

Complaint

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IN THE MATTER OF

MR. ROMANO, INC., ET AL.

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

Docket C-877. Complaint, Feb. 8, 1965—Decision, Feb. 8, 1965

Consent order requiring three affiliated Beverly Hills, Calif., clothing retailers to cease violating the Textile Fiber Products Identification Act by falsely advertising the fiber content of men's apparel, by using generic names of fibers and fiber trademarks in an improper manner on labels and in newspaper advertisements, and failing to set forth other required information.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mr. Romano, Inc., and Malibu Clothes, Ltd., corporations, and Bel-Air Clothes, Ltd., a corporation, trading as Malibu Clothes and William Firestone and Stanley Firestone individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Mr. Romano, Inc., Malibu Clothes, Ltd., and Bel-Air Clothes, Ltd., are corporations organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents William Firestone and Stanley Firestone are officers of corporate respondents. They formulate, direct and control the acts and practices of corporate respondents, including the acts and practices hereinafter set forth.

Respondents are engaged in retail selling of textile fiber products and their office and principal place of business is located at 228 South Beverly Drive, Beverly Hills, California.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transporta-

tion or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were falsely and deceptively advertised by means of advertisements which appeared in newspapers of interstate circulation, in that certain of said advertisements contained statements which represented, either directly or by implication, that said products were composed wholly or substantially of a fiber, when, in truth and in fact, said product was not composed wholly or substantially of said fiber.

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

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels:

1. Which failed to disclose the true generic name of the fiber present.

2. Which set forth the generic name of a fiber present in an amount of five percent or less.

PAR. 5. Certain of said textile fiber products were further misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

- A. Generic names of fibers were set forth on labels when such fibers were present in amounts of five percentum or less of the total fiber weight in violation of Rule 3 of the aforesaid Rules and Regulations.

B. Fiber trademarks were placed on labels without the generic names of the fibers appearing on such labels, in violation of Rule 17(a) of the aforesaid Rules and Regulations.

C. Fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

PAR. 6. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were articles of wearing apparel which were falsely and deceptively advertised in newspapers of interstate circulation in that the true generic names of the fibers in such articles were not set forth.

PAR. 7. Certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder.

Among such textile fiber products but not limited thereto, were textile fiber products which were falsely and deceptively advertised in newspapers of interstate circulation, in the following respects:

A. A fiber trademark was used in advertising textile fiber products, namely men's apparel, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

B. A fiber trademark was used in advertising textile fiber products, namely men's apparel, containing more than one fiber and such fiber trademark did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

C. A generic name of a fiber was used in advertising in such a manner as to be false, deceptive or misleading as to fiber content, or to indicate directly or indirectly, that a textile fiber product was composed wholly or substantially of such fiber, when, in truth and

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in fact, said product was not composed wholly or substantially of said fiber, in violation of Rule 41(d) of the aforesaid Rules and Regulations.

PAR. 8. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification 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 Mr. Romano, Inc., Malibu Clothes, Ltd., and Bel-Air Clothes, Ltd., trading as Malibu Clothes, are corporations organized, existing and doing business under and by virtue of the laws of the State of California, with their office and principal place of business located at 228 South Beverly Drive, Beverly Hills, California.

Respondents William Firestone and Stanley Firestone 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, Mr. Romano, Inc., and Malibu Clothes, Ltd., corporations, and Bel-Air Clothes, Ltd., a corporation, trading as Malibu Clothes, and William Firestone and Stanley Firestone, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing, delivering for introduction, selling, advertising, or offering for sale, in commerce, or transporting or causing to be transported in commerce, or importing into the United States, any textile fiber product; or selling, offering for sale, advertising, delivering, transporting, or causing to be transported, any textile fiber product which has been advertised or offered for sale in commerce; or selling, offering for sale, advertising, delivering, transporting, or causing to be transported, after shipment in commerce, any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act:

1. Which are falsely or deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of constituent fibers contained therein.
2. Unless each such product has securely affixed thereto or placed thereon a stamp, tag, label or other means of identification correctly showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.
3. Which designates a fiber by its generic name on any label when such fiber is present in any textile fiber product in amount of five percentum or less.
4. Which uses a fiber trademark on labels affixed to such textile fiber products without the generic name of the fiber appearing on the said label.
5. Which uses a generic name or fiber trademark on any label, whether required or non-required, without making a full and complete fiber content disclosure in accordance with the Act and Regulations the first time such generic name or fiber trademark appears on the label.

It is further ordered, That respondents, Mr. Romano, Inc., and Malibu Clothes, Ltd., corporations, and Bel-Air Clothes, Ltd., a corporation, trading as Malibu Clothes, and William Firestone and Stanley Firestone, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or

through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Falsely and deceptively advertising textile fiber products by:

1. Making any representations, by disclosure or by implication, as to the fiber contents of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertisements without a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

4. Using the generic name of a fiber in advertising in such a manner as to be false, deceptive or misleading as to fiber content, or to indicate directly or indirectly, that a textile fiber product is composed wholly or substantially of such fiber, when such product is not composed wholly or substantially of such fiber.

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

JACOBY-BENDER, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8587. Complaint, July 18, 1963—Decision, Feb. 11, 1965*

Order dismissing a complaint which charged a New York City distributor of metal expansion watchbands to watch manufacturers and to retailers with failure to disclose the foreign origin of such bands for the reason that the respondent had discontinued the practice prior to the issuance of the complaint.

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 JACOBY-BENDER, INC., a corporation, and MAX JACOBY and WILLIAM E. STARK, 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 JACOBY-BENDER, INC., is a corporation organized, existing and doing business under and by virtue of the State of New York, with its office and principal place of business located at 62-10 Northern Boulevard in the city of (Woodside) New York, Queens, State of New York.

Respondents MAX JACOBY and WILLIAM E. STARK 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 advertising, offering for sale, sale and distribution of metal expansion 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. When offered for sale or sold by respondents, said watchbands do not bear disclosure showing that they are substantially of foreign origin.

PAR. 5. In the absence of an adequate disclosure that a product, including metal expansion 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. 6. 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. 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 metal expansion watchbands of the same general kind and nature as that sold by the respondents.

PAR. 8. 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, and 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. 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.

Initial Decision

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Mr. Herbert L. Blume supporting the complaint.

Mr. Philip K. Schwartz of *Davis, Gilbert, Levine & Schwartz*, New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

MAY 1, 1964

This case involves, generally speaking, the omission to mark or otherwise disclose the foreign origin, Hong Kong, of skeletons of metal expansion watchbands, sold in the United States, allegedly in violation of Section 5 of the Federal Trade Commission Act. The skeleton is the expansible part of a metal expansion watchband. Respondents, among other things, claim that their Hong Kong skeleton is something less than a completed skeleton.

There is a stipulation of facts herein (CX 17), executed by counsel, both of whom were very cooperative in connection with the prehearing conference procedure. This is supplemented by official notice in respect to consumer understanding and consumer preference for domestic products, as taken by the Commission in the complaint and construed by the examiner to apply to substantial parts. Respondents offered no evidence to disprove the noticed facts, but they have challenged the legality and applicability of the official notice.

Respondents have a special defense of discontinuance, which is the part of this case stressed the most. The proof in support thereof is contained in an affidavit of discontinuance filed with the Commission and executed over a year before the complaint herein was filed, and also in current affidavits submitted in lieu of testimony, as provided for in the aforementioned stipulation.

In the examiner's opinion discontinuance (including likelihood of resumption) is indeed the salient issue in this case, and it will be given extended consideration in this decision. It may be said at once, however, after careful deliberation, that the defense is not sustained. First of all, the proof in support thereof, contained in the current affidavits in lieu of testimony, is very meager except on the oblique issue of the claimed finality of the Commission's acceptance of the affidavit of discontinuance. Secondly, likelihood of resumption is not demonstrated by the proof herein, and is actually negated by the interchangeability beyond recognition of domestic and foreign skeletons, and resulting watchbands, and by respondents' present export business, from which any watchbands containing foreign skeletons may easily be diverted instead of being exported.

As to the violation charged against the respondents in the complaint, which is supported by the stipulation of facts and the official

notice taken, as aforesaid, respondents apparently do not contend that violation has not been proved, except in the following particulars, which will be disposed of at once:

(1) Respondents, as already stated, have challenged the legal basis for taking official notice, although they did not avail themselves of the opportunity to disprove the noticed facts made available to them, pursuant to § 3.14(d) of the Rules of the Commission. The official notice as taken in the complaint, paragraph 5, reads as follows:

In the absence of an adequate disclosure that a product, including metal expansion 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.

Immediately following this is another sentence containing the words "substantial components thereof," as follows:

Respondents' failure to clearly and conspicuously disclose the country of origin of such articles of merchandise, or substantial components thereof, is, therefore, to the prejudice of the purchasing public.

In a prehearing conference order, dated October 21, 1963, the examiner, in paragraph 5 thereof, called upon the respondents for any proposed proof denying the validity of this official notice, and also stated:

In this connection the hearing examiner hereby gives formal notice that he intends to take official notice as alleged in the complaint, and to clarify the same by expressly making the official notice applicable not merely to a metal expansion watchband as a whole, but to a substantial component thereof.

Further matter as to official notice is contained in the Findings of Fact 5 herein.—The examiner decides against respondents in respect to their challenge of the legal basis for taking official notice, or its applicability to substantial components, inasmuch as he feels bound by Commission precedents and policy thereon, which are directly challenged by respondents.

