to remain thereon until consummation of consumer sale of the products, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the products.

2. Offering for sale, selling or distributing any such products packaged or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product or substantial part or parts thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

*It is further ordered*, That respondents Prospect Bracelet Company, Inc., a corporation, and its officers, and Sheldon Parker, 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 any article or product in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to imported watchbands, and the principal components thereof, do forthwith cease and desist from:

1. Advertising or disseminating any list or preticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondents' trade area.

*It is further ordered*, That the hearing examiner's initial decision, as amended, be, and it hereby is, adopted as the decision of the Commission, effective October 8, 1964.

*It is further ordered*, That respondents Prospect Bracelet Company, Inc., a corporation, and Sheldon Parker, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing,



Complaint

66 F.T.C.

setting forth in detail the manner and form of their compliance with the order to cease and desist.

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IN THE MATTER OF

ROBERT F. BRUNS TRADING AS BRUNS-TRAVERS FURS

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

*Docket C-843. Complaint, Oct. 5, 1964—Decision, Oct. 5, 1964*

Consent order requiring an Omaha, Nebr., furrier to cease misbranding and falsely invoicing his fur products.

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 Robert F. Bruns, an individual, trading as Bruns-Travers Furs, hereinafter referred to as respondent has 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 Robert F. Bruns is an individual trading as Bruns-Travers Furs.

The respondent is a retailer of fur products with his office and principal place of business located at 1825 Farnam, Omaha, Nebraska.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has 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 not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and the manner and form described by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products without labels and fur products with labels which failed to show that the fur product contained or were composed of used fur, when such was the fact.

PAR. 4. 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) The disclosure "secondhand," where required, was not set forth on labels, in violation of Rule 23 of said Rules and Regulations.

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

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

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondent 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. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

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

(c) 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.

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

PAR. 7. Respondent 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, has 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. 8. The aforesaid acts and practices of respondent, 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Robert F. Bruns is an individual trading as Bruns-

Travers Furs with his office and principal place of business located at 1825 Farnam, Omaha, Nebraska.

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

ORDER

*It is ordered.* That respondent Robert F. Bruns, an individual, trading as Bruns-Travers Furs, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as 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. 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.

2. Failing to disclose that fur products contain or are composed of secondhand used fur.

3. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder on one side of the labels affixed to fur products.

4. 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.

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

B. Falsely and deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act 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. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules

and Regulations promulgated thereunder in abbreviated form.

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

4. 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 Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

*It is further ordered.* That respondent Robert F. Bruns, an individual trading as Bruns-Travers Furs or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introducing, selling, 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 misbranding fur products by substituting for the labels affixed to such fur product 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.

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

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IN THE MATTER OF

HOOSIER TARPAULIN & CANVAS GOODS COMPANY,  
INC., ET AL.

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

*Docket C-844. Complaint, Oct. 5, 1964—Decision, Oct. 5, 1964*

Consent order requiring an Indianapolis, Ind., manufacturer of tarpaulins, tents, sleeping bags and other camping equipment, to cease misrepresenting the price and size of its merchandise in catalogs and on preticketed labels.

## 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 Hoosier Tarpaulin & Canvas Goods Company, Inc., a corporation, and Victor M. Goldberg and Robert T. Goldberg, 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 Hoosier Tarpaulin & Canvas Goods Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1302-10 West Washington Street, Indianapolis 6, Indiana.

Respondents Victor M. Goldberg and Robert T. Goldberg are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business addresses are the same as that of the corporate respondent. The residence address of Victor M. Goldberg is 5201 Washington Boulevard, Indianapolis, Indiana, and the residence address of Robert T. Goldberg is 501 Fairway, Indianapolis, Indiana.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, advertising, offering for sale, sale and distribution of tarpaulins, tents, and other canvas products, and in advertising, offering for sale, and sale of sleeping bags and other camping equipment to wholesalers and to retailers for resale to the public.

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

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of using fictitious prices in connection therewith, and misrepresenting the size of said products by various methods and means. Typical but not all inclusive of which are the following:

Complaint

66 F.T.C.

A. By distributing, or causing to be distributed, to retailers and others, catalogs describing, among other things, respondents' tents and containing a stated retail price of each by listing "Price Each" after or under which appears a stated amount in dollars.

In the manner aforesaid, respondents thereby represent, directly or indirectly, that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their said tents are made at retail in their trade territory.

In truth and in fact, respondents know that the retail prices set forth in said catalogs, and otherwise, are appreciably in excess of the highest price at which substantial sales have been made at retail in their trade area. Therefore, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling prices of said tents.

B. By attaching, or causing to be attached, tickets, tags, or labels to their sleeping bags upon which a certain amount is printed, and by distributing, or causing to be distributed, to retailers and others, catalogs describing, among other things, respondents' sleeping bags and containing a stated retail price for each. Typical of the statement on the price ticket is the following:

LIST PRICE  
\$28.00

Among and typical of the statements contained in respondents' 1962 catalog is the following:

\$28.00 ea.

In the manner aforesaid, respondents thereby represent, directly or indirectly, that the amounts listed on the preticketed labels or other listing have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their said sleeping bags are made in their trade territory.

In truth and in fact, respondents know that the retail prices set forth on the preticketed labels or other listing are appreciably in excess of the highest price at which substantial sales are made at retail in their trade area. Therefore, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of said sleeping bags.

C. By attaching, or causing to be attached, labels to cartons and outer wrappings containing their tarpaulins and tents, stating "cut size," of the tarpaulins, and "base size" of the tents. Further, respondents list the "base size," only in their catalogs describing their said

tents and the dimensions listed therein are almost invariably larger than the actual size of the tents described. The terms "cut size," and "base size," when used in the manner alleged above, are confusing and tend to indicate that such descriptions are the actual sizes of the finished products. In the manner aforesaid, respondents represent that the dimensions of the tarpaulins and tents following the words "cut size," and "base size" are the actual sizes of the tarpaulins and tents.

In truth and in fact, the actual sizes of the finished products are smaller than the sizes set out on the label and in the catalog following the words "cut size," and usually the actual sizes of the finished products are smaller than the sizes set out on the labels and in the catalog following the words "base size."

Therefore, the statements and representations and acts and practices set forth above are false, misleading and deceptive.

PAR. 5. By the aforesaid acts and practices, respondents place in the hands of the uninformed or unscrupulous retailers means and instrumentalities by and through which they may mislead the public as to the usual and regular retail price and size of said products.

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

#### 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. Hoosier Tarpaulin & Canvas Goods Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 1302-10 West Washington Street, Indianapolis 6, Indiana.

Victor M. Goldberg and Robert T. Goldberg 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, Hoosier Tarpaulin & Canvas Goods Company, Inc., a corporation, and its officers and Victor M. Goldberg and Robert T. Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of tarpaulins, tents, canvas products, sleeping bags, other camping equipment or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area.

## Complaint

2. Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order.

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the size of respondents' merchandise.

4. Putting any plan in operation through the use of which retailers or others may misrepresent the size of respondents' merchandise.

5. Advertising, labeling, representing in a catalog, or otherwise representing the "cut size," or dimensions of material used in their construction, unless such representation is accompanied by a description of the finished or actual size in immediate conjunction therewith with the latter description being given at least equal prominence.

6. Misrepresenting the size of such products on labels 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.

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 IN THE MATTER OF

## THE HISTORY BOOK CLUB, INC., ET AL.

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

*Docket C-845. Complaint, Oct. 7, 1964—Decision, Oct. 7, 1964*

Consent order requiring a Stamford, Conn., book club to cease falsely representing in the collection of its delinquent accounts that such accounts are being turned over to an independent collection agency, or that an attorney is about to take legal action.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The History Book Club, Inc., a corporation, and Frank Melville and John R. Gibb, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it

## Complaint

66 F.T.C.

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

PARAGRAPH 1. Respondent The History Book Club, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 40 Guernsey Street in the city of Stamford in the State of Connecticut.

Respondents Frank Melville and John R. Gibb are individuals and officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of books, publications and other merchandise to the general public by and 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 books, publications and other merchandise, when sold, to be shipped from their places of business and sources of supply located in the States of New York and Connecticut to purchasers thereof located in the various other States of the United States and in the District of Columbia, and they maintain and at all times mentioned herein have maintained a substantial course of trade in said books, publications and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents offer for sale the aforesaid books, publications and other merchandise through the United States mails. Said books, publications and other merchandise are distributed and payment made therefor through the United States mails.

For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the aforesaid transactions, respondents have made certain statements and representations in letters and notices disseminated through the United States mails to purportedly delinquent customers.

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

- (a) On respondents' letterheads:

951

Complaint

## OVERLOOKED?

WE HAVE NOT YET RECEIVED YOUR PAYMENT FOR  
LAST MONTH. WON'T YOU SEND IT NOW? THANK YOU.

## A REMINDER

At the date printed on the enclosed statement your account was substantially in arrears. \* \* \*

We have sent you several statements and reminders that you are not keeping your account up to date. It has now reached the point where there is an amount overdue by more than three months. Can't we get this straightened out before it gets more complicated? \* \* \*

The important thing is that the account not be allowed simply to slide further in arrears. Unexplained failure to pay a just debt is bound to damage your credit with others as well as with us.

We must therefore take whatever action is necessary to assure prompt collection of the amount due. I do not like to proceed in this direction, but I cannot do otherwise unless I hear from you. \* \* \*

I am informed by our Audit Department that your account has fallen in arrears to the point where it must be referred to the Mail Order Credit Reporting Association.

This is a state of affairs that surely neither of us intended or enjoys, but in the absence of an explanation from you we can only regard the amount outstanding as a debt long overdue, to be collected promptly by whatever legal means may be necessary.

If we do not hear from you one way or the other within two weeks, your account must be turned over to outside agencies for investigation and collection. We sincerely hope you will not force us to adopt procedures that can only lead to additional expense and trouble for you, but we assure you that we will collect what is rightfully due by whatever legal means may prove necessary.

(b) On the following letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.  
NEW YORK 18, N.Y.

Your account with The History Book Club, a member of the Association, is recorded as long overdue.

We hope you will not take too lightly the matter of this past-due indebtedness. To have your name listed on our member's record of undersirable accounts can certainly do your credit standing no good.

Furthermore, our members cannot continue indefinitely to send reminder letters. More direct steps to collect the monies rightfully due must follow.

It is very much to your advantage to settle this matter *now*. Kindly send your check or money order directly to our member by return mail, enclosing our card. Further action will then be unnecessary.

Despite many previous reminders and requests, your account remains unsettled. Our member therefore serves notice hereby that your account will be turned over at the end of fifteen days from this date for whatever legal steps may be necessary to enforce collection.

Such action may result in court costs far in excess of the amount presently due; and your refusal to communicate with our member means that you, and you alone, must be held responsible for any action that may be taken.

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 have represented directly and by implication 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 "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 to take other legal steps to collect the outstanding amount due.

F. Letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

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 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 "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 letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared or mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondents.

Therefore, the statements and representations as set forth in Paragraphs Four and Five 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 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 The History Book Club, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 40 Guernsey Street, in the city of Stamford, State of Connecticut.

Respondents Frank Melville and John R. Gibb 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

Decision and Order

66 F.T.C.

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

*It is ordered.* That respondent The History Book Club, Inc., a corporation, and its officers, and Frank Melville and John R. Gibb individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, publications or other merchandise 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 or has been 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 establish that where payment is not received the information of said delinquency is referred to a separate, bona fide credit reporting agency.

2. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency unless respondents in fact turn such accounts over to such agencies.

3. Delinquent accounts will be turned over to an attorney to institute suit or other legal action where payment is not made, unless respondents establish that such is the fact.

4. Delinquent accounts will be or have been turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose.

5. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," any other fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control is an independent, bona fide collection or credit reporting agency.

6. Letters, notices or other communications in connection with the collection of respondents' accounts which have been prepared or originated by respondents, have been prepared or originated by any other person, firm or corporation.

*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

## ALFRED BOGE FURRIERS ET AL.

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

*Docket C-846. Complaint, Oct. 7, 1964—Decision, Oct. 7, 1964*

Consent order requiring a Spokane, Wash., retail furrier to cease falsely invoicing and deceptively advertising its fur products and failing to keep required records.

## 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 Alfred Boge Furriers, a corporation, and Alfred Boge, individually and as an officer of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alfred Boge Furriers is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington.

Alfred Boge is president of said corporate respondent and formulates, directs and controls the acts, practices and policies of said corporate respondent.

Respondents are retailers of fur products with their office and principal place of business located at North 8 Post Street, in the city of Spokane, State of Washington.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of 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 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 to show the true animal name of the fur used in the fur product.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) 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. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Spokane Spokesman-Review, a newspaper published in the city of Spokane, State of Washington.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

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

PAR. 6. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in that the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 7. In advertising fur products for sale as aforesaid respondents represented through such statements as "Save 20-30% on our entire collection" that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 8. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

#### 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 Textiles and Furs 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 Fur Products Labeling 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 said Acts, 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. Respondent Alfred Boge Furriers is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Washington with its office and principal place of business located at North 8 Post Street, in the city of Spokane, State of Washington.

Respondent Alfred Boge is president of said corporation and his address is the same as that of said corporation.

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

ORDER

*It is ordered.* That respondents Alfred Boge Furriers, a corporation, and its officers, and Alfred Boge, 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 into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

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

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

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

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

2. Fails to set forth the term "natural" as part of the information required to be disclosed in advertisements 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.

3. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

4. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

5. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such fur products are not reduced to afford to purchasers the percentage of savings stated.

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

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

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IN THE MATTER OF

WORLD WIDE TELEVISION CORPORATION ET AL.

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

*Docket 8595. Complaint, Sept. 13, 1963—Decision, Oct. 8, 1964*

Order requiring two affiliated sellers of new and used television sets and other appliances located in Bladensburg, Md., and Philadelphia, Pa., to cease mis-

Complaint

63 F.T.C.

representing the selling terms, service and guarantees of the products they sell.

## 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 World Wide Television Corporation, Saveway-Meter-Matic Television Corporation, Saveway Meter Corporation, Lu-Gil Corporation trading under the names Lancaster Sales Company and Lancaster Sales, and Gilbert Tucker, 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 World Wide Television Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 2375 Rhode Island Avenue, N.E., Washington 18, D.C.

Respondents Saveway-Meter-Matic Television Corporation and Saveway Meter Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with their principal office and place of business located at 2107 Garrison Boulevard, Baltimore 16, Maryland.

Respondent Lu-Gil Corporation, trading under the names of Lancaster Sales Company and Lancaster Sales, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its principal office and place of business located at 2163 Ridge Avenue, Philadelphia 21, Pennsylvania.

Respondent Gilbert Tucker is an individual and is an officer of each of the corporate respondents. He formulates, directs and controls the acts and practices of each of said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of respondent Lu-Gil Corporation.

PAR. 2. Respondents are now, and for a number of years last past have been, engaged in the advertising, offering for sale, sale and distribution of new and used television sets, appliances and other products to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents cause said products to be shipped from their respective locations in the States of Pennsylvania and Maryland and the District of Columbia to

various purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The majority of the shares of stock of each of the said corporate respondents is owned by the said Tucker who, as aforesaid, formulates, directs and controls the affairs of each of the corporate respondents. Respondent Tucker causes the said products to be shipped from the said place of business of respondent Lu-Gil Corporation located in the State of Pennsylvania to respondents Saveway-Meter-Matic Corporation and Saveway Meter Corporation located in the State of Maryland and to respondent World Wide Television Corporation located in the District of Columbia. The four corporate respondents are, therefore, but devices employed by the said Tucker to effectuate the acts and practices hereinafter alleged.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents have made numerous statements and representations respecting the terms of sale, financing, service and guarantees for said products in advertisements inserted in newspapers and other advertising media, and by means of radio broadcasts transmitted by radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

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

No down payment.