(2) Respondents challenge the contention that "Hong Kong" skeletons in this matter are substantial parts of the watchbands. As already stated, they contend that their Hong Kong skeletons are, and were, in any event less than full skeletons. The examiner holds, however, that respondents' Hong Kong skeletons, even if technically something less than full skeletons, are substantial parts of the watchbands. The basic facts in connection therewith are stated in Finding of Fact 4 herein, last paragraph. Reference is also made to the Trade Practice Conference Rules, *i.e.*, to those covering the Metallic Watch

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Band Industry, 16 C.F.R. § 60.4, particularly footnote 3, reading as follows:

Parts which are to be considered as substantial include the skeletons or interliners of the expansion type bands, whether of the entire length of the band or but a substantial portion of such length, and whether caps and end pieces are affixed thereto before or after the importation of such skeletons or interliners.

(3) Respondents contend that respondent William E. Stark is in no event individually liable for any violation which may be found herein, and that the complaint is incorrect in alleging that he is one of those who "formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth." Complaint counsel submitted no proof supporting this allegation in respect to respondent Stark, nor did he submit a proposed finding thereon, although he does include respondent Stark individually in his proposed order.—The examiner hereby dismisses the complaint as against respondent Stark individually.

FINDINGS OF FACT¹

1. Respondent Jacoby-Bender, 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 place of business located at 62-10 Northern Boulevard in the Borough of Queens, city of New York, State of New York.

Respondent Max Jacoby is, and has been, the president of respondent corporation. He, his wife, and one Bernard Kanter, are and have been, the directors of the corporate respondent. Said respondent Max Jacoby owns and/or controls 85% of the common stock, the only voting stock. He formulates, directs and controls (and has done so in the past) the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address for the purpose of this proceeding is the same as that of the corporate respondent.

Respondent William E. Stark is and has been the production manager of respondent corporation and vice president in charge of production. His entire stock ownership consists of 3% of the common stock. He does not and has not formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

2. Respondent Jacoby-Bender, Inc., hereinafter called the "firm," "company," or "corporate respondent," and the respondent Max

¹ Findings 1-7 hereof correspond to One to Seven of the complaint.

Jacoby—both of whom are hereinafter referred to as the “respondents”—are now, and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of metal expansion watchbands to manufacturers and distributors of watches as well as to retailers for resale to the public.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their metal expansion watchbands, 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 metal expansion watchbands in commerce, as “commerce” is defined in the Federal Trade Commission Act.

The corporate respondent is a large firm in the watchband industry. It manufactures four to five million watchbands a year, most of them metal expansion watchbands (CX 17A-B).

4. Many of said watchbands have consisted in substantial part of components—comprising roughly the skeleton or expansible part of the watchband—which were manufactured in, and imported from, Hong Kong and, therefore, from a foreign country. When offered for sale or sold by respondents said watchbands have not borne disclosure showing that they were of substantially foreign origin, nor has disclosure been made in any way.

The proof herein as to this relates basically to the past, commencing in 1960, but with imports halted (after Commission contacts with respondents) as per respondents’ affidavit of discontinuance of May 1962, and with sales in the United States halted, according to respondents, by the end of the summer of 1962 (RX 1D). However, although the complaint, issued in July 1963, permits, it does not require proof of “present” violation.—Moreover, any violation continues even after sales of the watchcases considered as “instrumentalities of deception” (see Finding 6).

The said Hong Kong skeletons, or the components comprising such skeletons, as integral parts of the watchbands, are definitely a substantial part of the watchbands. The unique and distinguishable feature of the metal expansion watchband is obviously its ability to expand and contract within the requirements for daily use (see CX 17C—par. 9(a)). The expansible feature exists solely by virtue of the skeleton whether it has many links or few. The essence of the skeleton is a series of link-like springs joined together, link by link, so as to exercise the proper tension and expansibility. The addition to these springs, properly joined, of the decorative metal covering,

of plates and of mechanical services, so as to make them into a finished skeleton and then incorporate them into a watchband, cannot vitiate the aforesaid essence of the skeleton.—The fact that the production cost of the skeleton is not a major cost of the watchband (CX 17D-E), is accordingly hardly controlling on the issue of whether it is a substantial part of the watchband; moreover it must be borne in mind that, due to the Hong Kong labor market as distinguished from that of the United States, labor costs in Hong Kong may be substantially less than in the United States.

5. In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin—a fact of which the Commission took official notice in the complaint. Metal expansion watchbands containing foreign skeletons, such as those of the respondents, are fairly described as being of foreign origin, and are so understood by the purchasing public, or a substantial portion thereof, if made aware of the foreign origin. In any event, the aforesaid public belief and understanding of domestic origin of a product relates not only to a completed article such as a watchband but also to a substantial part of a product, such as a skeleton of a watchband—of which fact the examiner takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for such articles which are of domestic origin—as to which fact the Commission also took official notice in the complaint.

As stated in the preceding paragraph, metal expansion watchbands containing foreign skeletons are fairly described as of foreign origin, rather than domestic, and are so understood by the consuming public, or a substantial part thereof, if made aware of the foreign origin; thus the official notice taken by the Commission comprehends an otherwise domestic watchband containing a foreign skeleton. In any event, the aforesaid public preference for articles of domestic origin relates not only to completed articles, such as metal expansion watchbands, but also to substantial parts thereof, such as the skeleton of an expansion watchband, and there is a public preference for watchbands composed of domestic skeletons—of which fact the hearing examiner herein takes official notice.

Respondents' failure to disclose the said country of origin of "substantial components" (complaint, par. 5) of their aforesaid watchbands is, therefore, to the prejudice of the purchasing public.

6. By the aforesaid practices, respondents have placed in the hands of watch manufacturers, distributors and retailers, means and instru-

mentalities by and through which they may mislead the public, and the public may continue to be misled, as to the place of origin of such watchbands or substantial components thereof, *i.e.*, after distribution and sale of the watchbands by respondents.

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 metal expansion watchbands of the same general kind and nature as that sold by respondents. (This represents an allegation of the complaint admitted by the amended answer.)

8. Although some of such facts may be incorporated above, all the facts contained in the Stipulation Between Counsel—also referred to herein as the stipulation of facts (CX 17A-G)—are found as facts herein.

Discontinuance (and Likelihood of Resumption)

9. The affidavit of discontinuance, sworn to May 23, 1962 by respondent Jacoby, is inconclusive as to discontinuance up to that date, and is not even reaffirmed herein by Mr. Jacoby, whose current affidavit is devoted to exonerating Mr. Stark from individual liability. As to the inconclusiveness of the affidavit of discontinuance, even as supplemented by other proof as to facts up to its date, reference is made to Finding 13, and also to the extended discussion on discontinuance immediately after these Findings of Fact.

Even assuming, by resolving of doubts in respondents' favor, that the affidavit of discontinuance, by itself or otherwise, does prove discontinuance up to its date, May 16, 1962, there is no proof of discontinuance from that date on, and the proof indicates substantial likelihood of resumption. See Findings 10 to 14, inclusive.

10. The one pertinent current affidavit, December 3, 1963—sworn to by respondent Stark, not by respondent Jacoby, the firm's principal and signer of the affidavit of discontinuance—contains no proof of discontinuance as such commencing from the date of the affidavit of discontinuance, May 16, 1962, and indeed no affirmation thereon except two sentences telling what Mr. Stark told his lawyer about the subject, namely, in April 1963, when the proposed complaint herein was served.

Mr. Stark's affidavit, it may also be pointed out, contains little on discontinuance prior to May 16, 1962, and actually adds nothing, on *acts* of discontinuance, to what is contained in the affidavit of discontinuance of that date.

11. The four current affidavits, including Stark's above affidavit, submitted by respondents herein are otherwise devoted to discontin-

uance only in the oblique sense of trying to show by alleged admissions by Commission personnel and otherwise that the affidavit of discontinuance and its acceptance by them was intended by them as a closing of the matter by the Commission and that commencement of the present proceedings has violated this. Two of the four affidavits are devoted entirely to exonerating respondent Stark from individual liability, namely, his own second affidavit, and respondent Jacoby's affidavit, already referred to.

12. The stipulation of facts (CX 17), submitted February 10, 1964, contains nothing on discontinuance as such, *i.e.*, on ending imports or sales, except the statement that the firm (CX 17F,G, par. 15, 16) "discontinued its working agreement with the Kailey Company"—a Hong Kong company which made skeletons for the firm—"some time after they were aware of an investigation being conducted by the Federal Trade Commission" and that "[t]ypical of the steps" it took, the firm sent Kailey a wire, dated March 1, 1962, reading:

STOP MANUFACTURE OF SKELETONS BECAUSE OF STAMPING RESTRICTIONS WRITING

13. The affidavits and the stipulation, however, do bring out facts not helpful to respondents, even as to discontinuance prior to May 16, 1962. They bring out that Hong Kong skeletons are indistinguishable from skeletons manufactured here by respondents (CX 17E, par. 11(b)), that they have been freely intermingled by respondents with domestic skeletons (*id.*), that watchbands containing Hong Kong skeletons are indistinguishable from those containing domestic skeletons (CX 17E, par. 11(a))—either by respondents, distributors, or consumers—and that no attempt was made by respondents to make disclosure, say, by circulars or advertising, that part of its production of watchbands utilized Hong Kong skeletons received by the firm prior to the time it allegedly stopped importing them or selling watchbands containing them (CX 17E, par. 11(d)).

Thus the discontinuance of manufacture in and importing from Hong Kong, of skeletons, as claimed by respondents in its May 1962 affidavit of discontinuance, was ineffective insofar as watchbands composed of the same were already sold and until at least the "end of the summer" would continue to be sold by respondents and thereafter by distributors. They would have the effect of "instrumentalities of deception" until all of them, after various steps of distribution, reached ultimate consumers—if not still continuing as instrumentalities of deception even in the hands of ultimate consumers.

Moreover, the stipulation of facts, February 10, 1964, shows that respondents also *export* watchbands (CX 17B, par. 4), *i.e.*, to foreign countries, outside the United States. Respondents may still, of course, lawfully import Hong Kong skeletons and incorporate them into watchbands. Moreover, they may lawfully, it may be assumed, export such watchbands, without disclosure, for sale in various foreign countries. However, such watchbands can easily, even inadvertently, be diverted to sales within the United States, *i.e.*, since such watchbands are indistinguishable from domestic watchbands.—No export business was disclosed in the affidavit of discontinuance.

These undisputed facts are gone into more fully in the discussion following these Findings, with further citations to the affidavits and the stipulation. They foreclose respondents on the question of *likelihood of resumption*, which is part of the issue of discontinuance, even assuming that discontinuance of import and sale of watchbands with Hong Kong skeletons were proved in this case.

14. There is no other proof as to discontinuance, including likelihood or unlikelihood of resumption, except as above indicated. There is no *testimony* as to discontinuance, nor was there any offer or proffer of testimony on discontinuance, except in the oblique sense heretofore noted as to the claimed finality of the Commission's acceptance of the affidavit of discontinuance, as to which respondents' attorney gave testimony which was stricken by the examiner.

DISCUSSION ON DISCONTINUANCE

Inasmuch as discontinuance is the most contested issue in this case it will be discussed and analyzed at some length, even though this may necessitate a degree of repetition in some particulars. The discussion and analysis is subdivided as follows:

A digest of the proof in respect to discontinuance, as contained in the stipulation of facts and the affidavits.

A chronology, commencing with the first contact of the Commission, December 28, 1961, until the issuance of the complaint.

Various steps in the proceeding herein.

Merits of the defense.

Proof

The following is a digest, somewhat cryptic in form, of the proof:

Affidavit of Discontinuance.

This is RX 6A, dated May 23, 1962. Sworn to by respondent Max Jacoby, principal and president of respondent corporation.

Firm is manufacturer of watchbands sold to customers among several states in commerce. (No reference to any export business in this affidavit.)

Firm has caused certain "component parts" of a portion of the total number of its metal watchbands manufactured and sold by it "to be manufactured in a foreign country" (pp. 1-2). Said component parts used by it in the manufacture of watchband "skeletons" used by it in completed watchbands. "These skeletons, when brought into the United States were commingled with other watchbands manufactured 'in toto' " by the firm in New York. "Nowhere on the watch bands, nor on the packages, would a notation setting forth foreign origin appear." "Jacoby-Bender, Inc., has imported skeletons used in the manufacture of metal watch bands which watch bands may have been distributed to their customers situate among the several states in commerce" (p. 2).

"It is the intention of this company not to resume the above described practice in the future", unless properly marked or unless permitted by Trade Practice Conference Rules in effect from time to time (p. 2).

The affidavit also states (p. 3) as to discontinuance as such :

In line with this policy of the company, we have already discontinued the importation of all skeletons for incorporation in watchbands sold by Jacoby-Bender, Inc., anywhere in the United States and its territories, without proper marking. On March 1, 1962 the following telegram was sent to our supplier :

Stop manufacture of skeletons because of stamping restrictions. Writing.

On March 1, 1962, a letter was written by William E. Stark, Vice-President, Jacoby-Bender, Inc. to H. G. Kailey and Co., Ltd., our supplier in Hong Kong, further instructing that firm to discontinue manufacturing the skeletons presently being made for Jacoby-Bender, Inc., and further discontinuing the entire operation.

(The text of this letter is not revealed, nor has it ever been revealed in the evidence herein.)

The affidavit goes on to state the following as to its legal effect :

This affidavit does not constitute an admission by the company that the law has been violated.

Deponent acknowledges that this affidavit does not give him any promise of immunity, nor does it in any way preclude the Federal Trade Commission from any further action in this matter, and the said Federal Trade Commission reserves any and all rights it might have to proceed further in this matter.

Stipulation of Facts.

This is CX 17. Submitted at the hearing, February 10, 1964.

The firm is one of the large manufacturers of watchbands; annual gross over five million dollars (par. 3(a)).

"The major part of the business of the firm is connected with metal expansion watchbands." (par. 3(d)) It manufactures four to five million watchbands annually, including fabric and leather watch straps (par. 3(c)).

In addition to selling throughout the United States in "commerce" (par. 2), the firm manufactures watchbands sold "for export" (par. 4). (As already pointed out, nothing was said about export in the affidavit of discontinuance.)

The Commission's initial contact in connection with the investigation herein was made with the firm on or about December 28, 1961 (par. 4), as of which date the stipulation, in general, speaks.

On that date certain styles of the firm's watchbands "were worked on, in part, in Hong Kong" (par. 5), and "sold throughout the United States."

"For some time prior to March 1, 1962, the firm maintained a working agreement with the H. G. Kailey Co. of Hong Kong" (par. 6(a)) for making watchband skeletons or the parts thereof.

Of the 4,200,000 watchbands, for the year, manufactured by the company in the year 1960-1961, 400,000 were, in part, worked on in Hong Kong (par. 7(b)).

Pursuant to the working agreement, the firm shipped steel and certain parts to Kailey (par. 8(a)). Kailey worked according to the firm's plans and blueprints (par. 8(b)). Kailey might use end plates and top plates manufactured by the company, to which the company might add top shells in New York (par. 9(d)).

The stipulation also states as follows:

Respondents have no means of knowing from a physical inspection of said watchbands made from said parts whether they have had some work done on them in Hong Kong or not. (par. 11(a))

Such skeletons made of said parts produced in Hong Kong were commingled with similar skeletons produced by the firm in its plant in the United States, making further distinction or identification impossible. (par. 11(c))

The stipulation also states:

The firm made no disclosure on these products, or its catalogs, sales material, packaging or advertising of the nature and extent to which some of its watchbands contained parts or components produced in whole or in part in Hong Kong. (par. 11(d))

The stipulation also states that Kailey used the firm's dies or dies made according to the firm's blueprints (par. 14).

The stipulation further states:

15. With respect to watchband skeletons and parts thereof, imported from Hong Kong by the firm for sale in the United States, the firm discontinued its

working agreement with the Kailey Company some time after they were aware of an investigation being conducted by the Federal Trade Commission with respect to the manufacture, distribution, advertising and sale of said products.

(It will be noted that the discontinuance is related to watchbands sold in the United States, nothing being said in this connection about exports. Apart from this, it may be noted that literally construed the "sale" referred to is sale of skeletons, although actually it should be sale of watchbands containing such skeletons.)

The stipulation also states the following:

16. Typical of the steps referred to in the preceding sentence is a Western Union Telegram dated March 1, 1962, addressed to "KAILEY CO. HONG KONG"

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JACOBY BEND

(It will be noted that there is no statement as to the claimed contents of the letter as there is in the affidavit of discontinuance.)

The stipulation also contains the following:

18. There have been filed herewith affidavits of Philip K. Schwartz, Max Jacoby and W. E. Stark (2 affidavits) dated December 1963. These affidavits shall be the proof on behalf of respondents in lieu of testimony as to the matters contained therein.

The final provision of the stipulation is as follows:

20. The facts set forth in this stipulation, and in the affidavits referred to herein, and the exhibits referred to herein, shall constitute the testimony and evidence in this proceeding, and shall constitute the entire record in this proceeding, except as may otherwise be agreed upon in writing by counsel for the complaint and counsel for respondents.

This was modified by stipulation, as appears in preconference order dated January 29, 1964, permitting respondents to offer testimony in support of their affirmative defense. It was also understood that facts officially noticed—subject, however, to all of respondents' legal objections—might be considered as part of the proof.

*Respondent Stark's Affidavit*²

This affidavit is RX 1. Sworn to December 3, 1963.

"In the year 1960, JACOBY-BENDER, INC., commenced importing from Hong Kong certain unfinished metal watchband skeletons." (RX 1E) The firm furnished "Hong Kong" with the plates, and for some of its bands also furnished the top plates (right, left

² Respondent Stark also has a second affidavit, devoted entirely to exonerating himself from individual liability.

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and center). On arrival in New York the firm attached top shells and performed other necessary operations (RX 1E).

"There was no difference in appearance or quality between the skeleton as imported and the same skeleton when made by our Company at our own plant." (RX 1F) The imported skeletons were made from United States steel and from the firm's blueprints.

There were two sizes of skeletons imported, to wit, a full skeleton and a half-skeleton (RX 1F).

"The last order for full skeletons was placed on November 22, 1961." (RX 1F) The last and only order for half-skeletons was placed in November 1961, but after part shipment it was "cancelled in 1962 as described in the Affidavit of Discontinuance."

Upon service of the proposed complaint herein, on April 19, 1963, Mr. Stark immediately went to Mr. Schwartz, the firm's lawyer, with the papers, and the latter

asked me whether we had complied with the Affidavit since it was signed. I told him we had—fully, completely, and without exception. He then asked me if we were still selling any bands any place in the United States. I told him that we had discontinued all such sales and had disposed of all those watchbands by the end of the preceding summer. (RX 1D; our emphasis.)

Apart from the aforementioned material in Mr. Stark's affidavit, there is nothing else in the four "current" affidavits about actual discontinuance after the date of the affidavit of discontinuance, or as to the practices discontinued.

(The affidavit of Mr. Jacoby, the principal and chief stockholder of respondent firm, completely skips the topic of discontinuance and limits itself to facts designed to exonerate respondent Stark from individual liability.)

Respondent Stark does cover in his affidavit the facts leading up to the affidavit of discontinuance, *i.e.*, as follows:

The visit of Mr. Sangiorgi of the New York office to the firm on or about December 28, 1961 in regard to "our expansion watchbands" (RX 1A). His further visit on January 4, 1962, stating he was investigating the importing of watchbands without disclosing imported parts, his spending hours at the firm's premises, and receiving requested information (RX 1A-B). Mr. Schwartz's letter of January 23, 1962, giving additional information (RX 1C), Mr. Jacoby's signing of the affidavit of discontinuance on May 23, 1962, said affidavit being suggested by Mr. Sangiorgi (RX 1C).