No money down.

\* \* \* only 25 cents a day.

Only quarters a day.

If you can afford a pack of cigarettes you can afford to own 23" famous make TV the easy METERMATIC WAY.

\* \* \* every day you just place a few coins in a hidden meter behind your TV set \* \* \* and in just a few months \* \* \* you own the set outright.

There's no banks \* \* \* no finance companies.

No bill collectors. That meter keeps the bill collectors away.

\* \* \* they gotta give good service. They know that if the set isn't working you won't put any coins in the meter that's hidden behind the set \* \* \* So they gotta get around there and fix it.

Service's fully guaranteed!

Service guarantee included.

The Metermatic plan is better because service is guaranteed.

Brand new giant screen Olympic Console Television with Full One Year Guarantee including picture tube.

PAR. 6. By and through the use of the aforementioned statements, and others of similar import and meaning not specifically set out herein, the respondents represent, directly or by implication:

- (1) That no down payment is required in any case.
- (2) That purchasers can apply as little as 25 cents each day toward the purchase of the television set, service and other charges.
- (3) That in a few months purchasers will own their television sets outright.
- (4) That no purchasers will have to deal with banks or finance companies.
- (5) That no purchasers will have to deal with bill collectors.
- (6) That respondents provide repair and maintenance service without additional charge.
- (7) That respondents' product is unconditionally guaranteed for one year.

PAR. 7. In truth and in fact:

- (1) Down payments are, in fact, required in many cases.
- (2) Purchasers of respondents' products are required to pay more than 25 cents a day toward the purchase of the television set. They are, in fact, required to sign a contract providing for monthly payments varying in amount with the model television purchased. Should the amount deposited in the meter aggregate less than the monthly payment contracted for, respondents' employees or representatives undertake to collect the difference from the purchaser.
- (3) Few, if any, purchasers acquire full title to respondents' products within a few months. The period of time usually required to discharge all liabilities, obligations and duties under the contract of purchase is 24 months.
- (4) Purchasers, in many instances, are required to make payments to banks or finance companies.
- (5) Purchasers do have to deal with bill collectors. Respondents, in many instances, send men around to purchasers once or twice a month to collect payments.
- (6) Respondents do not provide repair and maintenance service without additional charge. An annual charge of approximately 65 dollars is included in the sales contract for servicing respondents' products.
- (7) Respondents' products are not unconditionally guaranteed for one year. Said guarantee is subject to numerous requirements, limitations and restrictions. In addition, the advertised guarantee fails to set forth the nature, conditions and extent of the guarantee, the manner

961

Initial Decision

in which the guarantor will perform thereunder and the identity of the guarantor.

Therefore, the advertisements and representations referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 8. In the conduct of their business, at all times mentioned herein, the respondents have been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of television sets, appliances and other products 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' products by reason of said erroneous and mistaken belief.

PAR. 10. 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 in commerce, in violation of Section 5 of the Federal Trade Commission Act.

*Mr. Terral A. Jordan* and *Mr. Laurence W. Fenton* supporting the complaint.

*Gerber and Galfand*, Philadelphia, Pa., by *Mr. Hyman Schwartz* for the respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER\*

MAY 4, 1964

This proceeding was commenced by the issuance of a complaint on September 13, 1963, charging the respondents with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act by misrepresenting the selling terms, financing, service and guarantees for new and used television sets sold by them.

After respondents had been duly served with the complaint, two of the corporate respondents, World Wide Television Corporation and

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\*Paragraph 4 of the Order is reported as corrected by Hearing Examiner's Order dated May 20, 1964.



Lu-Gil<sup>1</sup> Corporation, and the individual respondent, Gilbert Tucker, appeared by counsel and thereafter filed their joint answer admitting a number of the specific allegations in the complaint, but denying generally the illegality of the practices charged in the complaint.

As to Saveway-Meter-Matic Television Corporation, the aforesaid three respondents stated in their answer that they have no knowledge as to the truth of the averments in the complaint as to that corporation.

As to Saveway Meter Corporation, the aforesaid three respondents stated in their answer that "Articles of Merger of said Saveway Meter Corporation with and into a corporation known as Philamet Corporation were filed December 1, 1961, in the Office of the Secretary of State of the Commonwealth of Pennsylvania; that on February 29, 1963, a Certificate of Election to Dissolve was filed by Philamet Corporation, but that Articles of Dissolution have not yet been filed in the said Department of State for the sole reason that there exists a delay on the part of the Department of Revenue of the Commonwealth of Pennsylvania and other cognizant departments of the Commonwealth of Pennsylvania in furnishing the required clearance certificate indicating the payment of all State taxes to date. These three respondents aver that such taxes have, in fact, all been paid but that nevertheless the Department of State of the Commonwealth of Pennsylvania requires the filing of the clearance certificate with the Articles of Dissolution; and these three respondents are informed that in due course as soon as the clearance certificate is supplied by the Department of Revenue of said Commonwealth of Pennsylvania the aforementioned Articles of Dissolution will be filed."

Upon the motion of complaint counsel, a prehearing conference was scheduled for December 12, 1963. By a joint motion of the parties filed December 9, 1963, it was requested that the prehearing conference be cancelled for the reason that as a result of pretrial negotiations the parties were about to enter into a stipulation of facts. Accordingly, by order dated December 11, 1963, the prehearing conference was cancelled subject to being reset on ten days notice.

Thereafter, a Stipulation of Facts dated January 6, 1964, and an undated addendum thereto, together with Commission Exhibits 1 to 21 inclusive, attached to and made a part of the Stipulation of Facts, were presented to the hearing examiner and by order dated February 19, 1964, the Stipulation of Facts, undated addendum, and Commission Exhibits 1 to 21 inclusive, were accepted and received in evidence and made a part of the official record of this proceeding.

<sup>1</sup> Referred to as "Lou-Gil Corporation" only in respondents' answer.

Paragraph Seven of the Stipulation of Facts set forth that the Stipulation should be received in lieu of evidence and further hearings are waived by the parties.

The record was accordingly closed and the parties were afforded an opportunity to submit proposed findings, conclusions, and order.

Both parties filed proposed findings of fact, conclusions and order together with their respective reasons in support thereof.

Consideration has been given to the proposed findings, conclusions and briefs submitted. The findings of fact adopted follow, as referenced, the exact language of the Stipulation of Facts, and to that extent are not in dispute. Certain proposed findings and conclusions of respondents, not a part of the Stipulation of Facts, not herein after specifically adopted are rejected. Based upon the entire record, consisting of the Complaint, Answer, Stipulation of Facts and addendum thereto, exhibits, and other matters of record, the hearing examiner makes the following findings as to facts, conclusions drawn therefrom and order.

#### FINDINGS OF FACT

1. For the reasons set forth in respondents' answer and agreed to by complaint counsel, the complaint may be dismissed as to respondent, Saveway Meter Corporation. (Stip. of Facts, para. 2; Ans. para. 1, p. 2.)

2. The complaint may also be dismissed as to respondent Saveway-Meter-Matic Television Corporation which now appears to have had no separate corporate existence and to have been a trade name used, at one time, by respondent, Saveway Meter Corporation. (Stip. of Facts, para. 3; Ans. para. 2, p. 1.)

3. Respondent World Wide Television Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4905 Annapolis Road, Bladensburg, Maryland (formerly 2375 Rhode Island Avenue, N.E., Washington 18, D.C.).

Respondent Lu-Gil Corporation, trading under the names of Lancaster Sales Company and Lancaster Sales, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its principal office and place of business located at 2163 Ridge Avenue, Philadelphia 21, Pennsylvania.

Respondent Gilbert Tucker is an individual and is an officer of each of the corporate respondents. He formulates, directs and controls the acts and practices of each of said corporate respondents, including the

Initial Decision

66 F.T.C.

acts and practices hereinafter set forth. His address is the same as that of respondent Lu-Gil Corporation. (Ans. para. 2, p. 1.)

4. Respondents are now, and for a number of years last past have been, engaged in the advertising, offering for sale, sale and distribution of new and used television sets, appliances and other products to the purchasing public. (Ans. para. 2, p. 1.)

5. In the course and conduct of their business, respondents cause said products to be shipped from their respective locations in the States of Pennsylvania and Maryland to various purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Ans. para. 2, p. 1.)

6. The majority of the shares of stock of each of the said corporate respondents is owned by the said Tucker who, as aforesaid, formulates, directs and controls the affairs of each of the corporate respondents. Respondent Tucker causes the said products to be shipped from the said place of business of respondent Lu-Gil Corporation located in the State of Pennsylvania to respondent World Wide Television Corporation located in the State of Maryland. The two corporate respondents are, therefore, but devices employed by the said Tucker to effectuate the acts and practices established herein. (Ans. para. 2, p. 1.)

7. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents have made numerous statements and representations respecting the terms of sale, financing, service and guarantees for said products in advertisements inserted in newspapers and other advertising media, and by means of radio broadcasts transmitted by radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across State lines.

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

- (1) No down payment. (CX 1, 17, 19)
- (2) No money down. (CX 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18)
- (3) \* \* \* just 25 cents a day. (CX 2, 8, 12)
- (4) Only quarters a day. (CX 9, 10, 16, 17, 18, 19)
- (5) If you can afford a pack of cigarettes you can afford to own 23" famous TV the easy METERMATIC WAY. (CX 9, 10)
- (6) \* \* \* every day you just place a few coins in a hidden meter behind your TV set \* \* \* and in just a few months \* \* \* you own the set outright! (CX 7, see also CX 1, 11, 12)
- (7) No banks, no finance companies! (CX 1, 4, 5, 8, 12, 14, 16, 18)

- (8) That meter keeps the bill collectors away. (CX 15)
- (9) Meter Matic's GOTTA GIVE GOOD SERVICE! They know if your set isn't working \* \* \* you won't put any coins in the hidden meter. (CX 12, see also CX 1, 3, 4, 11, 13)
- (10) Service's fully guaranteed! (CX 14)
- (11) Service guarantee included! (CX 17)
- (12) The Metermatic Plan is better because service is guaranteed. (CX 4)
- (13) BRAND NEW GIANT SCREEN OLYMPIC CONSOLE TELEVISION with FULL ONE YEAR GUARANTEE including picture tube. (CX 8)

8. By and through the use of the aforementioned statements, and others of similar import and meaning not specifically set out herein, the respondents represent, directly or by implication (CX 1-20):

- (1) That no down payment or money down is required.
- (2) That purchasers can apply as little as 25 cents each day toward the purchase of the television set, service and other charges.
- (3) That in a few months purchasers will own their television sets outright.
- (4) That no purchasers will have to deal with banks or finance companies.
- (5) That no purchasers will have to deal with bill collectors.
- (6) That respondents provide repair and maintenance service without additional charge.
- (7) That respondents' products are unconditionally guaranteed for one year.

9. The aforesaid statements and representations, and others of similar import and meaning not specifically set forth herein, are false, misleading and deceptive.

- (1) At or about the time of delivery, respondents usually require of purchasers of new television sets a payment of between \$15 and \$20 which is variously denominated as delivery charge, sales tax or deposit on the meter; but, on occasion, respondents will accept payments as low as \$5. (Stip. of Facts, Para. Five, 1.)
- (2) At the time of purchase, purchasers of respondents' television sets sign conditional sales contracts or other contracts of purchase which provide for monthly payments approximating \$20 a month for brand new television sets for a period of 24 months. (Stip. of Facts, Para. Five, 2.)

(3) Prior to May 1, 1962, substantial numbers of the promissory notes executed by purchasers of television sets from respondents have been transferred and assigned by respondents to banks or finance companies and such purchasers, as a consequence thereof, have been required to make payments to and otherwise deal with such banks or finance companies. Subsequent to May 1, 1962, and up to August 1,

1962, the only financing done was by way of direct loans to respondents from financing agencies. Respondents, after May 1, 1962, collected directly from all their customers, so that, in fact, none of said purchasers were required to deal with banks or finance companies in connection with their said purchases (of television sets) from respondents. As of August 1, 1963, respondents resumed the practice of discounting purchasers' notes with financial institutions, so that as of August 1, 1963, purchasers of respondents' television sets whose notes were discounted have been required to deal with the said financial institutions. (Stip. of Facts, Para. Five, Addendum to Stip. of Facts, and CX 21.)

(4) Respondents send out collectors or other employees once or twice a month to collect the amounts purchasers have deposited in their meters. Should the amount deposited in the meter aggregate less than the monthly payment contracted for, respondents' employees or representatives undertake to collect the difference from the purchasers. (Stip. of Facts, Para. Five, 4.)

(5) Purchasers of new television sets from respondents pay \$65 per year for two years for repair, maintenance and service. (Stip. of Facts, Para. Five, 5.)

(6) The warranty or guarantee set forth in the booklet entitled, "Operating Instructions and Warranty, Olympic Division of the Siegler Corporation," (CX 20 a-h) is the warranty or guarantee given by the respondents on the Olympic television sets which constituted a substantial proportion of the sets sold by respondents and the guarantee or warranty given by respondents on other makes and kinds of television sets provides for substantially similar terms and conditions; in addition to the foregoing warranty or guarantee, and as part of the aforesaid annual service charge in the amount of \$65, respondents give and provide an unconditional guarantee on parts, labor and maintenance. (Stip. of Facts, Para. Five, 6.)

10. Predicated on the facts set forth in finding No. 9, it is further found that:

(1) Down payments of between \$15 and \$20 are usually required of purchasers of new television sets at or about the time of delivery variously denominated as a delivery charge, sales tax or deposit on the meter.

(2) Purchasers of respondents' products are required to pay more than 25 cents a day toward the purchase of the television set.

(3) Few, if any, purchasers acquire full title to respondents' products within a few months.

(4) Purchasers prior to May 1, 1962, were, and subsequent to Au-

gust 1, 1963, are, required to make payments to banks or finance companies.

(5) Purchasers have to deal with bill collectors.

(6) Respondents do not provide repair and maintenance service without additional charge.

(7) Respondents' products are not unconditionally guaranteed for one year. Said guarantee is subject to numerous requirements, limitations and restrictions. (See CX 20 h, for conditions, limitations, etc.) The advertised guarantee fails to set forth the nature, conditions and extent of the guarantee, the manner in which the guarantor will perform thereunder and the identity of the guarantor.

11. In the conduct of their business, at all times mentioned herein, the respondents have been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of television sets, appliances and other products of the same general kind and nature as those sold by respondents. (Ans. Para. 1, p. 3, Stip. of Facts, Para. Six.)

12. 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.

#### CONCLUSIONS

1. 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.

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

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

#### ORDER

*It is ordered.* That respondents World Wide Television Corporation, a corporation, Lu-Gil Corporation, a corporation, trading under the names of Lancaster Sales Company and Lancaster Sales or under any other name or names, and their officers, and Gilbert Tucker, individually and as an officer of each of said corporations, and respond-

ents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of television sets, appliances or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that no down payment is required of purchasers of respondents' products when such payments must, in fact, be made by all or a part of said purchasers.

2. Representing, directly or by implication, that purchasers of respondents' products are required to pay as little as 25 cents a day; or, by any means, misrepresenting the amount, frequency or duration of the payments required under respondents' sales contracts.

3. Representing, directly or by implication, that purchasers of respondents' products become the owners of such products within any period of time which is less than that time actually required to discharge all liabilities, obligations and duties under the contract of purchase and to acquire full title thereto.

4. Misrepresenting, directly or by implication that purchasers of respondents' products will not have to deal with banks or finance companies.

5. Representing, directly or by implication that no purchasers of respondents' products will have to deal with bill collectors: or, by any means, misrepresenting respondents' usual and customary methods of collection.

6. Representing, directly or by implication, that repair and maintenance service on products purchased from respondents is provided without additional charge.

7. Representing, directly or by implication, that respondents' 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.

*It is further ordered.* That this complaint be, and it hereby is, dismissed as to Saveway-Meter-Matic Television Corporation, and Saveway Meter Corporation.