Nothing further heard from Commission until April 19, 1963, when served with proposed complaint (RX 1C).

Mr. Schwartz's Affidavit.

This is RX 4. Sworn to December 3, 1963. Mr. Schwartz, the attorney, corroborates Mr. Stark in regard to dealings with Mr. Sangiorgi. He refers to his letter of January 23, 1962 to the Commission, and material enclosed (RX 4B). States that Mr. Sangiorgi suggested the preparation of an affidavit of discontinuance and described what it should contain (RX 4B). Mr. Seidman, chief of the New York office, sent Mr. Schwartz a draft, copy of Mr. Seidman's letter being attached to Mr. Schwartz's affidavit (RX 4B). Changes were made in the affidavit and Mr. Seidman's office prepared another affidavit of discontinuance, which is the affidavit signed by Mr. Jacoby (RX 4B-C). "A copy is attached hereto and made a part hereof" (RX 4C).—The rest of the affidavit (RX 4D-G) deals with alleged statements and admissions by Mr. Seidman, Mr. Sangiorgi and Mr. Blume, complaint counsel herein, which respondents contend bear on the claimed finality of the Commission's "acceptance" of the 1962 affidavit of discontinuance. (Mr. Schwartz also testified at the hearing in regard to the above, but his evidence was stricken by the examiner.)

Chronology

"In the year 1960 Jacoby-Bender, Inc., commenced importing from Hong Kong certain unfinished watchband metal skeletons." (RX 1E)

The first contact of the Commission with respondents in regard to alleged violation was on or about December 28, 1961 (CX 17B, par. 4). Respondents appear to have been very cooperative. They furnished pertinent information and samples requested, and expressed a desire to discontinue any questionable activity (RX 1C, Stark). Respondent Stark states that they placed no orders after this first contact—that their last order was actually in November 1961 (RX 1F). Their attorney prepared and delivered to the Commission a letter dated January 23, 1962, containing additional information and material requested. A Commission representative suggested that (upon taking steps of discontinuance) they execute an affidavit of discontinuance, and he described what should be in the affidavit (RX 4B, Schwartz).

On March 1, 1962, the following wire was sent by respondents to H. G. Kailey and Co., Ltd., Hong Kong, a firm supplying skeletons of metal expansion watchbands

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On the same day a letter was sent to that company, the exact contents of which are not revealed in the record herein, although de-

scribed in the affidavit of discontinuance later executed as "discontinuing the entire operation" (RX 6C).

Mr. Jacoby's affidavit of discontinuance was prepared by Commission personnel, after certain corrections (RX 4B, Schwartz), and sworn to by respondent Jacoby, president and principal of respondent corporation, on May 23, 1962. It refers to the "manufacture of skeletons in a foreign country" (pp. 1-2) for watchbands sold by respondent corporation to its customers in the United States, and also refers to the wire to H. G. Kailey and Co., "our supplier in Hong Kong" (p. 3). It states: "It is the intention of this company not to continue the above described practice in the future * * *" (p. 2).

Respondent Stark indicates, at least, that they discontinued all sales in the United States of watchbands with Hong Kong parts (RX 1D), and had disposed of all such watchbands by the end of the summer of 1962 (RX 1D).

Nothing was heard by respondents from the Commission or its personnel in any way until the service of the proposed complaint, April 16, 1963, again according to Mr. Stark (RX 1D), when they were served with copies of the proposed complaint herein. Respondents claim that this procedure, including the eventual service of the complaint, was a breach of faith, penalizing it as against noncooperating competitors, and that it was a complete violation of the Commission's own Rules, or the spirit thereof.

Steps in Present Proceeding

The complaint itself issued on July 18, 1963. The preamble contains the Commission's preliminary declaration of "public interest." Paragraph four of the complaint, by using the present tense, seems to imply continuance of violation (*i.e.*, in spite of the affidavit of discontinuance):

PARAGRAPH FOUR: Said watchbands *consist* in whole or in substantial part of components which were manufactured in, and imported from Hong Kong. When offered for sale or sold by respondents, said watchbands *do* not bare disclosure showing that they *are* substantially of foreign origin. (Our emphasis.)

The amended answer by way of separate defense pleads the facts concerning the affidavit of discontinuance and annexes a copy, as to which it states (par. 10) as follows:

Pursuant to this affidavit, respondents agreed to, and did, discontinue the "importation of all skeletons for incorporation in watchbands sold by JACOBY-BENDER, INC., anywhere in the United States and its territories, without proper marking." (Quotation marks *not* added.)

The amended answer denies that the complaint is in the "public interest" and contends that issuance violates the provisions for informal administrative disposition provided for in § 1.42 of the Rules of the Commission.

At the prehearing conference respondents pressed vigorously their point that the complaint alleges violation in the present tense whereas complaint counsel was not proposing to offer any specific evidence of present violation or violation of the affidavit of discontinuance—and the complaint counsel himself informally moved to amend the complaint so as to allege violation in the past. Respondents opposed the motion on the ground that on the basis of past violation alone and discontinuance pursuant to the affidavit of discontinuance, the Commission might not have issued the complaint at all, and that accordingly the Commission might at this point withdraw or dismiss the complaint for lack of "public interest."

Particularly in view of respondents' "public interest" point, as well as the Commission's primary control over pleadings, the hearing examiner certified the motion, together with its public interest implications, to the Commission. By order of December 11, 1963, the Commission disposed of the same as follows (p. 2):

The Commission being of the opinion that the allegations of the complaint as issued herein are sufficient to include practices which may have taken place prior to the issuance thereof and that complaint counsel's request must therefore be denied; and

The Commission being of the further opinion that the record now before it is not adequate for a determination as to whether the alleged practices were in fact *discontinued with no likelihood of resumption* subsequent to the alleged affidavit of discontinuance, and that such a determination must be made upon facts fully developed in the public record:

It is ordered, That the request of counsel supporting the complaint for amendment of the complaint be, and it hereby is, denied. (Emphasis added.)

In order to support their special defense, respondents have made much of an alleged written recommendation of the New York office of the Commission that no complaint, or proposed complaint, issue against them—although this relates not so much to actual discontinuance as such as it does to the claimed effect of the affidavit of discontinuance and its acceptance by Commission personnel, and alleged admissions or declarations by them in regard thereto.

Particularly in this connection respondents made three requests, which are rather fully described in the hearing examiner's prehearing conference order dated January 29, 1964, and may be summarized as follows:

(1) Respondents made a motion for the production of the alleged document allegedly containing the recommendation of the New York

office that no complaint be issued in this case. The motion was withdrawn, but renewed at the hearing herein (and denied at the hearing by the examiner).

(2) Respondents (later) also asked for subpoenae directed to Mr. Seidman and Mr. Sangiorgi, of the New York office, so that they might testify as to the alleged document containing the alleged recommendation, and also, no doubt, as to alleged admissions or declarations made by them and bearing on the claimed finality of the affidavit of discontinuance. (The hearing examiner in due time denied this request.)

(3) Respondents also proposed to call as a witness their attorney, Philip K. Schwartz, Esq., to testify as to the alleged admissions or admissions of Mr. Seidman and Mr. Sangiorgi and to the alleged recommendation. The examiner made provision in the order whereby Mr. Schwartz would be permitted to testify at the hearing, with the understanding, however, that his testimony would be stricken. (He did testify and his testimony was stricken.)

In connection with this special defense, it was also contemplated by the prehearing conference order and understood by the parties, as follows:

(4) Respondents might offer proof in support of the defense of discontinuance, including the basic issue of discontinuance of imports and sales, in the form of affidavits, *i.e.*, in lieu of the "small stipulation" thereon they had been unable to negotiate with complaint counsel, as distinguished from the main stipulation of facts.

The prehearing conference order also provided that the case-in-chief and the defense-in-chief should be fully comprehended by the main stipulation of facts (although the stipulation also contains a few facts bearing on the special defense, such as respondents' discontinuance of its working agreement with the Hong Kong manufacturer, the commingling beyond recognition of Hong Kong skeletons with domestic ones, and respondents' export business in watchbands).

The hearing, which was somewhat pro forma in nature, was held on February 24, 1964, in New York City. The stipulation of facts as eventually signed was received in evidence as CX 17. It provides that the four affidavits submitted by respondent shall "be the proof on behalf of respondents in lieu of testimony as to the matters contained therein", and they were received as RX 1, 2, 3 and 4. The stipulation provides that the facts in the stipulation and the affidavits shall "constitute the entire record", which the examiner modified and extended, as stated above, so as to permit Mr. Schwartz to testify in behalf of respondents.

The stipulation and the affidavits are fully summarized above, so far as pertinent.

At the hearing various other exhibits were received in evidence, including exhibits referred to in the stipulation of facts. At the hearing, also, respondents moved, on complaint counsel's proof, to dismiss the complaint, largely on the ground that "there is nothing as yet to indicate that the practice alleged in the complaint has been in existence since the early part of 1962" (TR 18:19). Inasmuch as the examiner, at the time of the hearing, had not yet read the said affidavits, as submitted, which respondents' counsel stated "set forth in detail all of the arguments" for dismissal (TR 19:23), the examiner reserved decision on the motion, without objection (TR 20:1).

As for respondents' motion for the production of the alleged written recommendation of the New York office, this motion was denied by the examiner (TR 29, 30:14).

Mr. Schwartz announced that he would testify in support of respondents' special defense, stating that he did so because the examiner had denied his request for subpoena for Mr. Seidman and Mr. Sangiorgi, and for the production of the alleged recommendation (TR 30:22).

Mr. Schwartz thereupon did testify as to such an alleged recommendation that no complaint or proposed complaint be filed against respondents, and also as to alleged admissions or declarations of Mr. Seidman or Mr. Sangiorgi, as well as of present complaint counsel, in connection with the alleged recommendation and/or the actual issuance of the complaint. A motion to strike the testimony was granted by the hearing examiner (TR 36:9).

In their proposed findings and brief, respondents, in connection with discontinuance, continue to emphasize the claimed finality of the affidavit of discontinuance and its acceptance by the Commission, and the alleged admissions or declarations by Commission personnel after respondents protested the service of the proposed complaint upon them over a year later. They emphasize this aspect of the defense, rather than discontinuance as such, that is, actual discontinuance of the importing and sale of the Hong Kong skeletons for U.S. use, up to not only the date of the affidavit of discontinuance, but thereafter as well.

Respondents' only proposed findings as to discontinuance as such, apart from naked references to the affidavit of discontinuance, are two in number.

First, No. 8 proposes a finding that on April 1, 1963 "Stark told Schwartz that the Company was then and had been complying with

the affidavit [of discontinuance] ever since it was signed * * * that the Company had discontinued selling any watchbands in the United States * * * with the imported parts; that all such sales had been discontinued and all watchbands with those imported parts had been disposed of by the end of the preceding summer"—*i.e.*, as stated in Stark's affidavit. No finding based on this proposal is made by the examiner herein, as Mr. Stark's sworn declarations, actually consisting of only two sentences, are regarded as too indirect and inconclusive to prove much of anything, apart from being self-serving.

Secondly, No. 15 proposes that the last order for full skeletons was placed on November 22, 1961; and the last and only order of half-skeletons was placed the same month (with cancellation of part three months later) "as described in the Affidavit of Discontinuance." (These proposed findings have not been adopted as such, although they are cited in the findings as the proof of respondents and are more or less credited.)

Other proposed findings of respondents touch on the subject of discontinuance relating not to discontinuance as such but to alleged admissions, declarations and circumstances, both in 1962 and 1963, claimed to have established the finality of the affidavit of discontinuance and its "acceptance" by the Commission. (No findings are made herein as to these proposed findings.)

Respondents also state, in their prefatory remarks (p. 6) to their proposed findings: "The facts set forth in CX 17A-G are incorporated here by reference, and are made a part hereof." This refers to the stipulation of facts. (However, the stipulation adds nothing to respondents' case as to discontinuance, but rather subtracts from it, by its reference to the commingling of foreign and domestic watchbands beyond recognition, and to exporting of watchbands by respondents, the full significance of which will be set forth below.)

Respondents do not state that the four current affidavits submitted at the hearing should be incorporated in their proposed findings, as with the stipulation of facts. They do, however, state that by reason of these affidavits their proposed findings "with reference to the acts and practices of Respondents after May 23, 1962, taken from said exhibits, must be accepted as *uncontroverted evidence*" (p. 7, their emphasis). (The examiner is constrained to observe here that even though self-serving proof is uncontradicted, he is not obliged to accept it completely at face value—although no particular point is made in this decision about lack of credibility, as distinguished from the lack of substance in the affidavits.)

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In his written submission after hearing, complaint counsel argues as follows in regard to discontinuance:

(1) Even assuming that respondents fully complied and continue to comply with the affidavit of discontinuance (*i.e.*, that they discontinued the importing of Hong Kong skeletons as therein stated) there was *no full abandonment*, because they already had approximately 400,000 watchbands, unmarked, made from such Hong Kong skeletons (CX 17C, par. 7(b)), and they have made no showing that they stopped selling these watchbands already fabricated by them or that they made any disclosure as to foreign origin of the same, even by circulars or advertising, which might have disclosed at least that a substantial number of their watchbands had foreign skeletons. As to continued sales of the watchbands, respondents' dealers and ultimate retailers did not stop selling them, so far as their evidence discloses (the only possible evidence of discontinuance of sale being respondent Stark's 1963 affidavit implying that *respondents* stopped selling them "by the end of the preceding summer"). Thus, complaint counsel argues, "respondents have created a pollution of the stream of commerce" (p. 13). As to disclosure, respondents admittedly were unable to mark these watchbands having Hong Kong skeletons, inasmuch as they could not identify them—having commingled them with purely domestic watchbands, which have an identical appearance (CX 17E, par. 11(a)).

(2) Secondly, complaint counsel argues, there is no showing by respondents of lack of *likelihood of resumption* (p. 15), and whatever proof there is tends to show the contrary. Respondents are still in the same business. They are still subject to "being enticed by the exotic lure of coolie labor in Hong Kong", argues complaint counsel, particularly if their business should become bad and profits drop.

Merits of Defense

The examiner agrees in general with complaint counsel as to his conclusions, both as to the lack of discontinuance as such and as to the likelihood of resumption, but rests the conclusions on somewhat broader or more extended considerations than those set forth by complaint counsel.

To begin with, the examiner is gravely concerned by the circumstance that respondents have not only failed to produce proof of the specific items of fact referred to by complaint counsel, but they have failed to produce any proof at all, or certainly any acceptable proof, as to actual discontinuance *from the time of their affidavit of discon-*

tinuance until the hearing date—as distinguished from proof or attempted proof as to alleged Commission staff recommendations that no complaint be issued against respondents, and alleged admissions or declarations claimed to indicate the binding effect of the affidavit of discontinuance and its acceptance by the Commission.

The examiner is somewhat shocked to find, after reading respondents' affidavits, only two sentences affirming that there was such actual discontinuance, said two sentences consisting only of what the affiant, a non-principal of the corporate respondent, *told the firm's lawyer* months prior to the issuance of the complaint. Respondents herein have had able counsel, and such reticence does not smack of good faith on their part in presenting the real facts in this case on their special defense. Rather, it calls for especially careful scrutiny of their affidavit of discontinuance, as well as of the possibilities of resumption of violation.

(1) As to *abandonment* or discontinuance as such, even as evidenced in the affidavit of discontinuance of May 1962, the examiner has sufficient reservations, even though he realizes that it was prepared (after changes) by Commission personnel. There is nothing in the affidavit of discontinuance stating that Kailey and Co. is the sole Hong Kong or foreign firm from which respondent corporation imported skeletons; there is nothing in the stipulation of facts itself so stating. Moreover, the text of the letter of the same date as the telegram referring to it is not given in the affidavit of discontinuance nor in any of the affidavits or other proof in this case. Finally, although the affidavit of discontinuance states that it is the company's intention not to resume the importing of skeletons, the practice is described in the affidavit as being for sale "in the United States" (RX 6A). The respondent company is thus left free, on this wording, to import foreign skeletons for export, or at least ostensibly for export, and inadvertently or otherwise to intermingle them with domestic skeletons. As already stated a number of times, respondents admitted that domestic and Hong Kong skeletons are indistinguishable, and that watchbands made of them are indistinguishable.

As to abandonment, or discontinuance as such, from the date of the affidavit of discontinuance up to the date of issuance of complaint, or date of hearing, there is, as already fully pointed out, no proof whatever except Stark's two-sentence declaration as to what he told the firm's attorney.

(2) As to *likelihood of resumption*, in the examiner's opinion there is a sufficiently clear likelihood of resumption of violation, if one considers that respondent corporation may import Hong Kong or

other foreign skeletons for export, or ostensibly for export, yet always available for intermingling with domestic skeletons, both types of skeletons resulting in admittedly indistinguishable watchbands, which could all be sold to the American public as being completely domestic watchbands. It has already been demonstrated that the importing of Hong Kong skeletons for export trade is compatible with respondents' affidavit of discontinuance. The export trade factor is particularly realistic when bearing in mind the stipulated fact that respondents do export watchbands (CX 17B, par. 4). Respondents have every opportunity for resuming or continuing prior violation by using foreign skeletons for unmarked watchbands sold among the several states.

Such use of Hong Kong skeletons may come about inadvertently, or even negligently, due to the like appearance of watchbands composed of either Hong Kong or domestic skeletons. It may also come about casually through a subordinate employee, perhaps under pressure to fill a large United States order. Finally, it may come about deliberately, particularly during bad times, so as to take advantage of lower costs. If there is no violation today, there may easily be tomorrow.

Although the examiner has emphasized herein respondents' failure to produce adequate proof in support of the special defense, it is somewhat doubtful that additional proof would be sufficient to change the result, at least on the question of unlikelihood of resumption. This is because of the basic facts, already fully considered, that respondents are admittedly engaged in the export of watchbands, and that watchbands, whether they contain foreign or domestic skeletons, are admittedly indistinguishable—thus making resumption of violation very easy.

Respondents' argument that they are being penalized as compared with competitors indulging in the same practices who did not sign an affidavit of discontinuance, and instead continued the practices, has little weight. This is because of the facts and circumstances of this case, and the meager proof offered in support of the defense, however, inherently appealing the argument was, even to this examiner, during the course of proceedings herein.

Nor is respondents' argument convincing that the issuance of the complaint herein, and of course an order, disowns the Commission's own policy of enforcement procedure embodied in § 1.21 and § 1.42 of the new Rules of the Commission. The examiner has indeed been impressed by this argument presented by counsel, at least as theoretically stated and as limited to the question of good Commission pol-

icy. But the examiner is not impressed in the light of the affidavits submitted by respondents and the inconsequential proof contained therein or elsewhere in connection with the discontinuance. Incidentally, it may be noted here, as quoted above, that the affidavit of discontinuance contains an express statement that it does not "in any way preclude the Federal Trade Commission from any further action in this matter."

CONCLUSIONS OF LAW

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

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

3. Respondents have not established by competent evidence or proof their affirmative defense of discontinuance of the acts and practices alleged in the complaint. Moreover, assuming discontinuance as such, there is sufficient likelihood of resumption of the acts and practices herein found to be a violation of law.