#### FINAL ORDER

This case has been heard by the Commission on respondents' appeal from the initial decision of the hearing examiner. Upon examination of the record and after full consideration of the issues of fact and law

961

Complaint

presented, the Commission has concluded that the initial decision is correct in all respects. Accordingly,

*It is ordered,* That the initial decision of the hearing examiner, including the findings, conclusions, and order, as corrected by the hearing examiner's order dated May 20, 1964, correcting clerical error in initial decision, 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 of the order herein upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

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IN THE MATTER OF

E. W. SEDERSTROM TRADING AS DAKOTA SEED &  
GRAIN COMPANY

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

*Docket 8621. Complaint, Apr. 17, 1964—Decision, Oct. 8, 1964*

Order requiring a Sioux Falls, S.Dak., seller of seeds and grain to cease misrepresenting the nature of his business, his contractual obligations, that prospective customers are specially selected, and making other false 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 E. W. Sederstrom, trading as Dakota Seed & Grain Company, 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, E. W. Sederstrom, is an individual trading and doing business as Dakota Seed & Grain Company, with his principal office and place of business located at 104 North Covell Street in the city of Sioux Falls, South Dakota.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of seeds and grain to the public.

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\*Paragraph 3 reported as amended by order of Hearing Examiner dated Aug. 18, 1964.



PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from the States of North Dakota, South Dakota, and Colorado to purchasers located in various other States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, as aforesaid, respondent and respondent's sales agents or representatives call upon prospective purchasers and solicit the purchase of respondent's products. In the course and conduct of such solicitations, respondent and his sales agents or representatives, either directly or by implication, have made certain statements and representations to prospective purchasers of respondent's products, typical, but not all inclusive of which are the following:

1. Respondent is establishing a malting barley production program, similar to those of well-known or well-established seed concerns, in which his customers can profitably participate by growing barley for respondent from seeds sold by him.

2. As part of such program, respondent will purchase, and, under the terms of a written instrument, is contractually bound to purchase his customer's harvest at premium prices subject only to conditions in said instrument specifying quality.

3. The quality standards provided for by respondent in said written instrument are adequate to satisfy the standards of the malting barley market, and can be easily met by prospective customers.

4. Respondent is a large, well-established seed concern with the facilities, resources and personnel to carry out a program of malting barley production such as respondent is establishing, and has contracts, connections or agreements with well-known breweries and other industries using malting barley whereby a ready market is available for the sale of malting barley at premium prices.

5. Respondent's prospective customers are specially selected.

PAR. 5. In truth and in fact:

1. Respondent does not establish bona fide malting barley production programs in which purchasers of its seed can profitably participate.

2. Respondent does not purchase the harvest from a substantial number of his customers, nor is he contractually bound to purchase his customers' harvest. Instruments executed by respondent and his customers are merely "options" giving respondent the right but not obligating him to purchase said harvest.

3. The quality standards set forth by respondent do not satisfy the

requirements of a substantial part of the malting barley market, nor can malting barley of a marketable quality be easily produced for a variety of reasons, one of which is that malting barley of marketable quality is especially difficult to produce for a substantial number of respondent's customers as such customers' farms are located in an area unsuited for the production of such barley.

4. Respondent is not a large, well-established seed concern with facilities and personnel sufficient to carry out a bona fide malting barley production program, and he does not have contracts, connections or agreements with well-known breweries or other industries who will purchase respondent's products at premium prices.

5. Respondent's customers are not specially selected.

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

PAR. 6. In the course and conduct of respondent's business as aforesaid, respondent has been, and now is, in direct and substantial competition in commerce with other individuals and with various firms and corporations engaged in the sale in commerce of seeds and grain.

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

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute unfair 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.

*Mr. Guy E. Yelton* supporting the complaint.

Respondent *Mr. E. W. Sederstrom, pro se.*

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

AUGUST 26, 1964

STATEMENT OF THE PROCEEDING

The Federal Trade Commission issued its complaint in this matter April 17, 1964, charging respondent with misrepresentation in the sale and distribution of seeds and grain, in violation of Section 5 of

Initial Decision

66 F.T.C.

the Federal Trade Commission Act. The complaint was duly served, and respondent, on May 13, 1964, filed answer generally denying its allegations. The answer was signed both by respondent and by the law firm of Willy, Pruitt & Matthews, of Sioux Falls, South Dakota, which had duly filed its appearance as his counsel.

A prehearing conference was set for August 18, 1964, in Sioux Falls, South Dakota, with hearings to follow in Denver, Colorado. At the prehearing conference, respondent appeared in person and stated that he no longer was represented by counsel. After extended discussion, in which the hearing examiner carefully advised him of his rights, respondent elected to withdraw the denial answer previously filed, thereby waiving his right to contest the allegations of the complaint and authorizing the hearing examiner, without further notice, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, together with appropriate conclusions and order.

Without objection by counsel supporting the complaint, respondent's motion to withdraw his answer was granted, the answer was ordered stricken from the record, and the hearings set for August 20-21, 1964, in Denver, Colorado, were cancelled.

The record thus containing no answer by respondent, and respondent having explicitly expressed his intention to file no further answer and his desire

that such withdrawal shall be treated as though no answer had been filed under Section 3.5(c) of the Commission's Rules of Practice, and \* \* \* that such withdrawal be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint,

he is thereby in default. Moreover, in his motion, he has specifically authorized the hearing examiner, without further notice,

to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

Therefore, in accordance with respondent's motion, and pursuant to § 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings, effective August 1, 1963, the hearing examiner hereby declares respondent in default, now finds the facts to be as alleged in the complaint, and enters his initial decision containing such findings, appropriate conclusions drawn therefrom and order to cease and desist, as follows:

## FINDINGS OF FACT

1. Respondent, E. W. Sederstrom, is an individual trading and doing business as Dakota Seed & Grain Company, with his principal

office and place of business located at 104 North Covell Street in the city of Sioux Falls, South Dakota.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of seeds and grain to the public.

3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from the States of North Dakota, South Dakota, and Colorado to purchasers located in various other States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of his business, as aforesaid, respondent and respondent's sales agents or representatives call upon prospective purchasers and solicit the purchase of respondent's products. In the course and conduct of such solicitations, respondent and his sales agents or representataives, either directly or by implication, have made certain statements and representations to prospective purchasers of respondent's products, typical, but not all inclusive of which are the following:

1. Respondent is establishing a malting barley production program, similar to those of well-known or well-established seed concerns, in which his customers can profitably participate by growing barley for respondent from seeds sold by him.

2. As part of such program, respondent will purchase, and, under the terms of a written instrument, is contractually bound to purchase his customer's harvest at premium prices subject only to conditions in said instrument specifying quality.

3. The quality standards provided for by respondent in said written instrument are adequate to satisfy the standards of the malting barley market, and can be easily met by prospective customers.

4. Respondent is a large, well-established seed concern with the facilities, resources and personnel to carry out a program of malting barley production such as respondent is establishing, and has contracts, connections or agreements with well-known breweries and other industries using malting barley whereby a ready market is available for the sale of malting barley at premium prices.

5. Respondent's prospective customers are specially selected.

5. In truth and in fact:

1. Respondent does not establish bona fide malting barley production programs in which purchasers of its seed can profitably participate.

Initial Decision

66 F.T.C.

2. Respondent does not purchase the harvest from a substantial number of his customers, nor is he contractually bound to purchase his customers' harvest. Instruments executed by respondent and his customers are merely "options" giving respondent the right but not obligating him to purchase said harvest.

3. The quality standards set forth by respondent do not satisfy the requirements of a substantial part of the malting barley market, nor can malting barley of a marketable quality be easily produced for a variety of reasons, one of which is that malting barley of marketable quality is especially difficult to produce for a substantial number of respondent's customers as such customers' farms are located in an area unsuited for the production of such barley.

4. Respondent is not a large, well-established seed concern with facilities and personnel sufficient to carry out a bona fide malting barley production program, and he does not have contracts, connections or agreements with well-known breweries or other industries who will purchase respondent's products at premium prices.

5. Respondent's customers are not specially selected.

Therefore, the statements and representations as set out in Paragraph 4 hereof were and are false, misleading and deceptive.

6. In the course and conduct of respondent's business as aforesaid, respondent has been, and now is, in direct and substantial competition in commerce with other individuals and with various firms and corporations engaged in the sale in commerce of seeds and grain.

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

#### CONCLUSIONS

The aforesaid acts and practices of respondent, as herein found, 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 of the Federal Trade Commission Act.

#### ORDER

*It is ordered,* That respondents, E. W. Sederstrom, an individual trading as Dakota Seed & Grain Company, or under any other name

or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of seeds, grain or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that:
  - (a) Respondent is establishing, sponsoring or maintaining a program for the production or marketing of seed, grain or other products for customer participation, or misrepresenting in any other manner the nature of respondent's business.
  - (b) Respondent will purchase or is contractually bound to purchase all or part of the harvest or increase grown, raised or produced by his customers from products sold by respondent, or misrepresenting in any manner the obligations incurred by respondent under his contracts with purchasers.
  - (c) Prospective customers are specially selected.
2. Misrepresenting in any manner:
  - (a) The quality standards established by users of seed, grain or other products.
  - (b) The ease by which growers may produce products which will meet the quality standards of the brewery or other users of seed, grain or other products.
  - (c) The opportunities afforded or available to customers to market their products.

#### FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

*It is ordered,* That the initial decision of the hearing examiner shall, on the 8th day of October, 1964, become the decision of the Commission.

*It is further ordered,* That E. W. Sederstrom, an individual trading and doing business as Dakota Seed & Grain Company, shall, within sixty (60) days after service of this order upon him, file with the Commission a report in writing, setting forth in detail the manner and form of his compliance with the order to cease and desist.

Complaint

66 F.T.C.

IN THE MATTER OF  
RAINBOW-UNITED PHOTOGRAPHIC STUDIOS OF  
AMERICA, INC., ET AL.

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

*Docket C-847. Complaint, Oct. 8, 1964—Decision Oct. 8, 1964*

Consent order requiring Chicago, Ill., sellers of color photographs through door-to-door solicitation to cease misrepresenting the nature of their business, the quality of their pictures, and the promptness of delivery.

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 Rainbow-United Photographic Studios of America, Inc., a corporation, and Bernard Baskin and George Whitehouse, 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 Rainbow-United Photographic Studios of America, 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 2414 West Lawrence Avenue, in the city of Chicago, State of Illinois.

Respondents Bernard Baskin and George Whitehouse are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

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

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

PAR. 4. In the course and conduct of their business, and for the

purpose of inducing the purchase of their color photographs, the respondents and their agents engage in the acts and practices hereinafter set forth.

Most of the respondents' sales of color photographs are effected by means of door-to-door solicitation. For this purpose, they employ three types of agents, namely, coupon salesmen, photographers, and proof passers. Prospective purchasers are first contacted by a coupon salesman who exhibits to the prospect sample photographs and a coupon or certificate which read in part as follows:

<p><b>UNITED PHOTOGRAPHIC STUDIOS OF AMERICA, INC.</b>                  FILM PROCESSED IN HOLLYWOOD and NEW YORK                  UNITED'S Professional Photographers                  have taken over                  ONE MILLION                  PHOTOGRAPHS</p>	
<p><i>Taken in Your Home . . .</i>                  A new sensational photograph, a new process and completely new idea in color film and color printing.                  If you had color photography before, you will find this the first great step in the color portrait field.                  Only one certificate per residence will be honored.                  Our Professional Photographers                  Use a High Speed Strobe-Lite                  NO HEAT—NO GLARE                  Variety of color proofs to be shown in your home.  <b>FAMILY GROUPS OUR SPECIALTY</b>                  NO PASTELS                  THE NATION'S LARGEST                  COLOR PHOTOGRAPHY STUDIO  <b>YOU ARE UNDER NO OBLIGATION</b>  <b>FOR ADDITIONAL PORTRAITS</b>                  \$3.00 Cameraman Service Charge                  This cameraman's service charge entitles bearer to receive One 8 x 10 Multi-Color Portrait of One Person. An extra film charge of \$1.00 will be made for groups. This coupon good only on date shown. No refunds.</p>	<p>No. 42951                  LICENSED                  Some of our Associated Studios in the Chicago Area :                  American Convention Photographers                  National Office :                  UNITED PHOTOGRAPHIC STUDIOS OF AMERICA, Inc.                  2414 W. LAWRENCE AVE.                  CHICAGO 25, ILLINOIS                  PHONE Longbeach 1-0366                  MEMBER                  CREDITORS' RATING                  BUREAU                  For Credit Protection since 1915, covering all of United States and Canada—a national organization</p>
----- Day	----- Approx. Time
----- Date	----- Representative
<p>United Photographic Studios of America, Inc. will not be bound by any representation or agreement, either verbal or in writing, except as contained and printed in this Certificate.                  This Agent is an Independent Contractor                  Mailing and handling charge—                  50 cents additional.</p>	<p>Pay Representative Full Amount.                  AMOUNT PAID \$ ----                  PAY PHOTOGRAPHER BAL. \$ ----</p>



If the coupon salesman succeeds in selling the prospect a coupon he generally collects the \$3.00 cameraman service charge, or a somewhat larger or lesser amount. Thereafter, the customer is contacted by a photographer who takes a number of different poses of the subject or subjects to be photographed. After the exposed film has been developed into proof slides, the latter are turned over to a proof passer who exhibits them to the customer for selection. At this time, the proof passer attempts to, and often does induce the customer to place an order for additional portraits.

PAR. 5. By and through the use of the aforesaid printed coupon or certificate and by and through oral statements made by their agents, respondents have represented, directly or by implication:

1. That the process they employed was new, and constituted a completely new idea in color film and color printing.
2. That the respondents' method constituted the first great step in the color portrait field.
3. By and through the use of the phrase "Professional Photographers" that those employed by respondents to take pictures used techniques employed by highly trained and skilled photographers.
4. That a variety of color proofs would be shown in the purchaser's home.
5. That the respondents' operate the largest color photography studio in the nation.
6. That their photographs are natural color portraits.
7. That their finished photographs will be equal in appearance, quality and workmanship to sample photographs and proof slides exhibited to purchasers and prospective purchasers.
8. That photographs ordered by customers will be delivered within a reasonable period of time.

PAR. 6. In truth and in fact:

1. The process and method employed by respondents was not new, but used principles and materials which had been readily available generally to purchasers of such materials.
2. Respondents' method was not the first great step in the color portrait field.
3. Those employed by respondents to take pictures did not use techniques employed by highly trained and skilled photographers, and therefore, respondents did not employ "Professional Photographers".
4. No color proofs were shown to purchasers or prospective purchasers, but color slides were shown to them.
5. Respondents have not operated, and do not now operate, the largest color photography studio in the nation.

6. The photographs offered for sale and sold by respondents are not natural color portraits. Although the photographs are colored in that they are not the conventional black and white type, they do not portray the true color of the eyes and complexion of the person or persons photographed.

7. The photographs offered for sale and sold by respondents are inferior to those which purchasers and prospective purchasers are led to believe they will receive as a result of viewing the sample photographs and proof slides exhibited by agents of respondents. In all instances the finished prints are far less brilliant and colorful than the samples and slides viewed by purchasers, and in many instances, there is a loss of proper focusing, or a distortion of features or colors, or both.

8. In many instances respondents do not deliver their products to purchasers within a reasonable period of time. In some instances, purchasers are forced to wait many weeks for delivery of photographs which have been fully or partially paid for.

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

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of color photographs and portraits 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' 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, Rainbow-United Photographic Studios of America, 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 2414 West Lawrence Avenue, in the city of Chicago, State of Illinois.