4. The acts and practices of the respondents herein found, have been to the prejudice and injury of the public and of the competitors of said respondents, and have constituted 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.

5. An order to cease and desist should issue against said respondents, to wit, Jacoby-Bender, Inc., and Max Jacoby, individually, as well as such other persons described or indicated in the below order.

COMMENTS ON ORDER

The proposed order of complaint counsel is adopted as the order in this case except as follows:

1. Respondent William E. Stark is not named individually in the below order. Instead, the wording "MAX JACOBY and WILLIAM E. STARK, individually and as officers of said corporation", has been changed to MAX JACOBY, individually and as president of said corporation.

2. The below order relates only to dealings in watchbands, and, to accomplish this, the words "or any other products" appearing in the proposed order are deleted. The examiner believes that under the particular facts in this case, particularly those bearing on the likelihood of resumption, it is unnecessary in the public interest to order that respondents cease and desist in connection with products other than watchbands.

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Respondents will note that the order includes an alternative to marking or stamping the products themselves. The alternative is marking or stamping labels or tags affixed to the products. The words "likely to be" are a change from "to be likely."

ORDER

It is ordered, That respondents JACOBY-BENDER, INC., a corporation, and its officers, and MAX JACOBY, individually and as president of said corporation, and respondents' representatives, agents or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watchbands, in commerce, as "commerce" is defined in the Federal Trade Commission Act, 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 product 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 likely to be observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

3. Placing in the hands of manufacturers, distributors, 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 complaint be and hereby is dismissed as against respondent WILLIAM E. STARK individually.

OPINION OF THE COMMISSION

By the Commission:

This matter is before the Commission on the appeal of the respondents from the hearing examiner's initial decision. The complaint charged that respondents, by their failure to disclose the foreign origin of the skeletons of metal expansion watch bands sold in the United States, had violated Section 5 of the Federal Trade Commission Act. The hearing examiner found that the charges were sustained except as to respondent Stark individually, and entered an order prohibiting the practices alleged as against respondent corporation and respondent Max Jacoby, and dismissing the complaint as to respondent Stark individually.

Respondent Max Jacoby, during the course of the investigation and prior to the complaint, signed and submitted to the Commission pursuant to Commission procedure, an affidavit stating in effect that the practices which were subsequently alleged in the complaint had been discontinued and would not be resumed. There is no evidence in this record that respondents have failed in any way to live up to this commitment. In fact, the respondents have shown about as affirmatively as it is possible for them to do so, that the practices alleged have been entirely discontinued and will not be resumed. They stopped selling watch bands in the United States with the imported parts in 1952, and have sold none since. Respondents have demonstrated their good faith in this matter and have been completely cooperative throughout. In these circumstances, we do not believe the public interest would be well served by the issuance of an order to cease and desist.

Accordingly, it is directed that an order issue herewith vacating the initial decision and dismissing the complaint.

Commissioner MacIntyre did not concur.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the respondents' appeal from the hearing examiner's initial decision, and upon the briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined for the reasons stated in the accompanying opinion that the initial decision should be vacated and the complaint dismissed:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated.

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

Commissioner MacIntyre not concurring.

IN THE MATTER OF

PAGODA SILKS, INC., ET AL.

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

Docket C-878. Complaint, Feb. 11, 1965—Decision, Feb. 11, 1965

Consent order requiring a Hawaii importer, manufacturer, and retailer of wearing apparel and scarves—also known as *justi*—to cease violating the Flammable Fabrics Act by importing, manufacturing, and selling articles of wearing apparel made of fabrics which are so highly flammable as to be dangerous when worn.

COMPLAINT

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

PARAGRAPH 1. Respondent Pagoda Silks, Inc. is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Hawaii. Respondents Lutgarda Tessmer and Dallas G. Tessmer are officers of the corporate respondent and formulate, direct and control the policies, acts and practices of the said corporate respondent.

Respondents are importers, manufacturers and retailers of wearing apparel with their office and principal place of business located at 315 Royal Hawaiian Avenue, Honolulu, Hawaii.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported and

caused to be transported, in commerce, and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned above were scarves, also referred to as jusi.

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

Among the articles of wearing apparel mentioned above were scarves, also referred to as jusi.

PAR. 4. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder and as such constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

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 Flammable Fabrics 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

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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 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 Pagoda Silks, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii with its office and principal place of business located at 315 Royal Hawaiian Avenue, city of Honolulu, State of Hawaii.

Respondents Lutgarda Tessmer and Dallas G. Tessmer are officers of Pagoda Silks, Inc. and their office and principal place of business is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Pagoda Silks, Inc., a corporation, and its officers, and respondents Lutgarda Tessmer and Dallas G. Tessmer, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

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

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

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

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

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

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

THE 721 CORPORATION DOING BUSINESS AS BONWIT TELLER

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

Docket C-879. Complaint, Feb. 11, 1965—Decision, Feb. 11, 1965

Consent order requiring a New York City importer and retailer of wool products to cease violating the Wool Products Labeling Act by misbranding the fiber content of sweaters by labeling sweaters as "60% mohair, 33% wool, 7% nylon," when such sweaters contained substantially different fibers and amounts than represented, by failing to disclose on labels the percentage of the total fiber weight of wool and other fibers, and by using the term "mohair" on labels to describe certain fibers that were not entitled to such designation.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of 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 The 721 Corporation, a corporation doing business as Bonwit Teller, hereinafter referred to as respondent, has 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 The 721 Corporation is a corporation doing business as Bonwit Teller organized, existing and doing business under and by virtue of the laws of the State of Delaware.

Respondent is an importer and retailer of wool products with its office and principal place of business located at 721 Fifth Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondent has introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 60% mohair, 33% wool, 7% nylon, whereas in truth and in fact, said sweaters contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded 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 as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain sweaters 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 five per centum of said total fiber weight; of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is five 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 the term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products when certain of the fibers described as "mohair" were not entitled to such designation, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondent as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

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 Wool Products Labeling Act of 1939, 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 The 721 Corporation, is a corporation organized, existing and doing business as Bonwit Teller under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 721 Fifth Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent The 721 Corporation, a corporation, doing business under the name of Bonwit Teller or any other name or names, and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool sweaters or any other wool product, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939:

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. Unless each such product has securely affixed thereto, or placed thereon, a stamp, tag, label or other means of identification correctly 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. To which is affixed a label wherein the term "mohair" is used in lieu of the word "wool" in setting forth the required information on labels affixed to such wool products unless the fibers described as mohair are entitled to such designation and are present in at least the amount stated.

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

IN THE MATTER OF

UNION BAG-CAMP PAPER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT

Docket 7946. Complaint, June 15, 1960¹—Decision, Feb. 12, 1965

Consent order requiring a New York City manufacturer of paper products— with assets exceeding \$102,000,000 prior to merger with Camp Manufacturing Co., Inc., in 1956—to divest itself absolutely within 18 months of the grocers bag and sack plant located at Richmond, Va., which it acquired as a result of the merger between Union Bag & Paper Corp. and Camp Manufacturing Co., Inc., in 1956; to divest itself of the following five corrugated box plants: (1) within 18 months of the plant located at Baltimore, Md., acquired by acquisition of The Eastern Box Co., in 1959, (2) within 30 months of the plant located at Benton Harbor, Mich., acquired by acquisition of River Raisin Paper Co., in 1960, (3) within 36 months of the plant located at Chicago, Ill., Union Bag & Paper Co. owned plant, (4) within 48 months of the plant located at Eaton Rapids, Mich., acquired by acquisition of River Raisin Paper Co., in 1960, (5) within 60 months of the plant located at Washington, Pa., acquired by acquisition of River Raisin Paper Co., in 1960; requiring it to make available and offer for sale to jobbers and other users of paper classified as Census coarse paper, in each of the years 1965–1969 at least 70,000 tons of paper (approximate tonnage sold by Camp Manufacturing Co., Inc., to unaffiliated customers during the year 1955), of which 35,000 tons must be of paper classified by Census Bureau as Census coarse paper (SIC category 26212), and in each of the years 1970–1974 at least 50,000 tons of paper, of which 25,000 tons must be of paper classified as Census coarse paper (as designated above), at prescribed prices, quality, terms, and conditions; and to cease and desist from acquiring any company in the kraft paper and board converting industry for the next ten years without prior approval of the Federal Trade Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more

¹ Reported as amended on Aug. 3, 1961, by adding paragraphs numbered 36 through 44, entitled Count VI.

particularly designated and described, has violated and is now violating the provision of Section 7 of the Clayton Act (U.S.C. Title 15, Section 18), as amended and approved December 29, 1950, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21), stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Union Bag-Camp Paper Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 233 Broadway, New York, New York.

PAR. 2. Prior to and until July 12, 1956, Union Bag & Paper Corporation, sometime hereinafter referred to as Union, was a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey.

Union owned or held under lease in excess of 900,000 acres of timberland in Georgia, North Carolina, South Carolina, and Florida.

Union's business operations included the manufacture, sale and distribution of various types of paper bags, shipping sacks, kraft paper, paperboard, board honeycomb, and corrugated shipping containers. Union's principal plant was located at Savannah, Georgia, and various other plants of Union were located in Trenton, New Jersey, Chicago, Illinois, St. Louis, Missouri, and Hudson Falls, New York.

Union's net sales in 1955 exceeded \$123,000,000.

Union's total assets, as of March 31, 1956, exceeded \$102,000,000.

PAR. 3. In the course and conduct of its business, prior to and until July 12, 1956, Union purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to the various locations of its plants. Additionally, Union sold the products manufactured at its various plants located in various states to purchasers located in various other States of the United States, and Union caused such products, when sold, to be transported across state boundaries. Union was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 4. Prior to and until July 12, 1956, Camp Manufacturing Company, Incorporated, sometimes hereinafter referred to as Camp, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia.