Respondents Bernard Baskin and George Whitehouse 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 Rainbow-United Photographic Studios of America, Inc., a corporation, and its officers, and Bernard Baskin and George Whitehouse, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photographs in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from representing, directly or by implication:

1. That the process employed by respondents is new, or is a new idea in color film or color printing.
2. That the respondents' method constitutes the first great step in the color portrait field.
3. That the respondents employ "Professional Photographers"; or otherwise representing that those persons employed by re-

spondents to take pictures use techniques employed by highly trained and skilled photographers: *Provided, however*, That it shall be a defense in any proceeding instituted for enforcement of this provision for respondents to establish that such persons do use said techniques when taking pictures for the purchasers and prospective purchasers of the pictures.

4. That color proofs other than color slide proofs will be shown or displayed to the purchaser.

5. That respondents operate the largest color studio in the nation or otherwise misrepresenting the size of respondents' business.

6. That respondents' photographs are natural color portraits or photographs.

7. That respondents' finished portraits or photographs will be equal in quality and workmanship to sample photographs and proof slides which have been exhibited to purchasers and prospective purchasers: *Provided, however*, That it shall be a defense in any proceeding instituted for enforcement of this provision for respondents to establish that the photographs furnished by them to purchasers are in every instance equal in quality and workmanship to sample photographs and proof slides exhibited to such purchasers and prospective purchasers.

8. That photographs ordered by customers will be delivered within a certain period of time or upon a particular date unless said photographs are delivered within such time or upon such date; or misrepresenting in any manner, directly or by implication, the period of time within which respondents' merchandise will be delivered.

*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.

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IN THE MATTER OF

BUTTERFIELD GOLF COMPANY, INC., ET AL.

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

*Docket C-848. Complaint, Oct. 9, 1964—Decision, Oct. 9, 1964.*

Consent order requiring a concern in Lisle, Ill., engaged in repainting and labeling used golf balls, and in the purchase of golf balls recovered or re-

Complaint

66 F.T.C.

constructed by others which they then painted and labeled, to cease selling such golf balls with no disclosure on the balls or their wrappers or containers of the fact that they were rebuilt or reconstructed.

## 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 Butterfield Golf Company, Inc., a corporation, and John H. Keller, 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 Butterfield Golf Company, 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 1705 Ogden Avenue, Lisle, Illinois.

Respondent John H. Keller, is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business 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 washing, repainting and labeling of used golf balls and in the offering for sale, sale and distribution of said golf balls and used golf balls which have been recovered, rebuilt or reconstructed by others, then purchased by the respondents and painted and labeled by said respondents. Both of said types of balls are sold to the public and to dealers for resale to the public.

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

PAR. 4. In the course and conduct of their business, respondents wash and repaint golf balls and relabel them and also purchase recovered, rebuilt or reconstructed golf balls, portions of which balls

have been used and reclaimed, the latter of which are painted and labeled by the respondent.

Respondents do not disclose either on the balls, on the wrappers, on the bags or on the boxes in which the balls are packed, or in any other manner, that said golf balls are washed, repainted, re-covered, rebuilt or reconstructed. When such previously used golf balls are washed, repainted, re-covered, rebuilt or reconstructed and labeled, in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, such golf balls are understood to be and are readily accepted by the public as new balls, a fact of which the Commission takes official notice.

PAR. 5. By failing to disclose the fact as set forth in Paragraph Four, respondents place in the hands of uninformed or unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of their said golf balls.

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 products of the same general kind and nature as those sold by respondents and with manufacturers, jobbers and retailers of new golf balls.

PAR. 7. The failure of respondents to disclose on the golf balls themselves, on the wrapper or on the box or bag in which they are packed or in any other manner, that they are previously used balls which have been washed, repainted, re-covered, rebuilt or reconstructed has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were and are new in their entirety and into the purchase of substantial quantity 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 the 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 the 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. Respondent Butterfield Golf Company, 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 1705 Ogden Avenue, Lisle, Illinois.

Respondent John H. Keller is an officer of said corporate respondent and his address is the same as that of the corporate respondent.

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

#### ORDER

*It is ordered,* That respondents Butterfield Golf Company, Inc., a corporation, and its officers, and John H. Keller, 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 washed, repainted, re-covered, rebuilt or reconstructed golf balls in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly and conspicuously disclose on the bags or boxes in which respondents' washed, repainted, recovered, rebuilt or reconstructed golf balls are packaged, on the wrapper and on said golf balls themselves, that they are previously used balls which have been washed, repainted, recovered, rebuilt or reconstructed: *Provided, however,* That disclosure need not be made on

the golf balls themselves if respondents establish that the disclosure on the bags, wrappers and/or boxes is such that retail customers, at the point of sale, are informed that the golf balls are previously used and have been washed, repainted, re-covered, rebuilt or reconstructed.

2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the prior use and washed, repainted, re-covered, rebuilt or reconstructed nature and construction of their golf balls.

*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.

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IN THE MATTER OF

REGAL AUDIO INSTRUMENTS ET AL.

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

*Docket C-849. Complaint, Oct. 12, 1964—Decision, Oct. 12, 1964*

Consent order requiring distributors of "Ultima" hearing aids in Buffalo, N.Y., to cease representing falsely in advertising that the device was unconditionally guaranteed, that respondent individual had been employed by NASA for many years and participated in the development of Project Mercury space capsules, that the "Ultima" hearing aid had a permanent source of power which would never need replacement, that it would bring every wearer's hearing up to normal levels, and that it was approved and endorsed by the Federal Trade Commission, among other false 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 Regal Audio Instruments, a corporation, Ultima Audio, Inc., a corporation, and Endel Are, individually and as an officer 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 Regal Audio Instruments, is a corpora-



## Complaint

66 F.T.C.

tion organized, existing and doing business under and by virtue of the laws of Canada, with principal places of business at Fort Erie, Ontario, Canada, and at 505 Pearl Street, in the city of Buffalo, State of New York.

Respondent Ultima Audio, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 505 Pearl Street, in the city of Buffalo, State of New York.

Respondent Endel Are, is an individual and an officer of both corporate respondents. He formulates, directs and controls the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth. His offices and principal places of business are located at the above stated addresses.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of hearing aids which come within the classification of a device as "device" is defined in the Federal Trade Commission Act. This device is sold and distributed under the name "Ultima."

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 transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents 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 said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said Ultima hearing aid by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and have disseminated, or caused the dissemination of, advertisements concerning said device 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 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 disseminated as hereinabove set forth are the following:

989

## Complaint

- (a) \* \* \* each Ultima is fully guaranteed.
- (b) There is a full refund made if it does not give complete satisfaction.
- (c) For many years a scientist with the United States National Aeronautical Space Administration (NASA), Mr. Are was responsible for the development of the Molecular Electronic Amplifier for Space Capsules of Project Mercury.
- (d) No batteries used in Ultima.
- (e) The Power Generator in the Ultima is a permanent device which never needs replacement.
- (f) \* \* \* The Ultima is powered by a Thermocell, more simply known as a power generator. Power is now generated to make the Ultima operate indefinitely with heat from your body.
- (g) The Ultima when binaurally fitted, will correct losses up to 85%.
- (h) \* \* \* It covers easily up to 65 db hearing loss without any feedback problem.
- (i) Volume Controlled Automatically \* \* \* The Ultima has a built in volume control \* \* \*.
- (j) The Ultima gives the exact volume and frequency response to bring your hearing to the normal level.
- (k) No distortion, \* \* \*.
- (l) We have supplied to the Federal Trade Commission working models of the Ultima, Circuit Diagrams, Technical Data, Information of our production and fitting methods in order to prove that we have accomplished A Major Breakthrough in the hearing aid industry. The original correspondence with the FTC and all information is available in our files for inspection.

PAR. 6. By and through the use of the aforementioned statements and representations, and others of similar import and meaning, not specifically set out herein, respondents have represented and are now representing, directly and by implication that:

- (1) The Ultima hearing aid is unconditionally guaranteed.
- (2) The full price will be refunded to any purchaser who is not satisfied with the Ultima hearing aid.
- (3) Endel Are, represented as the inventor and developer of the Ultima hearing aid, was an employee of the National Aeronautics and Space Administration (NASA) for many years and actively participated in the development of equipment for Project Mercury space capsules.
- (4) The Ultima hearing aid requires no batteries for its operation.
- (5) The Ultima hearing aid has a built-in automatic device providing a permanent source of power and never needing replacement.
- (6) The Ultima hearing aid operates on power generated from body heat and will continue to operate in this fashion indefinitely.
- (7) When fitted binaurally the Ultima hearing aid will enable an individual with an 85% hearing loss to hear normally.
- (8) The Ultima hearing aid will cover a 65 decibel hearing loss.
- (9) The Ultima hearing aid contains an automatic device for the control of volume.

## Complaint

66 F.T.C.

(10) The Ultima hearing aid will bring every wearer's hearing up to normal levels.

(11) The Ultima hearing aid does not distort voices and other sounds.

(12) The Ultima hearing aid was submitted to the Federal Trade Commission for approval, and accepted, approved and endorsed by the Commission.

PAR. 7. In truth and in fact:

(1) The Ultima hearing aid is not unconditionally guaranteed nor is the full purchase price refunded in all cases of dissatisfaction; the advertising does not disclose the manner of performance under the guarantee nor that there are terms and conditions limiting the guarantee and the refund offer; the identity of the guarantor is not disclosed in the advertising and some purchasers are unable to secure performance under the guarantee from either the respondents or their dealers.

(2) Endel Are was never employed by the National Aeronautics and Space Administration (NASA), nor did he have any part in the development of equipment for Project Mercury space capsules.

(3) The power source of the Ultima hearing aid is a cadmium cell battery which must be recharged at frequent intervals.

(4) However fitted, the Ultima hearing aid will not substantially improve the hearing of an individual with an 85% hearing loss.

(5) The Ultima hearing aid will not cover a 65 decibel hearing loss, or substantially improve the hearing of an individual with such a loss.

(6) The Ultima hearing aid does not contain an automatic volume control.

(7) The Ultima hearing aid will not substantially improve the wearer's hearing if the individual has more than a minor hearing loss.

(8) The Ultima hearing aid will cause distortion of voices and other sounds.

(9) The Ultima hearing aid was submitted to the Federal Trade Commission by proposed respondents in the course of an official investigation to determine the truth or falsity of the advertising. The Commission has neither approved nor endorsed the Ultima hearing aid.

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'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 Regal Audio Instruments is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with principal places of business at Fort Erie, Ontario, Canada, and at 505 Pearl Street, in the city of Buffalo, State of New York.

Respondent Ultima Audio, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 505 Pearl Street, in the city of Buffalo, State of New York.

Respondent Endel Are is an individual and an officer of both corporations, and his address is the same as that of said corporations.

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

## PART I

*It is ordered,* That respondents Regal Audio Instruments, a corporation, Ultima Audio, Inc., a corporation, and their officers and Endel Are, individually and as an officer 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 any hearing aid device or any component thereof do forthwith cease and desist from directly or indirectly:

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

(a) The said product is guaranteed unless, in immediate conjunction therewith, there is a clear and conspicuous disclosure of the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform, and unless the guarantor does, in fact, perform in accordance with the guarantee as so represented.

(b) The purchase price of the said product will be refunded unless, in immediate conjunction therewith, there is a clear and conspicuous disclosure of all terms and conditions required for such refund, the identity of the refunder and the procedure necessary to secure the refund, and unless the purchase price is in fact refunded to all persons complying with such terms, conditions and procedure.

(c) The said product was invented or developed by any individual who was at any time employed by the National Aeronautics and Space Administration (NASA) or participated in the development of equipment for Project Mercury space capsules or any other equipment for space exploration; or that respondents' products have been invented or developed by any individual or organization, or by any individual or organization possessed of specified scientific qualifications or experience, unless respondents can establish such to be the facts.

(d) Said hearing aid has been endorsed or approved by the Federal Trade Commission.

#### PART II

*It is further ordered,* That respondents Regal Audio Instruments, a corporation, Ultima Audio, Inc., a corporation, and their officers, and Endel Are, individually and as an officer 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 the hearing aid device known as Ultima, or any other device of substantially the same construction or possessing substantially similar properties, or any component thereof, do forthwith cease and desist from directly or indirectly:

1. Disseminating, or causing the dissemination of, by means of the United States mails or by any means in commerce, as "com-

merce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that:

(a) The said hearing aid operates on power from any source other than a battery which needs to be recharged at frequent intervals.

(b) The said hearing aid contains an automatic volume control.

(c) The said hearing aid, whether fitted monaurally or binaurally will improve the hearing of any individual unless specifically limited to those persons having only a minor hearing loss.

(d) The said hearing aid does not distort voices or other sounds.

#### PART III

*It is further ordered,* That respondents Regal Audio Instruments, a corporation, Ultima Audio, Inc., a corporation, and their officers, and Endel Are, individually and as an officer 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 any hearing aid device, or any component thereof, do forthwith cease and desist from directly or indirectly:

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

#### MODERN QUILTERS, INC., ET AL.

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

*Docket C-850. Complaint, Oct. 14, 1964—Decision, Oct. 14, 1964*

Consent order requiring a Minneapolis, Minn., manufacturer of interlining materials to cease misbranding, falsely guaranteeing and deceptively invoicing its wool products.

Complaint

66 F.T.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Modern Quilters, Inc., a corporation and Abraham Sikora individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 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 Quilters, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its principal place of business located at 58 Glenwood Avenue, Minneapolis, Minnesota. Individual respondent Abraham Sikora is an officer of said corporation. He formulates, directs and controls the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. The address of said individual respondent is the same as that of the corporate respondent. Respondents are engaged in the manufacture and distribution of interlining materials.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 respondents have introduced, manufactured for introduction, into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, wool products, as the terms "commerce" and "wool product" are defined in said Act.

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

Among such misbranded wool products, but not limited thereto, were certain quilted interlining materials labeled or tagged by respondents as "Reprocessed 70%, 30%," which labels or tags, in light of accompanying documents implied that the product contained 70% Reprocessed Wool fibers and 30% Non-woolen fibers, whereas in truth and in fact said products contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain quilted interlining materials with labels on or affixed thereto, which failed to disclose:

The percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight of, (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fibers is per centum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that words constituting the name or designation of a fiber which was not present in the wool product appeared in or as a part of the listing or marking of required fiber content on the stamp, tag, label, or other mark of identification affixed to the wool products, in violation of Rule 25 of the said Rules and Regulations.

PAR. 6. The respondents furnished false guaranties that certain of their said wool products were not misbranded, when respondents in furnishing such guaranties had reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported, or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

PAR. 7. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair or deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 8. Respondents are now, and for some time last past, have been engaged in the offering for sale, sale and distribution of products, namely quilted interlining materials to garment manufacturers. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. Respondents in the course and conduct of their business as aforesaid, have made statements on their invoices and shipping memoranda to their customers misrepresenting the character and amount of



the constituent fibers present in such products. Among such misrepresentations, but not limited thereto, were statements representing certain quilted interlining material to be "70% Reprocessed Wool, 30% Acetate," whereas in truth and in fact, the said product contained substantially different fibers and quantities of fibers than were represented.

PAR. 10. The acts and practices set out above have had, and now have, the tendency and capacity to mislead and deceive purchasers of said products as to the true content thereof and to cause them to misbrand products manufactured by them in which said materials are used.

PAR. 11. The acts and practices of the respondents set out above 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, within the intent and meaning of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, 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 Modern Quilters, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its principal place of business located at 58 Glenwood Avenue, Minneapolis, Minnesota.

Respondent Abraham Sikora is an officer of the above named corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondents Modern Quilters, Inc., a corporation and its officers, and Abraham Sikora, 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 offering for sale, sale, transportation, distribution or delivery for shipment or shipment in commerce, of woolen quilted interlining materials or other wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from :

Misbranding of such products by :

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included 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.
3. Setting forth as a part of the listing or marking of required fiber content on the stamp, tag, label or other mark of identification affixed to a wool product words which constitute the named or designation of a fiber which is not present in the wool product.

*It is further ordered,* That respondents Modern Quilters, Inc., a corporation and its officers, and Abraham Sikora, 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 wool product is not misbranded under the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder when there is reason to believe that any wool product so guaranteed may be introduced, sold, transported or distributed in commerce as the term "commerce" is defined in the aforesaid Act.

*It is further ordered,* That respondents Modern Quilters, Inc., a corporation and its officers, and Abraham Sikora, individually and as an officer of said corporation, and respondents' representatives,

Complaint

66 F.T.C.

agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of quilted interlining materials or other 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 such 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.

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IN THE MATTER OF

CHAS. PFIZER & CO., INC.

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

*Docket 7780. Complaint, Feb. 11, 1960—Decision, Oct. 16, 1964*

Order dismissing without adjudicating the allegations—the Food and Drug Administration having asserted jurisdiction under the 1962 amendments of the Federal Food, Drug and Cosmetic Act, enacted during pendency of the proceeding—complaint charging a drug manufacturer with representing falsely in advertising mailed to doctors and inserted in medical journals that its product "Enarax" had been clinically tested for more than a year before it was placed on the market, that it had been tested on 512 patients, and that all the "references" listed therein related to the product when in fact they related to only one of its components.

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 Chas. Pfizer & Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Chas. Pfizer & Co., 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 11 Bartlett Street, Brooklyn, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of a drug preparation called "Enarax," which preparation contains ingredients which come within the classification of drugs, as the term "drug" is defined in the Federal Trade Commission Act, to pharmacists 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 "Enarax," when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertising material mailed to individual members of the medical profession throughout the United States and advertisements inserted in various medical journals having national circulation, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent, by means of the aforesaid advertisements and advertising material, has represented, directly or by implication, that the product "Enarax" had been clinically tested for more than a year before it was placed on the market; that it had been tested on 512 patients; and that all of the "references" listed therein related to said product.

PAR. 6. The aforesaid advertisements and representations contained therein are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the product "Enarax" had not been clinically tested for more than a year. It had not been tested on 512 patients. Many of the "references" listed in respondent's advertising material

did not relate to the product "Enarax," but instead related to only one of the components of "Enarax".

PAR. 7. The dissemination by the respondent of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Edward F. Downs* and *Mr. Anthony J. Kennedy, Jr.* supporting the complaint.

*Dewey, Ballantine, Bushby, Palmer & Wood*, by *Mr. John E. F. Wood*, *Mr. Charles E. Stewart, Jr.*, *Mr. Arnold G. Fraiman* and *Mr. Judson A. Parsons, Jr.* for the respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

AUGUST 8, 1962

The complaint in this matter charges the respondent, Chas. Pfizer & Co., Inc., a corporation, with violation of the Federal Trade Commission Act in the dissemination of certain advertisements concerning a drug preparation. Following respondent's answer denying violations of the Act, hearings were held, at which the testimony of medical practitioners was received and a number of exhibits admitted in evidence. Proposed findings and briefs have been filed by both parties. To the extent they are inconsistent with the findings made herein, they are deemed rejected.

On the record thus constituted, the undersigned makes the following:

FINDINGS OF FACT

1. Respondent Chas. Pfizer & Co., Inc., hereafter sometimes referred to as Pfizer, 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 11 Bartlett Street, Brooklyn, New York.

2. Respondent is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of a drug preparation called Enarax, which preparation contains ingredients which come within the classification of drugs, as the term "drug" is defined in the Federal Trade Commission Act, to retail drug outlets and others. In certain cases Pfizer's customers resell such products and preparations to the public.

3. Federal law prohibits the sale of Enarax to the public except on the prescription of a physician.

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

5. In the course and conduct of its business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act. This advertising material was mailed only to individual members of the medical profession throughout the United States or inserted in various medical journals having national circulation, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. Enarax is a drug preparation used principally in the treatment of peptic ulcers and other gastrointestinal disorders. Enarax contains two components, namely, an anticholinergic agent, oxyphencyclimine, sold under respondent's tradename of Daricon, and a tranquilizer, hydroxyzine hydrochloride, sold under respondent's tradename of Atarax. Each of the components of Enarax has its own therapeutic properties.

7. No question has been raised as to the efficacy and safety of Enarax. There is no contention that in marketing and advertising Enarax respondent has made any claims or representations with respect to its safety or efficacy which are not in fact true.

8. Oxyphencyclimine, the anticholinergic component of Enarax and the more important component of the combination, was developed by respondent. After extensive and thorough clinical testing, which had been reviewed by the Food and Drug Administration, and after a New Drug Application pertaining to it had been made effective, it was separately marketed by respondent in January 1959. It is similar in its action to other anticholinergic agents marketed by other pharmaceutical houses.

9. Atarax, the tranquilizer component of Enarax, was first marketed by respondent as a separate drug in May 1956, and by 1959 was well known and widely used by the medical profession. Before Atarax was marketed, it had been subjected to an extensive and

thorough clinical testing program which had been reviewed by the Food and Drug Administration; and a New Drug Application pertaining to it had become effective.

10. Enarax was first marketed and advertised by respondent in March of 1959 after certain clinical tests of Enarax and of its components had been reviewed by the Food and Drug Administration and after a New Drug Application pertaining to it had become effective.

11. By the time Enarax was placed on the market, the medical profession had for many years been using combined anticholinergic and tranquilizer therapy in the treatment of the conditions for which Enarax is used. It was also well understood by the medical profession that, when anticholinergics and tranquilizers are used together, both act in exactly the same manner as if each drug were used alone. This is true whether they are administered separately but concurrently, or are combined in a single tablet.

12. In respondent's advertisements appearing in the medical journals as well as in the literature distributed to the medical profession, which were the only advertisements of the drug, truthful disclosure was made of the formula of Enarax, showing quantitatively each of its ingredients.

13. Typical of the advertisements circulated by respondent on Enarax were the following:\*

14. Respondent, by means of the aforesaid advertisements and advertising material, has represented directly or by implication that Enarax had been clinically tested for more than a year before it was placed on the market; that it had been tested on 512 patients; and that some of the footnote "references" listed therein related to the product Enarax.

15. In truth and in fact, Enarax had not been clinically tested for more than a year before it was placed on the market, nor upon 512 patients, and not all of the footnote references purportedly relating to Enarax did so relate. When placed on the market in March 1959, Enarax had been tested on only approximately 155 patients and some of the references purportedly relating to Enarax in fact related to one of the components of Enarax.

16. Before Enarax was marketed, a combination of oxyphencyclimine and Atarax, administered separately but concurrently, had been clinically tested for more than one year. In addition, oxyphencyclimine itself had been clinically tested on more than 512 patients and for more

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\*Pictorial advertisements are omitted in printing.

1000

## Initial Decision

than one year. Atarax had been clinically tested in over a thousand cases and had been on the market for almost three years when Enarax was first marketed.

17. By representing that Enarax had been clinically tested for more than a year in a given number of cases and found to be effective in a given number of cases, respondent necessarily represented that such clinical testing was properly conducted and adequate to establish the efficacy of Enarax as a treatment of the disorders for which it was recommended. Enarax was clinically tested according to 131 case reports submitted to the respondent by eight different doctors of medicine as well as 24 additional observations which are not on record here. The 131 case reports, when considered in connection with the other testing referred to in Finding 16, above, provided information sufficient in all respects for evaluating the safety and efficacy of Enarax, and constituted valid clinical testing.

18. There is no evidence in this record that the representation that Enarax had been clinically tested on 512 patients and for more than one year constitutes a false representation of a material fact in the light of the testing previously done upon the component ingredients of Enarax.

19. There is no evidence in this record that the footnote references erroneously attributable to Enarax instead of one of the component drugs constitute a false representation of a material fact.

## DISCUSSION

The Food and Drug Administration has the duty of determining the adequacy of clinical tests before releasing a new drug on the market, and made such a determination for not only Daricon and Atarax, but for Enarax as well. The proceeding here at the Federal Trade Commission is directed only to the respondent's advertising.

Section 12 of the Federal Trade Commission Act makes it unlawful to disseminate any false advertisement for the purpose of inducing, or which is likely to induce, the purchase in commerce of a drug. Since drug is defined as an article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man, it is clear that Enarax is covered thereby. The Act, further, defines a false advertisement and states:

\* \* \* No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.



It is undisputed that the advertisements involved were disseminated only to members of the medical profession and included a truthful disclosure of the formula. The only issue, therefore, is whether these advertisements contained false representations of material facts.

Respondent first contends that these advertisements did not represent that Enarax had been clinically tested for more than one year and upon 512 patients, but, instead, represented that the tests were done on the anticholinergic component, oxyphencyclimine. If this were so, the issue could be resolved quickly in favor of the respondent since it is undisputed that oxyphencyclimine was so tested. However, the record makes it quite clear that some doctors would and did read these advertisements as representing that Enarax had been so tested rather than oxyphencyclimine. True, some of these doctors admitted that with more careful reading it would be clear that the testing referred to the oxyphencyclimine rather than to the Enarax. It is also true that doctors should render a more than superficial reading of a medical advertisement. Nevertheless, we are not concerned with what a doctor should do, but with what a doctor does. It is inescapable to conclude that some and perhaps many doctors will read these advertisements superficially and come to the conclusion that Enarax had been tested for more than one year and on 512 patients. The representation thus conveyed to the unsuspecting doctor is false even though some doctors making a careful reading of the advertisement and with specialized knowledge of the subject would not be misled.

This conclusion, however, does not dispose of this case. It is not sufficient to find that a representation in a drug advertisement is false. False representation, as the Act clearly spells out, must involve a material fact before it may be concluded that there was a false advertisement. The issue here is whether a representation that Enarax had been clinically tested when, instead, only its component ingredients had so been tested is a false representation of a material fact. Stated otherwise, does it matter materially if a doctor reading the Enarax advertisement thinks that Enarax, rather than its components, had been clinically tested? On this issue I am compelled to conclude that Commission counsel have not sustained the burden of proof incumbent upon them.

Counsel supporting the complaint called six medical practitioners. One, Dr. Karp, testified that he would prescribe Enarax whether it had been clinically tested or not because he was familiar with the component drugs involved and knew that they had been tested. Another, Dr. Fine, was an eye, ear, nose, and throat specialist who does not use anticholinergics in his practice so there would be no basis for deter-

mining what difference it made to him whether these component drugs had been tested or not. Drs. Sisskind and Saeli were not asked whether it mattered to them that Enarax had not been tested as advertised. Dr. Brozen testified that he liked to know what a new product consisted of. Finally, Dr. Grollman, who testified at great length on the validity of the clinical tests, was silent as to what difference it made to him or the medical profession that Enarax had not been tested as advertised, but only its components.

On the other hand, all the doctors called by the respondent testified that it made no difference whether Enarax had been clinically tested or not since the two component drugs of Enarax had been clinically tested and the action of the components, as well as the combined drug, was known. One of them, Dr. Ruffin, explained further that, although a physician is very hesitant to prescribe a new drug that has never been tested, he would be just as well satisfied to know only that the components of the mixture had been tested and not the mixture itself. Moreover, even if a physician did not know the action of the individual component drugs of a mixture, but knew there had been clinical testing of such component drugs, he would be satisfied in using the untested combination. He also stated:

Q. So that if you look at the two components and you mix them together and there is no change in the chemistry of the two, then, in your opinion, there is no necessity to test the combination?

A. Absolutely none, as far as I am concerned.

Q. Well, as far as you are concerned but how about as far as the medical profession is concerned?

A. Well, if I can speak for the profession, the answer is there is no occasion for the testing.

Q. That is in all instances?

A. Yes, sir, and I can find you dozens of instances in which this is accepted by the profession.

The testimony of each of the three gastroenterological specialists called by the respondent is essentially the same. There is nothing in the record which suggests that any doctor would consider these advertisements to be false representations of a material fact in conveying the impression that Enarax had been clinically tested for more than one year and on 512 patients, when, as a matter of fact, it had not been so tested, but only its component drugs had been. Counsel supporting the complaint urge that the hearing examiner, nevertheless, conclude that such misrepresentation involved a material fact and ignore the testimony of the medical specialists to the contrary. Such action on my part, I believe, would be unwarranted and presumptuous. The field of chemistry and medicine is a highly technical area where even experts often

Initial Decision

66 F.T.C.

disagree. To conclude, in the absence of any supporting data, that something is a material fact to the medical profession where the record contains only a flat contradiction by the medical experts to such conclusions is the height of folly. Indeed, it would be difficult to render a decision if there were contradictory versions by the specialists. Here, however, all the evidence points in one direction. I cannot set myself up as an authority to take official notice of scientific complexities at variance with uncontradicted expert opinion. These are not "material facts \* \* \* within [the] expert knowledge [of the Commission] derived from experience." Even if they were such, respondent had the right "to show the contrary" (Administrative Procedure Act, Sec. 7(d), 5 U.S.C. 1006(d)) which it did here. See *Manco Watch Strap Co., Inc.*, Docket No. 7785, March 13, 1962 [60 F.T.C. 495]; cf. *Industrial Engineering Associates*, 50 F.T.C. 300 (1953) where the Commission upheld of the hearing examiner who found:

\* \* \* since the representation \* \* \* was \* \* \* made in a publication intended for circulation among physicians only, who, it can be *assumed*, will not be misled by anything respondents might say regarding their product, and since there is no substantial evidence that the general consuming public would be misled thereby, \* \* \* public interest does not require \* \* \* corrective action \* \* \*. (Emphasis supplied.)

Also, *Waltham Precision Instrument Co., Inc.*, Docket No. 6914, July 20, 1962 [61 F.T.C. 1027], where no deception was found in the use of a term in an advertisement addressed to the watch-making trade which term was "not *likely to confuse* the technical experts \* \* \*." (Emphasis supplied.)

Similarly, as regards the footnote references in these advertisements, it is undeniable that, although some of them were keyed to specific items in the advertisements, others were not so keyed and could be, and were, understood by some doctors to refer to Enarax, when as a matter of fact they referred to one of the component drugs. The impression left with some doctors reading the advertisement was undoubtedly misleading. The materiality of such misrepresentation, however, is entirely unknown. Some of the doctors testified that they would be interested in knowing more about the component drugs. The record, however, is silent as to what difference it made to them that a specific footnote referred to a component drug rather than to the combination, Enarax. As in the case of the clinical testing, I cannot substitute my impression and conclude that doctors receiving the advertisement would experience the same. Such proof was the burden of counsel supporting the complaint and its absence cannot be compensated for by official notice.

The conclusions reached above require a dismissal of this complaint and render it unnecessary to decide whether the 131 case reports on Enarax constituted valid clinical tests. Since, however, this issue was contested vigorously, some comment is warranted, particularly in view of the current concern regarding drug testing. Commission counsel presented Dr. Grollman who testified that the 131 reports were not adequate to constitute valid clinical testing. Respondent's witnesses, on the other hand, disagreed and testified that neither the lack of formal controls, nor the lack of underlying data upon which the diagnoses were based, nor the insufficiency of the progress notes, nor the absence of testing for side effects, nor the use of adjunctive therapy, rendered these clinical tests invalid. It appears from the record that the validity of a clinical test has various criteria, depending upon whether the drug is a life-saving drug, like an antibiotic; a drug with specific actions in specific diseases; or a drug for the relief of symptoms, like Enarax. In the clinical tests of the life-saving drug and the drug with a specific action, an evaluation of the drug's efficacy is accomplished by laboratory tests. In testing a drug used for symptomatic relief, it may be proper to make a subjective evaluation which cannot be demonstrated objectively. Under such circumstances, the inadequacies and insufficiencies objected to by Dr. Grollman were not critical, in the opinion of the gastroenterological experts, *particularly in view of the prior testing done upon the component drugs*. Although Dr. Grollman is a doctor of considerable repute, he has not had the degree of specialization in gastroenterology that the respondent's witnesses possess, nor does it appear he was made familiar with the prior clinical testing done upon the component drugs of Enarax. On balance, therefore, it is reasonable to conclude that, although valid clinical testing should often and perhaps usually have the controls and underlying data specified by Dr. Grollman, such completeness is not required in all types of clinical testing; that in the clinical testing of drugs for the relief of symptomatic disorders where the component drugs have been subjected to clinical testing, simpler and more abbreviated tests are valid for such purpose. The testing of Enarax falls within the latter category and constituted valid clinical testing in the unanimous expert opinion of the gastroenterological specialists who testified.