Camp owned approximately 240,000 acres of timberland in Virginia and North Carolina.

Camp's business operations included the manufacture, sale and distribution of various types of paper bags, sacks, kraft paper and paperboard. Camp's principal plants were located near Franklin, Virginia, and in Richmond, Virginia.

Camp's net sales in 1955 exceeded \$33,000,000.

Camp's total assets, as of March 25, 1956, exceeded \$31,000,000.

PAR. 5. In the course and conduct of its business, prior to and until July 12, 1956, Camp purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to its manufacturing facilities located in Virginia. Additionally, Camp sold the products manufactured at its plants located in Virginia to purchasers located in various other States of the United States, and Camp caused such products, when sold, to be transported across state boundaries. Camp was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 6. On or about July 12, 1956, Union merged with Camp. In accordance with the terms of the Agreement of Merger between Union and Camp, all of the assets of Union vested in Camp, the surviving corporation, and the surviving corporation, respondent herein, adopted the corporate name "Union Bag-Camp Paper Corporation".

PAR. 7. The effect of respondent's acquisition of the assets of Union, as set forth in Paragraph Six, may be substantially to lessen competition, or to tend to create a monopoly in each and every line of commerce in which, prior to the acquisition, either Union or Camp, or the both of them, were engaged, in each and every section of the country in which either Union or Camp, or the both of them, sold their various products.

Included among the results of the aforesaid acquisition were the following:

In various parts of, and in all of, that area of the country which consists of the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, and the District of Columbia, in the manufacture and in the sale of (1) grocery bags and grocery sacks, (2) merchandise bags, (3) shipping sack paper, and (4) bag paper:

- (1) An independent competitive factor has been eliminated;
- (2) Each and every form of actual competition between Union and Camp has been eliminated;

(3) Each and every form of potential competition between Union and Camp has been forestalled;

(4) A concentration of manufacturing facilities and a combination of sales and sales organizations have occurred; and

(5) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 8. The aforesaid merger, with the results and effect as alleged in this Count I, constitutes a violation of Section 7 of the Clayton Act, as amended.

COUNT II

PAR. 9. Respondent Union Bag-Camp Paper Corporation, sometimes hereinafter referred to as Union Bag-Camp, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 233 Broadway, New York, New York.

PAR. 10. Since July 12, 1956, and continuously thereafter to the present, Union Bag-Camp's business operations included the manufacture, sale and distribution of various types of paper bags, shipping sacks, kraft paper, paperboard, board honeycomb and corrugated shipping containers. Included among its plants and facilities in operation were those formerly operated by Union and by Camp at the locations hereinbefore set forth in paragraphs 2 and 4 of Count I.

PAR. 11. In the course and conduct of its business, since July 12, 1956, and continuously thereafter to the present, Union Bag-Camp purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to the various locations of its plants. Additionally, Union Bag-Camp sold the products manufactured at its various plants located in various states to purchasers located in various other States of the United States, and Union Bag-Camp caused such products, when sold, to be transported across state boundaries. Union Bag-Camp was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 12. Prior to and until October 31, 1958, Universal Paper Bag Company, sometimes hereinafter referred to as Universal, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania.

Universal's business operations included the manufacture, sale and distribution of various types of shipping sacks. Universal's plant was located at New Hope, Pennsylvania.

Universal's net sales in 1957 exceeded \$2,000,000.

Universal's total assets, as of June 30, 1958, exceeded \$1,000,000.

PAR. 13. In the course and conduct of its business, prior to and until October 31, 1958, Universal purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to the location of its plant in Pennsylvania. Additionally, Universal sold the products manufactured at its plant located in Pennsylvania to purchasers located in various States of the United States, and Universal caused such products, when sold, to be transported across state boundaries. Universal was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 14. On or about October 31, 1958, Union Bag-Camp acquired all of the outstanding stock of Universal.

PAR. 15. The effect of Union Bag-Camp's acquisition of the stock of Universal may be substantially to lessen competition, or to tend to create a monopoly in each and every line of commerce in which, prior to the acquisition, either Union Bag-Camp or Universal, or the both of them, were engaged, in each and every section of the country in which either Union Bag-Camp or Universal, or the both of them, sold their various products.

Included among the results of the aforesaid acquisition were the following:

In various parts of, and in all of, that area of the country which consists of the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Louisiana, and the District of Columbia, in the manufacture and in the sale of shipping sacks:

- (1) An independent competitive factor has been eliminated;
- (2) Each and every form of actual competition between Union Bag-Camp and Universal has been eliminated;
- (3) Each and every form of potential competition between Union Bag-Camp and Universal has been forestalled;
- (4) A concentration of manufacturing facilities and a combination of sales and sales organizations have occurred; and
- (5) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 16. The acquisition of the stock of Universal, with the results and effect as alleged in this Count II, constitutes a violation of Section 7 of the Clayton Act, as amended.

COUNT III

PAR. 17. The allegations of Paragraphs Nine, Ten and Eleven of Count II are made a part of this Count III and incorporated by reference as if fully rewritten herein.

PAR. 18. Prior to and until March 2, 1959, Highland Container Company, sometimes hereinafter referred to as Highland, was a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

Highland's business operations included the purchase of liner board and corrugating material and the manufacture, sale and distribution of corrugated sheets and corrugated shipping containers. Highland's plant was located at Jamestown, North Carolina.

Highland's net sales in 1958 exceeded \$3,900,000.

Highland's total assets, as of September 30, 1958, exceeded \$1,600,000.

PAR. 19. In the course and conduct of its business, prior to and until March 2, 1959, Highland purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to the location of its plant in North Carolina. Additionally, Highland sold the products manufactured at its plant located in North Carolina to purchasers located in various other States of the United States, and Highland caused such products, when sold, to be transported across state boundaries. Highland was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 20. On or about March 2, 1959, Union Bag-Camp acquired approximately 51½ percent of the stock of Highland.

PAR. 21. The effect of Union Bag-Camp's acquisition of the aforesaid stock of Highland may be substantially to lessen competition, or to tend to create a monopoly in each and every line of commerce in which, prior to the acquisition, either Union Bag-Camp or Highland, or the both of them, were engaged, in each and every section of the country in which either Union Bag-Camp or Highland, or the both of them, sold their various products.

Included among the results of the aforesaid acquisition were the following:

In various parts of, and in all of, that area of the country which consists of the southwestern part of the State of Virginia and the western part of the State of North Carolina, in the manufacture and in the sale of corrugated shipping containers:

- (1) An independent competitive factor has been eliminated;

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- (2) Each and every form of actual competition between Union Bag-Camp and Highland has been eliminated;
- (3) Each and every form of potential competition between Union Bag-Camp and Highland has been forestalled;
- (4) A concentration of manufacturing facilities and a combination of sales and sales organizations have occurred; and
- (5) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 22. The acquisition of the aforesaid stock of Highland, with the results and effect as alleged in this Count III, constitutes a violation of Section 7 of the Clayton Act, as amended.

COUNT IV

PAR. 23. The allegations of Paragraphs Nine, Ten and Eleven of Count II are made a part of this Count IV and incorporated by reference as if fully rewritten herein.

PAR. 24. Prior to and until April 9, 1959, The Eastern Box Company, sometimes hereinafter referred to as Eastern, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland.

Eastern's business operations included the purchase of liner board and corrugating material and the manufacture, distribution and sale of corrugated shipping containers. Eastern's plant was located in Baltimore, Maryland.

Eastern's net sales in 1958 exceeded \$6,000,000.

Eastern's total assets, as of December 31, 1958, exceeded \$1,700,000.

PAR. 25. In the course and conduct of its business, prior to and until April 9, 1959, Eastern purchased products and materials from sellers located in various States of the United States and caused such products and materials, when purchased, to be transported across state boundaries to the location of its plant in Maryland. Additionally, Eastern sold the products manufactured at its plant in Maryland to purchasers located in various other States of the United States, and Eastern caused such products, when sold, to be transported across state boundaries. Eastern was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 26. On or about April 9, 1959, Union Bag-Camp acquired a majority of the stock of Eastern.

PAR. 27. The effect of Union Bag-Camp's acquisition of the aforesaid stock of Eastern may be substantially to lessen competition, or to tend to create a monopoly in each and every line of commerce in

which, prior to the acquisition, either Union Bag-Camp or Eastern, or the both of them, were engaged, in each and every section of the country in which either Union Bag-Camp or Eastern, or the both of them, sold their various products.

Included among the results of the aforesaid acquisition were the following:

In various parts of, and in all of, that area of the country which consists of the State of Delaware, the Counties of Salem and Cumberland, in the State of New Jersey, the city of Baltimore, Maryland, the Eastern Shore of Maryland, the the Counties of Baltimore, Hartford and Cecil, in the State of Maryland, in the manufacture and in the sale of corrugated shipping containers:

- (1) An independent competitive factor has been eliminated;
- (2) Each and every form of actual competition between Union Bag-Camp and Eastern has been eliminated;
- (3) Each and every form of potential competition between Union Bag-Camp and Eastern has been forestalled;
- (4) A concentration of manufacturing facilities and a combination of sales and sales organizations have occurred; and
- (5) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 28. The acquisition of the aforesaid stock of Eastern, with the results and effect as alleged in this Count IV, constitutes a violation of Section 7 of the Clayton Act, as amended.

COUNT V

PAR. 29. The allegations of Paragraphs Nine, Ten and Eleven of Count II are made a part of this Count V and incorporated by reference as if fully rewritten herein.

PAR. 30. Prior to and until January 10, 1957, Allied Container Corporation, sometimes hereinafter referred to as Allied, was a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey.

Allied's business operations included the purchase of liner board and corrugating material and the manufacture, sale and distribution of corrugated shipping containers. Allied's principal plant was located at Hyde Park, Massachusetts.