## ORDER

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

## OPINION OF THE COMMISSION

OCTOBER 16, 1964

The Commission issued its complaint in the above-captioned proceeding in 1960. The complaint charges respondent with having misrepresented, in advertising material for its prescription drug "Enarax", that the product had been clinically tested for more than a year before it was placed on the market, and with related misrepresentations, in violation of Section 12 of the Federal Trade Commission Act, which proscribes false advertising of food, drugs, devices or cosmetics. While the matter was pending before the Commission on cross-appeals from the initial decision of the hearing examiner dismissing the complaint on the merits, the Federal Food, Drug, and Cosmetic Act was amended by the passage of the Drug Amendments of 1962. Subsequently, certain regulations were promulgated by the Secretary of Health, Education, and Welfare as provided for in the amendments.

On July 10, 1964 [p. 1521 herein], the Commission ordered "that the appeal in this case should be reargued, such reargument to be limited, however, to the following single question: whether the Drug Amendments of 1962 (76 Stat. 780) to the Federal Food, Drug and Cosmetic Act, and/or any regulations issued under such amendments by the Secretary of Health, Education, and Welfare cover the acts and practices alleged in the complaint." The order further provided that "the General Counsel of the Department of Health, Education and Welfare is invited to submit a brief setting forth the Department's views on the question presented and, if he desires, to participate in the oral argument." The matter having been duly reargued, and the views of the Department on the question having been received by the Commission in a letter of August 4, 1964, from the Assistant General Counsel for Food and Drugs, decision of the appeal is now appropriate.

Section 502(n) of the amended Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 352(n), provides that a prescription drug shall be deemed misbranded "unless the manufacturer \* \* \* includes in all advertisements \* \* \* such \* \* \* information in brief summary relating to side effects, contraindications, and effectiveness as shall be required in regulations which shall be issued by the Secretary [of Health, Education, and Welfare]." Section 502(n) further provides that "no advertisement of a prescription drug, published after the effective date of regulations issued under this subsection applicable to advertisements of prescription drugs, shall, with respect to the matters specified in this subsection or covered by such regulations, be subject

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## Opinion

to the provisions of sections 52-57 of Title 15 [*i.e.*, Sections 12 through 17 of the Federal Trade Commission Act, as amended]". One of the regulations that the Secretary has promulgated pursuant to Section 502(n) provides that every prescription-drug advertisement "shall fairly show the effectiveness of the drug in the conditions for which it is recommended in the advertisement, together with a showing of those side effects and contraindications that are pertinent with respect to the uses recommended \* \* \*. A fair balance shall be made in presenting the information on effectiveness and that on side effects and contraindications." 21 CFR § 1.105(e). The Department of Health, Education, and Welfare has advised the Commission that this provision of the regulations embraces the false advertising of Enarax charged in the Commission's complaint; in its letter of August 4, 1964, the Assistant General Counsel for Food and Drug states:

We do not regard an ad as complying with the "fair balance" requirements when it falsely represents the extent of the clinical testing as alleged in your complaint. We consider the advertising complained of in your Docket No. 7780 to be within the scope and application of the Amendments of 1962 of the Federal Food, Drug, and Cosmetic Act and the regulations promulgated thereunder.

Congress, in the Drug Amendments of 1962, desired to avoid both regulatory gaps and regulatory conflicts in the policing of prescription-drug advertising by the Federal Trade Commission and the Food and Drug Administration. Accordingly, since the FDA has asserted jurisdiction under Section 502(n) of the advertisements challenged in the Commission's complaint, the Commission will not proceed further in this matter, but will set aside the initial decision and dismiss the complaint without an adjudication of the allegations of the complaint. Should the FDA's assertion of jurisdiction subsequently prove unfounded, in part or in whole, the Commission will take such further action in this area as may be warranted in the public interest.

It should be noted that the Commission's complaint was brought exclusively under the food and drug sections (Sections 12 through 17) of the Federal Trade Commission Act. While Section 12 proscribes false advertising exclusive of labeling, Section 5 of the Federal Trade Commission Act proscribes all unfair or deceptive acts or practices in interstate commerce whether involving advertising or labeling. The Drug Amendments of 1962 were clearly not intended to repeal the Commission's authority under Section 5 to proceed, where appropriate to prevent any regulatory gap, against unfair or deceptive representations in the marketing of prescription drugs.

Complaint

66 F.T.C.

## FINAL ORDER

This matter having been heard by the Commission on cross-appeals from the initial decision of the hearing examiner dismissing the complaint, and the Commission having determined, for the reasons set forth in the accompanying opinion, that the initial decision should be set aside and the complaint dismissed without an adjudication of the allegations of the complaint,

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

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

## IN THE MATTER OF

## THE ANTONIO COMPANY ET AL.

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

*Docket C-851. Complaint, Oct. 19, 1964—Decision, Oct. 19, 1964*

Consent order requiring Tampa, Fla., distributors of cigars to purchasers for resale, to cease misrepresenting that their cigars are made entirely from tobacco grown in Cuba by the use of such brand names as "HAVANA BLUNTS," "CLEAR HAVANA," "SHERMAN'S Havana," and "IMPORTED HAVANA WRAPPER."

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Antonio Company, a corporation, and Karl B. Cuesta and A. L. Cuesta, Jr., 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 The Antonio Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2111 North Albany Avenue in the city of Tampa, State of Florida.

Respondents Karl B. Cuesta and A. L. Cuesta, Jr., are officers of the corporate respondent. They formulate, direct and control the acts

and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business 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 cigars to distributors, wholesalers, dealers and retailers for resale to the public.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their cigars, the respondents have made numerous statements and representations in connection with the advertising of their cigars by and through the use of brand names as well as descriptive and identifying matters and materials which purport to disclose the composition, formulation, and origin of their cigars.

Typical and illustrative of the aforesaid statements and representations are the following:

"HAVANA BLUNTS" "CLEAR HAVANA" "SHERMAN'S Havana"  
"IMPORTED HAVANA WRAPPER"

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, the respondents represented that said cigars were made entirely from tobacco grown on the island of Cuba.

PAR. 6. In truth and in fact, respondents' cigars bearing the aforesaid descriptions and other similar terms were not made entirely from tobacco grown on the island of Cuba.

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

PAR. 7. By the aforesaid practices, respondents place in the hands of distributors, wholesalers, dealers and retailers, means and instrumentalities by and through which they may mislead the public as to the composition, formulation and origin of their cigars.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce,



with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements; representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. 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 The Antonio Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2111 North Albany Avenue, in the city of Tampa, State of Florida.

Respondents Karl B. Cuesta and A. L. Cuesta, Jr., 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 The Antonio Company, a corporation, and its officers, and Karl B. Cuesta and A. L. Cuesta, Jr., individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cigars or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana" or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substantial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with," or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

*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

## STANDARD CIGAR COMPANY ET AL.

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

*Docket C-852. Complaint, Oct. 19, 1964—Decision, Oct. 19, 1964*

Consent order requiring Tampa, Fla., distributors of cigars for resale, to cease representing falsely that their cigars are made entirely from tobacco grown

Complaint

66 F.T.C.

in Cuba by the use of such brand names as "M & N Havana Specials," "Clear Havana," and "Habana."

## 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 Standard Cigar Company, and M & N Cigar Manufacturers, Inc., corporations, and Stanford J. Newman and Millard W. Newman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Standard Cigar Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, and respondent M & N Cigar Manufacturers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, both corporations with their principal office and place of business located at 2701 16th Street in the city of Tampa, State of Florida.

Respondents Stanford J. Newman and Millard W. Newman, are officers of the corporate respondents.

They formulate, direct and control the acts and practices hereinafter set forth of the corporate respondents, including the acts and practices set forth. Their business address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of cigars to distributors, wholesalers, dealers and retailers for resale to the public.

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

PAR 4. In the course and conduct of their aforesaid business, and for purpose of inducing the sale of their cigars, the respondents have

made, or caused to be made, numerous statements and representations in connection with the advertising of their cigars through the use of brand names and other descriptive and identifying matter and materials which purport to indicate the composition, formulation or origin of their cigars.

Typical and illustrative of the aforesaid statements and representations are the following:

"M & N Havana Specials"    "M & N Havana Panetelas"  
                   "Clear Havana"    "Mild Havana"    "Habana"  
                                   "all fine Havana tobacco"

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, the respondents represented that the cigars were made entirely from tobacco grown on the island of Cuba.

PAR. 6. In truth and in fact, respondents' cigars bearing the aforesaid descriptions and other similar terms were not made entirely from tobacco grown on the island of Cuba.

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

PAR. 7. By the aforesaid practices, respondents place in the hands of distributors, wholesalers, dealers and retailers, means and instrumentalities by and through which they may mislead the public as to the composition, formulation and origin of their cigars.

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

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. 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. Respondents Standard Cigar Company and M & N Cigar Manufacturers, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the States of Florida and Ohio respectively, with their offices and principal places of business located at 2701 16th Street in the city of Tampa, State of Florida.

Respondents Stanford J. Newman and Millard W. Newman are officers of said corporations, and their address is the same as that of said corporations.

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 Standard Cigar Company, and M & N Cigar Manufacturers, Inc., corporations, and their officers, and Stanford J. Newman and Millard W. Newman, individually and as officers of said corporations, 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 cigars or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana," or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in

1015

Complaint

conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substantial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with," or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

*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.

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IN THE MATTER OF

ABC VENDING CORPORATION ET AL.\*

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACT

*Docket 7652. Complaint, Nov. 4, 1959—Decision, Oct. 22, 1964*

Consent order requiring a large theater confectionery concessionaire headquartered in Long Island City, N.Y., to divest within a year certain concession rights and not to acquire other such rights for a period of 10 years without Commission approval; and also to cease inducing discriminatory prices and allowances from suppliers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18) as amended and approved December 29, 1950, and the provisions of Section 5 of the Federal Trade Commission Act

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\*Now known as ABC Consolidated Corporation et al.

Complaint

66 F.T.C.

(U.S.C., Title 15, Section 45) and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint pursuant to its authority thereunder and charging as follows:

## COUNT I

Charging violation of Section 7 of the Clayton Act, the Commission alleges:

PARAGRAPH 1. (a) Respondent, ABC Vending Corporation, hereinafter sometimes referred to as ABC, is a corporation organized in January 1947, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50-01 Northern Boulevard, Long Island City, New York.

(b) ABC was originally organized as the American Vending Corporation for the purpose of acquiring all of the capital stock of two groups of vending companies, Berlo Vending Company, named as a respondent herein, and Sanitary Automatic Candy Corporation. Such acquisitions were consummated by the exchange of 439,841 shares of ABC's stock for the capital stock of Berlo Vending Company, and 217,798 shares of ABC's stock for the capital stock of Sanitary Automatic Candy Corporation. By such acquisitions, ABC thereby obtained the business and assets of a number of long established, operating vending companies, most of which were wholly owned, and several of which were partly owned, by these acquired companies. On August 20, 1947, ABC's present corporate name, ABC Vending Corporation, was adopted. In later years, ABC acquired the remaining interest in several of the subsidiary companies in which it had obtained a partial interest through the original acquisition. In 1950, by an exchange of 89,240 shares of its stock, ABC acquired the remaining 25% interest in the Apex Beverage Corporation, and the remaining 50% interest in the Allied Beverage Company, both of which are now operated as divisions of ABC. In 1951, ABC acquired the remaining 25% interest in Northwest Automatic Candy Corporation, which was merged into ABC in 1954.

(c) Prior to October 28, 1957, ABC was both an operating company and a holding company, having approximately twenty-two active subsidiaries and affiliated companies, including respondent Berlo Vending Company. Eighteen of these companies were wholly owned, one 75% owned, one 66 $\frac{2}{3}$ % owned, and two 50% owned.

(d) Respondent ABC, directly and through its subsidiaries and affiliated companies, including respondent Berlo Vending Company, is

1019

## Complaint

engaged in the business of acquiring space for, maintaining, and otherwise operating vending concessions, consisting of attended confectionary stands and vending machines, in motion picture theatres and at other locations, through which candy, gum, other confections, popcorn, soft drinks, ice cream, and other foods, tobacco products, newspapers, magazines, novelties, and other merchandise are sold. Said products and merchandise, many of which are purchased by ABC, or by its subsidiaries and affiliated companies, by direct negotiations with a large number of manufacturers and other suppliers, are hereinafter sometimes referred to as concessionary products. Vending concessions belonging to ABC, its subsidiaries and affiliated companies, are located principally in indoor and outdoor (drive-in) motion picture theatres. Other such concessions are located in legitimate theatres, supermarkets, fairs, turnpikes, public transportation terminals and stations, sports arenas, hotels, industrial sites, government and military installations, and other places of amusement or public gathering. ABC, directly and through its subsidiaries and affiliated companies, acquires, maintains, and otherwise operates said vending concessions in many States of the United States and in the District of Columbia. In the course and conduct of its business, respondent ABC is engaged in commerce, as "commerce" is defined in the Clayton Act.

(e) Prior to October 28, 1957, respondent ABC, including operations of its subsidiaries and affiliates, was the largest commercial concessionaire operating in the motion picture theatre concession field in the United States. In addition, ABC, directly and through certain subsidiaries, was the largest manufacturer and distributor of popcorn in the United States; it was one of the leading dispensers of soft drinks through vending machines; and it was a significant and growing concern in the public transportation terminal concession field.

PAR. 2. (a) Respondent, Berlo Vending Company, hereinafter sometimes referred to as Berlo, a wholly owned subsidiary of respondent ABC, is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 South Broad Street, Philadelphia, Pennsylvania.

(b) Respondent, Berlo Vending Company, is engaged in the business of acquiring, maintaining, and otherwise operating vending concessions, principally in motion picture theatres and also in other places of public gathering, such as amusement parks, restaurants, swimming pools, ball parks, municipal auditoriums, and race tracks. Berlo operates and does business in the States of Pennsylvania, New York, Maryland, Virginia, West Virginia, North Carolina, Florida, Louisi-



ana, Ohio, Michigan, and New Jersey, and in the District of Columbia. In the course and conduct of its business, respondent Berlo is engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 3. (a) Prior to October 28, 1957, Confection Cabinet Corp., hereinafter sometimes referred to as Confection Cabinet, was a corporation organized in 1930, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 240 South Harrison Street, East Orange, New Jersey.

(b) The operations of Confection Cabinet were divided into five divisions with offices in East Orange, New Jersey, Chicago, Illinois, Detroit, Michigan, St. Louis, Missouri, and Los Angeles, California. Confection Cabinet's operations were conducted through thirty wholly owned subsidiaries, two subsidiaries in which Confection Cabinet had a 75% and 66 $\frac{2}{3}$ % interest respectively, three subsidiaries in which Confection Cabinet held a 50% interest in each, and five affiliated corporations and partnerships which were owned wholly or in part by the principal stockholders of Confection Cabinet.

(c) Confection Cabinet, its subsidiaries, and affiliate companies were engaged in the business of acquiring space for, maintaining, and otherwise operating vending concessions consisting of attended confectionary stands and vending machines in motion picture theatres and at other locations, through which candy, gum, other confections, popcorn, soft drinks, ice cream, tobacco products, novelties, and other merchandise were sold. Substantially all of Confection Cabinet's vending concessions were located in indoor and outdoor motion picture theatres. In the course and conduct of its business, Confection Cabinet was engaged in commerce, as "commerce" is defined in the Clayton Act.

(d) Prior to October 28, 1957, Confection Cabinet was the second largest commercial concessionaire operating in the motion picture theatre concession field in the United States and it was the only commercial concessionaire in the country that competed with respondent ABC on other than a local basis.

PAR. 4. (a) Prior to about December 5, 1957, Charles Sweets Company, hereinafter sometimes referred to as Charles Sweets, was a corporation organized in 1951, under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 429-33 South 61st Street, Philadelphia, Pennsylvania.

(b) Charles Sweets was engaged in the business of acquiring space for, maintaining, and otherwise operating vending concessions consisting of attended confectionary stands and vending machines in motion picture theatres and at other locations, through which candy,

1019

## Complaint

gum, other confections, popcorn, soft drinks, ice cream, tobacco products, novelties, and other merchandise were sold. The vending concessions of Charles Sweets were located in some 44 indoor and outdoor motion picture theatres in and around, and within a 50 mile radius of, Philadelphia, Pennsylvania, including southern New Jersey. Charles Sweets also operated a concession under contract with the Montgomeryville Merchandise Mart at Montgomeryville, Pennsylvania. In the course and conduct of its business, Charles Sweets was engaged in commerce, as "commerce" is defined in the Clayton Act.

(c) Prior to about December 5, 1957, Charles Sweets Concession Company, hereinafter sometimes referred to as Sweets Concession, was a corporation organized in 1956, under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 429-33 South 61st Street, Philadelphia, Pennsylvania.

(d) Sweets Concession was engaged in the business of acquiring, maintaining, and otherwise operating concession space through which it sold a general line of concessionary products at the Pensauken Merchandise Mart, Pensauken, New Jersey, and at the Parkside Golf Range, 52d Street and Parkside Avenue, Philadelphia, Pennsylvania. In the course and conduct of its business, Sweets Concession was engaged in commerce, as "commerce" is defined in the Clayton Act.

(e) Prior to December 5, 1957, both the Charles Sweets Company and the Charles Sweets Concession Company were wholly owned and operated by Charles Amsterdam. The combined operation of these two companies by Charles Amsterdam was the largest commercial concessionaire competitor of ABC and Berlo in the greater metropolitan area of Philadelphia, including southern New Jersey.

PAR. 5. (a) Sales derived from confectionary and refreshment stands and vending machines located in indoor and outdoor (drive-in) motion picture theatres in the United States constitute a substantial business. For example, during 1956, sales of all products through such locations averaged approximately \$7 million weekly. Also during 1956, annual sales through such locations of popcorn totaled approximately \$126 million, candy approximately \$98 million, soft drinks approximately \$34 million and ice cream approximately \$24 million.

(b) Confectionary and refreshment stands and vending machines located in indoor and outdoor motion picture theatres in the United States are operated by two distinct non-competing groups of individuals and corporations, namely:

(1) Owners and operators of motion picture theatres who, as an incident to their motion picture exhibiting business, purchase concession-

ary products from suppliers thereof and resell such products through their own stands or machines located in their own theatres;

(2) Commercial concessionaires who lease space or otherwise acquire, maintain, and operate vending concessions in indoor and outdoor motion picture theatres belonging to other individuals, partnerships, or corporations.

(c) The term "concessionaire" as used in this complaint is intended to include only commercial or professional concessionaires whose principal business activities are such as have been described in subsection (2) of subparagraph (b) of this Paragraph Five.

(d) In the normal course of their business, concessionaires usually procure the right to place their vending equipment and fixtures and to operate their concessions at locations by agreeing to pay the owner of the theatre a certain rate of commission based on the volume of sales of the various products sold through the concession. The concessionaire usually provides personnel to operate attended stands, supplies and services any vending machines placed at the location, and also stocks and supplies products sold at the stands. The arrangement between the concessionaire and owner or proprietor of the theatre may be either verbal or written, and may be terminated upon short notice by either party, or may be an arrangement covering a specified term of months or years.

(e) There is no significant competition from any source outside a motion picture theatre in the retail sale of products and merchandise sold through attended stands and vending machines inside the theatre, because such vending, in substantially all cases, is conducted on an exclusive basis, either by the theatre owner, or by a commercial concessionaire, and because theatre patrons, who buy substantially all of the merchandise sold through such stands and machines, are a captive customer group.

Substantial competition does exist, however, among commercial concessionaires in their striving and vying with and against each other to acquire, maintain, and operate vending concessions in motion picture theatres, and between commercial concessionaires and others who by arrangement or contract with theatre owners or operators sell concessionary products and merchandise to such theatre owners or operators for resale through confectionary and refreshment stands and vending machines.

(f) The business of acquiring and operating concessions in motion picture theatres in certain parts of the United States is difficult, if not impossible, for new concessionaires to enter. Entry into such business is restricted and limited by the heavy capital outlays required to pur-

chase inventories and to place, replace, or modernize confectionary and refreshment stands, vending machines, and other equipment; by the decreasing number of motion picture theatres doing business in the country; by the unusually high degree of concentration of operating facilities and financial resources held by respondent ABC directly and through its subsidiaries and affiliated companies; by respondent ABC's direct use or indirect use through its subsidiaries and affiliated companies of its financial power to inhibit, restrict, and eliminate competition; and by the dominant and monopolistic position held by respondent ABC in the business of operating, directly and through its subsidiaries and affiliates, concessions in motion picture theatres in certain sections of the United States and various parts thereof.

PAR. 6. (a) Prior to October 28, 1957, substantial competition and substantial potential competition existed between ABC, directly and through its subsidiaries or affiliates, including respondent Berlo, and Confection Cabinet in the acquiring and operating of concessions for confectionary and refreshment stands and vending machines in both indoor and outdoor motion picture theatres in the United States, especially in the States of New York and New Jersey and various parts thereof, particularly the greater metropolitan area of New York, New York, including northern New Jersey.

(b) As of October 28, 1957, ABC, directly and through its subsidiaries and affiliates, including respondent Berlo, operated vending concessions in 3,557 locations in 35 States, and the District of Columbia, of which approximately 2,755, or 77 percent, were located in indoor and outdoor motion picture theatres. Prior to October 28, 1957, Confection Cabinet operated vending concessions in 446 locations in 26 States and the District of Columbia, of which 439 or 98 percent were located in indoor and outdoor motion picture theatres. ABC, directly and through subsidiary corporations and affiliated companies, was engaged in the concessionary business in motion picture theatres in every State in which Confection Cabinet was engaged in such business, except for two States, Arizona and Wisconsin.

(c) As of October 28, 1957, Confection Cabinet had vending concessions in more motion picture theatres in the greater metropolitan area of New York, New York, including northern New Jersey, than it had in any other area in which it operated and did business. As of this same time, the largest concentration of vending concessions operated by ABC, directly and through its subsidiaries and affiliates, in motion picture theatres was in the greater metropolitan area of New York, New York, including northern New Jersey.

(d) In 1957, there were approximately 963 indoor motion picture theatres doing business in the State of New York and 349 such theatres in the State of New Jersey. Prior to October 28, 1957, ABC, directly and through its subsidiaries and affiliates, operated vending concessions located in 402, or about 42 percent, of the indoor motion picture theatres in the State of New York and operated vending concessions located in 252, or about 72 percent, of the indoor motion picture theatres in the State of New Jersey. Prior to October 28, 1957, Confection Cabinet operated vending concessions located in 97, or about 10 percent, of the indoor motion picture theatres in the State of New York and operated vending concessions located in 72, or about 21 percent, of the indoor motion picture theatres in the State of New Jersey.

(e) Prior to December 5, 1957, substantial competition, and substantial potential competition existed between ABC, directly and through its subsidiaries and affiliates, especially through respondent Berlo, and Charles Sweets and Sweets Concession in the acquiring and operation of vending concessions in both indoor and outdoor motion picture theatres and in other locations. Next to the greater metropolitan area of New York, New York, respondents' heaviest concentration of vending concessions in motion picture theatres was in the area in which Charles Sweets and Sweets Concession operated, namely, in eastern Pennsylvania, including the greater metropolitan area of Philadelphia, Pennsylvania, and southern New Jersey.

(f) Prior to December 5, 1957, ABC, directly and through its subsidiaries and affiliates, operated 544 vending concessions in the State of Pennsylvania, of which 479 were located in indoor, and 65 in outdoor, motion picture theatres. At this time, ABC, directly and through its subsidiaries and affiliates, operated 351 vending concessions in the State of New Jersey, of which 324 were located in indoor, and 27 in outdoor, motion picture theatres. Prior to December 5, 1957, Charles Sweets operated vending concessions in 44 motion picture theatres in parts of eastern Pennsylvania and southern New Jersey but primarily in the greater metropolitan area of Philadelphia, Pennsylvania. In this area, Charles Sweets as of this time was ABC's and Berlo's largest competitor in the operation of vending concessions in motion picture theatres.

PAR. 7. (a) On or about September 28, 1957, ABC entered into an agreement with Confection Cabinet and certain of its shareholders to purchase or acquire substantially all of the assets, concessions, and business of Confection Cabinet and its operating companies in exchange for 116,667 shares of ABC's common stock and \$65,665 in cash. Pursuant to said agreement ABC acquired all of the capital stock,

assets, concessions, and business of 34 wholly owned subsidiaries of Confection Cabinet, the capital stock interests owned by Confection Cabinet in 4 other affiliated corporations, and the equity interests owned by Confection Cabinet in two partnerships, plus other assets and properties owned by Confection Cabinet, including its corporate name, Confection Cabinet Corp. By said agreement, this acquisition was effective as of September 30, 1957, on which date the value of the 116,667 shares of ABC's common stock was \$14 per share, or \$1,633,338 in the aggregate. The net value of the assets, stock and other interests of the subsidiaries acquired by ABC from Confection Cabinet for the 116,667 shares of stock aggregated \$1,636,069 as of September 30, 1957. By said acquisition agreement, which was consummated on October 28, 1957, ABC acquired and integrated into its operations, the assets, concessions, and business of the following named wholly owned subsidiaries of Confection Cabinet:

1. Arizona Confection Cabinet Corp.
2. Calumet Refreshments, Inc.
3. Central Confection Cabinet Corp.
4. Concab Realty Co.
5. Florida Confection Cabinet Corporation
6. Fresh Pack Candies, Inc.
7. LeJeune Concessions, Inc.
8. Louisiana Confection Cabinet Corp.
9. Michigan Confection Cabinet Corporation
10. Mississippi Confection Cabinet Corp.
11. St. Clair Drive-In Refreshments, Inc.
12. Speedway Refreshments, Inc.
13. Tennessee Confection Cabinet Corp.
14. Texas Confection Cabinet Corp.
15. New York Toasted Nut House, Inc.
16. Ohio Confection Cabinet Corporation
17. Quincy Drive-In Refreshments, Inc.
18. Riverdale Refreshments, Inc.
19. Niles Drive-In Refreshments, Inc.
20. Bay Drive-In Refreshments, Inc.
21. Fraser Drive-In Refreshments, Inc.
22. Pontiac Drive-In Refreshments, Inc.
23. Drive-In Refreshments, Inc.
24. Asbury Drive-In Refreshments, Inc.
25. Morris Plains Drive-In Refreshments, Inc.
26. Union Drive-In Refreshments, Inc.

## Complaint

66 F.T.C.

27. New Brunswick Drive-In Refreshments, Inc.
28. Illinois Refreshments, Inc.
29. Outdoor Refreshments, Inc.
30. Super Popcorn Company
31. Custardland, Inc.
32. Superior Beverage Corp.
33. Cafeterias, Inc.
34. Confection Cabinet Corp., a Delaware corporation

Pursuant to said agreement Confection Cabinet's 50 percent capital stock interest in two other affiliated corporations, Supurmatic Vendors, Inc., and Merchandising Corporation, and Merchandising Corporation's wholly owned subsidiary, Supurdisplay, Incorporated, were also acquired by ABC.

Pursuant to said agreement of September 28, 1957, ABC also acquired for \$65,665 in cash the capital stock interests of the principal stockholders of Confection Cabinet in two other corporations and the principal shareholders' equity interests in two partnerships as follows:

	<i>Percent</i>
New York Popcorn, Inc., a New York Corporation.....	50
Refreshment Service, Inc., a Wisconsin Corporation.....	30
C & S Candy Co., a partnership.....	88.2
Stein, Smerling & Stern, a partnership.....	(1)

<sup>1</sup> Interest unknown.

(b) On or about September 20, 1957, respondent Berlo entered into an agreement with Charles Sweets and Charles Amsterdam to purchase or acquire the stock, assets, concessions, and business of Charles Sweets and Sweets Concession for approximately \$229,000. Said agreement provided that Berlo could take title in its own name or in the name of an affiliate. When said agreement was consummated on December 5, 1957, title to the stock and assets of Charles Sweets and Sweets Concession was taken partly by respondent ABC and partly by Vending Concessions, Inc., a newly formed wholly owned subsidiary of ABC. By virtue of said agreement, ABC acquired and integrated into its overall operations the stock, assets, concessions, and business of Charles Sweets and Sweets Concession.

PAR. 8. The effect of the aforesaid acquisitions by the respondents named herein may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce in which said respondents and Confection Cabinet, Charles Sweets, and Sweets Concession were engaged.

More specifically, the aforesaid effects include the actual or poten-

tial lessening of competition or a tendency to create a monopoly in the following ways, among others:

(a) Actual and potential competition between respondents and Confection Cabinet has been and will be eliminated in the business of acquiring, maintaining, and otherwise operating vending concessions in indoor and outdoor motion picture theatres in every State or area in which they competed, especially in the States of New York and New Jersey, and in various parts thereof, and particularly in the greater metropolitan area of New York, New York, including northern New Jersey.

(b) Actual and potential competition between respondents and Charles Sweets and Sweets Concession has been and will be eliminated in the business of acquiring, maintaining, and otherwise operating vending concessions in motion picture theatres in every State or area in which they competed, especially in the States of Pennsylvania and New Jersey and in various parts thereof, and particularly in the greater metropolitan area of Philadelphia, Pennsylvania.

(c) The aforesaid acquisitions have increased substantially ABC's overall position in the vending concession business in indoor and outdoor motion picture theatres by increasing substantially the number of such theatre concessions operated or controlled by ABC, directly and through its subsidiaries and affiliates, to the detriment of actual or potential competition.

(d) By its acquisition of Confection Cabinet, ABC, the largest operator of vending concessions in motion picture theatres in the United States, has eliminated its largest and principal competitor in the operation of vending concessions in motion picture theatres in certain sections of the country, especially in the States of New York and New Jersey, and in various parts thereof, and particularly in the greater metropolitan area of New York, New York, including northern New Jersey.

(e) By its acquisition of the stock, assets, and business of Charles Sweets and Sweets Concession through respondent Berlo, ABC, the largest operator of vending concessions in motion picture theatres in the United States, has eliminated its and Berlo's largest and principal competitors in the operation of vending concessions in motion picture theatres in the greater metropolitan area of Philadelphia, Pennsylvania.

(f) By reason of the aforesaid acquisitions, and the dominant and controlling position ABC occupied in the motion picture theatre concession business prior to these acquisitions, ABC has been placed in a monopolistic position in the operation of vending concessions in



motion picture theatres in certain sections of the country, especially in the States of New York, New Jersey, and Pennsylvania, and particularly in the greater metropolitan area of New York, New York, including northern New Jersey, and in the greater metropolitan area of Philadelphia, Pennsylvania.

(g) By reason of the aforesaid acquisitions, and the dominant position ABC occupied in the theatre concession field prior to these acquisitions, ABC, directly and through its subsidiaries and affiliates, is now one of the few concessionaires, and sometimes the only one, with whom motion picture theatre owners, in certain sections of the country, may contract and do business in arranging for the placement of vending concessions in their theatres.

(h) The aforesaid acquisitions have further substantially increased the dominant position which ABC enjoyed prior to these acquisitions, with the result that ABC, directly and through its subsidiaries and affiliates, now has, or may have, a decisive competitive advantage over its competitors in the acquisition, maintenance, and operation of vending concessions in motion picture theatres.

(i) The aforesaid acquisitions have substantially increased the purchase requirements of ABC, its subsidiaries, and affiliates, to such an extent that ABC, its subsidiaries, and affiliates, now have a decisive competitive advantage over competitors in the purchase of vended products and vending fixtures and equipment.

(j) Entry of prospective concessionaires into the business of operating vending concessions in motion picture theatres has been, or may be, discouraged because of the substantial number of theatre concessions operated or controlled by ABC, directly and through its subsidiaries and affiliates, and because of the dominant position, financial resources, and economic power of ABC in the areas in which it operates, especially in the States of New York, New Jersey, and Pennsylvania, and in various parts thereof, particularly in the greater metropolitan area of New York, New York, including northern New Jersey, and in the greater metropolitan area of Philadelphia, Pennsylvania.

(k) Concentration generally in the theatre concession field has been further greatly increased in that ABC, which was the largest concessionaire doing business in motion picture theatres prior to the acquisition, has increased substantially the number of motion picture theatre concessions which it controls or operates, directly and through its subsidiaries and affiliates; has increased substantially its capital, resources, operating facilities, and economic power; has eliminated from the concession field ABC's largest competitor and the only re-

maintaining concessionaire which competed with it on other than a local basis; and in the area of Philadelphia, Pennsylvania, has removed from the concession field its and Berlo's largest competitors.

(1) Actual and potential competition generally in the business of acquiring, maintaining, and otherwise operating vending concessions in motion picture theatres has been, or may be, further substantially lessened and the tendency toward monopoly in said business has been, or may be, further accelerated by the aforesaid acquisitions.

PAR. 9. The foregoing acquisitions, acts, and practices of respondents, as hereinbefore alleged and set forth, constitute violations of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18) as amended and approved December 29, 1950.

## COUNT II

Charging violation of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Paragraphs One through Eight of Count I are incorporated herein by reference and made a part of the allegations of this Count II of the complaint as if set forth in full text herein. In the course and conduct of their business, respondents, ABC Vending Corporation and Berlo Vending Company, are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 2. The acquisitions by respondent ABC, directly and through respondent Berlo, of the stock, business, assets, or facilities of other firms, engaged in the business of acquiring, maintaining, and otherwise operating vending concessions in motion picture theatres, or of other firms engaged in supplying merchandise to vendors of concessionary products in motion picture theatres, have been, are, or may be to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, and any future similar acquisitions by ABC, its subsidiaries, affiliates, officers, employees, or agents, or by Berlo, will further increase respondents' dominant and monopolistic position in said industry.

PAR. 3. Respondent ABC, operating directly and through its subsidiaries, as the largest operator of vending concessions in motion picture theatres in the industry, has been, and is now, able to exercise an actual and potential monopoly power both to frustrate the growth and business potential of its competitors and to eliminate their opportunities for business survival. In the course and conduct of its business, ABC, operating directly and through its subsidiaries, including Berlo, has used its dominant position and economic power to engage in, and

is now continuing to engage in, certain methods, acts, and practices which have the capacity, tendency, and effect of unduly hindering, lessening, restricting, or eliminating competition and unfairly diverting business to ABC, its subsidiaries, and affiliates, and away from their competitors who are in the business of acquiring, maintaining, and otherwise operating vending concessions in motion picture theatres, or who supply merchandise to vendors of concessionary products in motion picture theatres. Such methods, acts, and practices include the following, among others:

(a) Offering and making preclusive and unwarranted advances of funds, loans, or periodic commission payments to motion picture theatre owners or operators in such substantial amounts as to foreclose competition, in order to exclude competitors from effectively competing with ABC, its subsidiaries, and affiliates, for concessionary rights in motion picture theatres.

(b) Offering and extending additional substantial advances of funds, loans, or periodic commission payments to motion picture theatre owners or operators already indebted to ABC, its subsidiaries, and affiliates, to perpetuate, or further extend for unreasonable periods of time, the exclusive right to continue to operate vending concessions at such theatres.

(c) Offering and furnishing to motion picture theatre owners or operators preclusive inducements, such as new or remodeled vending facilities, fixtures and equipment, or other inducements, of such substantial value as to foreclose competition, in order to exclude competitors from effectively competing with ABC, its subsidiaries, and affiliates, for concessionary rights in motion picture theatres.

(d) Foreclosing and precluding competitors from an opportunity to compete with ABC, its subsidiaries, and affiliates, for concessionary rights in motion picture theatres, by negotiating, entering into, and renewing long term contracts or other arrangements with motion picture theatre owners or operators for the exclusive right to maintain and operate vending concessions in such theatres for unreasonable periods of time.

(e) Utilizing its dominant position and economic power as the largest operator of vending concessions in motion picture theatres in the industry:

(1) To command and receive for ABC, its subsidiaries, and affiliates, favored treatment from manufacturers and suppliers in the purchase of merchandise sold through their vending concessions. For example, ABC and Berlo have purchased, and do purchase, certain

candy products, such as special size bars and packages, on an exclusive or substantially exclusive basis, and have obtained, and do obtain, special terms, conditions, prices, and other favored treatment from certain manufacturer-suppliers.

(2) To influence, persuade, or coerce certain manufacturers or suppliers of concessionary products to refrain from selling their products, or certain of their products, to competitors of respondents.

PAR. 4. The effect of the methods, acts, and practices hereinbefore described and alleged in Paragraph Three, and things done pursuant to them, have been, are or may be, to divert to respondent ABC, its subsidiaries and affiliates, including respondent Berlo, and away from their competitors a substantial share of the available concessionary business in motion picture theatres in the United States, especially in the States of New York, New Jersey, and Pennsylvania; to discourage and tend to foreclose the entry of new competitors into the concessionary field in motion picture theatres; to lessen, hinder, restrain, and suppress competition from competitors in the acquiring of supply arrangements or concessionary rights in motion picture theatres; to cause theatre owners to refrain from granting concessionary rights or supply arrangements to competitors; to foreclose competitors from acquiring concessionary rights or supply arrangements from the owners of the principal theatre circuits and larger theatres in many sections of the country; to cause suppliers of vended products, especially certain candy manufacturers, to sell special size packages and bars of candy to ABC, its subsidiaries, and affiliates, on an exclusive basis and to refrain from selling such special candy products to competitors; to cause suppliers of vended products, especially candy suppliers, to sell their products to ABC, its subsidiaries, and affiliates, at prices and on terms and conditions which are more favorable than the prices, terms, and conditions accorded competitors; to enable ABC, directly and through its subsidiaries, including Berlo, to foreclose competition for concessionary rights in motion picture theatres by offering and furnishing such terms, commissions, and inducements as to preclude competitors from effectively competing for such locations; to enable respondent ABC, directly and through its subsidiaries and affiliates, including respondent Berlo, to dominate the concessionary business in motion picture theatres to such an extent that in certain sections of the country ABC, its subsidiaries, and affiliates, are the only concessionaires with whom theatre owners may do business; and to tend to create a monopoly in respondent ABC, in the concessionary business in motion picture theatres in certain sections of the country.

Decision and Order

66 F.T.C.

PAR. 5. The foregoing acquisitions, acts, and practices of respondents as herein alleged in this COUNT II are all to the prejudice of competitors and to the prejudice of the public; have a tendency to hinder and prevent, and have actually hindered and prevented, competition in the concessionary business in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in the concessionary business and have a tendency to create in ABC a monopoly in the concessionary business; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

*Mr. William J. Boyd, Jr., and Mr. Peter Jeffrey* for the Commission.  
*Schnader, Harrison, Segal & Lewis*, by *Mr. Edward W. Mullinix*  
and *Mr. Kimber E. Vought*, Philadelphia, Pa., for the respondents.

## DECISION AND ORDER

The complaint in this proceeding which issued on November 4, 1959, having charged respondents with violation of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, and an agreement having been entered into which agreement contains, *inter alia*, an order to cease and desist and to divest, an admission by the respondents of all the jurisdictional facts set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having determined that it should waive and hereby having waived the timely filing of notice of intent to enter into a consent agreement as prescribed by the Commission's Notice of July 14, 1961; and

The Commission, having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent ABC Consolidated Corporation, whose name prior to May 1, 1964, was ABC Vending Corporation, is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 50-01 Northern Boulevard, Long Island City, New York.

Respondent Berlo Vending Company is a wholly-owned subsidiary of respondent ABC Consolidated Corporation and is a corporation or-

ganized and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 South Broad Street, Philadelphia, Pennsylvania.

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 respondent ABC Consolidated Corporation, including respondent Berlo Vending Company, and their officers, directors, agents, representatives and employees, within twelve (12) months from the date of service of this Order, shall divest themselves absolutely, in good faith, to a purchaser or purchasers, approved by the Federal Trade Commission, of motion picture theater concessions and contract rights for the operation of motion picture theater concessions in the continental United States having aggregate concessionary sales of not less than \$4,000,000 of which not less than \$3,500,000 shall be in the New York and Philadelphia film exchange areas (defined later herein). Drive-in theater concessions included in the divestiture shall be not less than ten (10) in number, nor more than  $\frac{1}{6}$  of the total number of motion picture theater concessions to be divested in the New York and Philadelphia film exchange areas. Said theater concession and contract rights to be divested under this Order shall include all the assets, properties, rights and privileges, tangible and intangible, including, but not limited to, concession rights, vending machines, concession stands, fixtures, and other equipment required by the purchaser to operate the divested motion picture theater concessions.

## II

*It is further ordered,* That the assets required to be divested under Section I of this Order shall not be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with, or under the control or influence of, respondents, or any of respondents' subsidiary or affiliated companies.

## III

As used in this Order, the New York and Philadelphia film exchange area comprises the following listed counties in the States of New York, New Jersey, Pennsylvania, and Delaware:

## New York Film Exchange Area

*New York Counties*

Bronx	Orange	Suffolk
Dutchess	Putnam	Ulster
Kings	Queens	Westchester
Nassau	Richmond	
New York	Rockland	

*New Jersey Counties*

Bergen	Middlesex	Somerset
Essex	Monmouth	Sussex
Hudson	Morris	Union
Hunterdon	Passaic	Warren

## Philadelphia Film Exchange Area

*Pennsylvania Counties*

Adams	Lackawanna	Philadelphia
Berks	Lancaster	Pike
Bradford	Lebanon	Schuylkill
Bucks	Lehigh	Snyder
Carbon	Luzerne	Sullivan
Chester	Lycóming	Susquehanna
Columbia	Monroe	Tioga
Cumberland	Montgomery	Union
Dauphine	Montour	Wayne
Delaware	Northampton	Wyoming
Franklin	Northumberland	York
Juniata	Perry	

*New Jersey Counties*

Atlantic	Cape May	Mercer
Burlington	Cumberland	Ocean
Camden	Gloucester	Salem

*Delaware Counties*

Kent	New Castle	Sussex
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As used in this Order, the term "concessionary sales" means the sales of all products sold at indoor or drive-in motion picture theater concessions.

## V

As used in this Order, the term "concessionary products" refers collectively to products suitable for resale in concessions located in indoor or drive-in motion picture theaters, including, but not limited to, candy, popcorn, nuts, soft drinks, beverage syrups, ice cream, cigarettes and other related products.

## VI

*It is further ordered,* That for a period of three (3) years from the date of divestiture, but only so long as a divested motion picture theater concession location is served by the purchaser which was approved by the Commission and which purchased from respondents pursuant to said approval, respondents shall not solicit, acquire or operate, directly or indirectly, any such theater concession divested pursuant to this Order.

## VII

*It is further ordered,* That, for a period of ten (10) years from the date of service of this Order, respondents shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, any assets, stock, or other share capital, or any other interest, in any other business, corporate or otherwise, which is engaged in the operation of concessions in motion picture theaters in the United States, without the prior approval of the Federal Trade Commission.

## VIII

*It is further ordered,* That respondent, ABC Consolidated Corporation, its subsidiaries and affiliates, including respondent Berlo Vending Company, and their respective officers, directors, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the business of supplying or operating concessions in motion picture theaters in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Contracting, or offering to enter into contracts with owners or operators of motion picture theaters (exhibitors) for exclusive concessionary rights at such theaters for periods of time greater than five (5) years; provided, however, that any such contract covering indoor motion picture theater concessions shall be terminable by the exhibitor at any time following the expiration of thirty-six (36) months from the date of such contract, and any such contract covering drive-in motion picture theaters shall



be terminable by the exhibitor at any time following the expiration of forty-eight (48) months from the date of such contract; provided further that in the event of any such termination prior to the expiration of five (5) years, the exhibitor may be obligated to repay any outstanding loans or advances and any unamortized cost of equipment depreciated over a maximum amortization period of not more than five (5) years.

## IX

*It is further ordered.* That respondent ABC Consolidated Corporation, and its subsidiaries and affiliates, including respondent Berlo Vending Company, and their respective officers, directors, representatives, agents and employees, directly, or through any corporate or other device, in, or in connection with, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 45), of products suitable for resale by respondents in motion picture theater concessions, or in connection with any other transaction between respondents and their various suppliers, involving or pertaining to the regular business of respondents, in distributing and selling motion picture theater concessionary products in the course of commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith with cease and desist from:

Inducing and receiving or receiving any price, allowance, term, exclusive package, or any other consideration or thing of value from any manufacturer or other supplier of concessionary products, when, in either inducing and receiving or receiving, respondents know or should know that such price, allowance, term, exclusive package, or other consideration or thing of value is not affirmatively offered and made available on proportionally equal terms to all other customers of such manufacturer or supplier competing with respondents for the operation of concessions in motion picture theaters.

## X

*It is further ordered.* That respondent ABC Consolidated Corporation shall, within ninety (90) days from the date of service of this Order, notify each manufacturer or other supplier of concessionary products from which respondent ABC Consolidated Corporation, its subsidiaries and affiliates, including respondent Berlo Vending Company, made any purchase in commerce, or in the course of commerce, for resale in motion picture theater concessions, during a period of six (6) months prior to the date of service of this Order that the

1019

## Complaint

Federal Trade Commission has ordered ABC Consolidated Corporation, its subsidiaries and affiliates, including respondent Berlo Vending Company, and their respective officers, directors, representatives, agents and employees, directly or through any corporate or other device, forthwith to cease and desist from inducing and receiving or receiving any price, allowance, term, exclusive package, or other consideration, or thing of value, when, in either inducing and receiving or receiving, respondents know or should know that such price, allowance, term, exclusive package, or other consideration or thing of value is not affirmatively offered and made available on proportionally equal terms to all of respondents' competitors operating concessions in motion picture theaters.

## XI

Respondents shall periodically, within sixty (60) days from the date of service of this Order and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of their actions, plans, and progress, in complying with the provisions of this Order and fulfilling its objectives.

## IN THE MATTER OF

## DOUBLE EAGLE LUBRICANTS, INC., ET AL.

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

*Docket 8589. Complaint, July 29, 1963—Decision, Oct. 22, 1964*

Order requiring Oklahoma City sellers of previously used lubricating motor oil which they purchased from filling stations and other sources and then "re-refined" in their refinery plant, to cease selling such reclaimed oil without disclosing the prior use in advertising and promotional material and by a conspicuous statement to that effect on the front panel of containers; and to cease representing that reclaimed oil was manufactured from oil that had not been previously used.

## 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 Double Eagle Lubricants, Inc., a corporation, and Frank A. Kerran and Cameron L. Kerran, 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