Allied's net sales in 1956 exceeded \$7,000,000.

PAR. 31. In the course and conduct of its business, prior to and until January 10, 1957, Allied purchased products and materials from sellers located in various States of the United States and caused such

products and materials, when purchased, to be transported across state boundaries to the location of its plant in Massachusetts. Additionally, Allied sold the products manufactured at its plant located in Massachusetts to purchasers located in various other States of the United States, and Allied caused such products, when sold, to be transported across state boundaries. Allied was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 32. On or about January 10, 1957, Union Bag-Camp acquired, through its wholly owned subsidiary, Allied Container Company, Inc., all of the outstanding stock of Allied.

PAR. 33. The allegations of Paragraphs Eighteen, Nineteen and Twenty of Count III and the allegations of Paragraphs Twenty-Four, Twenty-Five and Twenty-Six of Count IV are made a part of this Count V and incorporated by reference as if fully rewritten herein.

PAR. 34. Both the effect of Union Bag-Camp's acquisition of the stock of Allied and the cumulative effect of Union Bag-Camp's acquisitions of the stock of Allied, Highland and Eastern, or of any two of them, may be substantially to lessen competition, or to tend to create a monopoly in various parts of, and in all of, that area of the country which consists of the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, and the District of Columbia.

Included among the results of the aforesaid acquisition of Allied, and included among the cumulative results of the aforesaid acquisitions of Allied, Highland and Eastern, or of any two of them, were the following:

In the aforesaid areas, in the manufacture and in the sale of linerboard and corrugating material:

- (1) Independent purchasers of linerboard and corrugating material have been eliminated;
- (2) Union Bag-Camp has obtained outlets for its linerboard and corrugating material;
- (3) Competitors of Union Bag-Camp in the sale of linerboard and corrugating material have been deprived of independent outlets for their products;
- (4) Actual competition between Allied, Highland and Eastern, or between any of them, in the purchase of linerboard and corrugating material has been eliminated;

(5) Potential competition in the purchase of linerboard and corrugating material has been forestalled;

(6) Actual competition between Union Bag-Camp and other sellers of linerboard and corrugating material has been eliminated or restricted;

(7) Potential competition between Union Bag-Camp and other sellers of linerboard and corrugating material has been forestalled; and

(8) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 35. Both the acquisition of the aforesaid stock of Allied, with the results and effect as alleged in this Count V, and the acquisitions of the aforesaid stock of Allied, Highland and Eastern, or of any two of them, with the cumulative results and effect as alleged in this Count V, constitute violations of Section 7 of the Clayton Act, as amended.

COUNT VI²

PAR. 36. The allegations of Paragraphs Nine, Ten and Eleven of Count II are made a part of Count VI and incorporated by reference, as if fully rewritten herein.

PAR. 37. Prior to and until April 12, 1960, River Raisin Paper Company, sometimes referred to hereinafter as River Raisin, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan.

River Raisin's business operations included the manufacture, purchase and sale of linerboard, corrugating material and chip and filler board, and the manufacture, sale and distribution of corrugated shipping containers and solid fiber shipping containers. River Raisin's principal plant was located at Monroe, Michigan, and various other plants of River Raisin were located at Benton Harbor and Eaton Rapids, Michigan; Washington and Lancaster, Pennsylvania; and Cleveland and Sharonville, Ohio.

River Raisin's net sales in 1959 exceeded \$22,000,000 and its total assets, as of December 31, 1959, exceeded \$13,000,000.

PAR. 38. In the course and conduct of its business prior to and until April 12, 1960, River Raisin purchased products and materials from sellers located in various States of the United States, and caused such products and materials, when purchased, to be transported across state boundaries to the various locations of its plants. Additionally,

² Paragraphs 36 through 44 added by order of hearing examiner of Aug. 3, 1961.

River Raisin sold the products manufactured at its various plants located in various states to purchasers located in various other States of the United States, and River Raisin caused such products, when sold, to be transported across state boundaries. River Raisin was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 39. On or about April 12, 1960, Union Bag-Camp acquired all of the outstanding stock of River Raisin.

PAR. 40. The effect of Union Bag-Camp's acquisition of the stock of River Raisin may be to substantially lessen competition, or to tend to create a monopoly in each and every line of commerce in which, prior to the acquisition, either Union Bag-Camp or River Raisin, or both of them, were engaged, in each and every section of the country in which either Union Bag-Camp or River Raisin, or both of them, sold their various products.

Included among the results of the aforesaid acquisition of River Raisin were the following:

In the United States as a whole, and in various parts of, and in all of, that area of the country which consists of all of the States of the United States except the States of Washington, Oregon, California, Idaho, Alaska, and Hawaii, in the manufacture and in the sale of linerboard, corrugating material and container chip and filler board:

- (1) An independent competitive factor has been eliminated;
- (2) An independent producer of container board has been eliminated;
- (3) Each and every form of actual competition between Union Bag-Camp and River Raisin has been eliminated;
- (4) Each and every form of potential competition between Union Bag-Camp and River Raisin has been forestalled;
- (5) A concentration of manufacturing facilities and a combination of sales organizations have occurred; and
- (6) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 41. Also included among the results of the aforesaid acquisition of River Raisin by Union Bag-Camp were the following:

In various parts of, and in all of, that area consisting of the States of Illinois, Indiana, Michigan, Ohio, Kentucky, Tennessee, West Virginia, Pennsylvania, Maryland, Delaware, New York, and New Jersey, in the manufacture and in the sale of corrugated shipping containers and solid fiber shipping containers:

- (1) An independent competitive factor has been eliminated;

(2) Each and every form of actual competition between Union Bag-Camp and River Raisin has been eliminated;

(3) Each and every form of potential competition between Union Bag-Camp and River Raisin has been forestalled;

(4) A concentration of manufacturing facilities and a combination of sales and sales organizations have occurred; and

(5) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 42. The allegations of Paragraphs Eighteen, Nineteen, and Twenty of Count III, the allegations of Paragraphs Twenty-Four, Twenty-Five and Twenty-Six of Count IV, and the allegations of Paragraphs Thirty, Thirty-One and Thirty-Two of Count V are incorporated by reference, as if fully rewritten herein.

PAR. 43. Both the effect of Union Bag-Camp's acquisition of the stock of River Raisin and the cumulative effect of Union Bag-Camp's acquisition of the stock of River Raisin, Allied, Highland, and Eastern, or any two of them, or any three of them, may be substantially to lessen competition or to tend to create a monopoly in various parts of, or in all of, the United States.

Included among the results of the aforesaid acquisition of River Raisin, and included among the cumulative results of the aforesaid acquisitions of River Raisin, Allied, Highland and Eastern, or any two of them, or any three of them, were the following:

In the United States as a whole, and in various parts of, and in all of, that area of the country which consists of all of the States of the United States except the States of Washington, Oregon, California, Idaho, Alaska and Hawaii, in the manufacture and in the sale of linerboard, corrugating material and container chip and filler board:

(1) Independent purchasers of linerboard, corrugating material, and container chip and filler board have been eliminated;

(2) Union Bag-Camp has obtained outlets for its linerboard and corrugating material;

(3) Competitors of Union Bag-Camp in the sale of linerboard, corrugating material, and container chip and filler board have been deprived of independent outlets for their products;

(4) Actual competition between River Raisin, Allied, Highland and Eastern, or between any of them, in the purchase of linerboard, corrugating material, and container chip and filler board has been eliminated;

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(5) Potential competition in the purchase of linerboard, corrugating material, and container chip and filler board has been forestalled;

(6) Actual competition between Union Bag-Camp and other sellers of linerboard, corrugating material, and container chip and filler board has been eliminated or restricted;

(7) Potential competition between Union Bag-Camp and other sellers of linerboard, corrugating material, and container chip and filler board has been forestalled; and

(8) The actual and potential competitive power of respondent has been enhanced to the detriment of competitors and to the detriment of actual and potential competition.

PAR. 44. Both the acquisition of the aforesaid stock of River Raisin, with the results and effect as alleged in this Count VI, and the acquisitions of the aforesaid stock of River Raisin, Allied, Highland and Eastern, or of any two of them, or of any three of them, with the cumulative results and effect as alleged in this Count VI, constitute violations of Section 7 of the Clayton Act, as amended.

DECISION AND ORDER WAIVING NOTICE AND ACCEPTING AGREEMENT
CONTAINING ORDER TO CEASE AND DESIST

The hearing examiner in the above-captioned proceeding having certified to the Commission the question whether the requirement of the Commission's Notice of July 14, 1961, requiring the filing of notice of intent to enter into a consent agreement should be waived; and it appearing that respondent's failure to file such notice was not for purposes of delay and that, in the circumstances, the requirement should be waived:

It is ordered, That the filing of notice by the parties as prescribed by the Commission's Notice of July 14, 1961, be, and it hereby is, waived.

And it further appearing that the agreement that has been entered into affords an adequate basis for appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order:

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent is a corporation existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 233 Broadway, New York, New York.

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

ORDER

I

a. *It is ordered*, That Union Bag-Camp Paper Corporation shall divest itself within a period not exceeding eighteen (18) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of the grocers bag and sack plant, located at Foot of Thirteenth Street, Richmond, Virginia, which was acquired by respondent as a result of the merger in 1956 of Union Bag & Paper Corporation with Camp Manufacturing Company, Inc., including all assets, properties, rights and privileges, tangible or intangible, acquired by respondent as a result of said merger, which are now located at said plant and used in the manufacture of grocers bags and sacks, together with such machinery and equipment as has been added to or placed on the premises of the said plant and are now used in the manufacture of grocers bags and sacks, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of grocers bags and sacks.

b. If at the expiration of five (5) years from the date of service upon it of this order, respondent has exhausted its good faith efforts to find a purchaser willing and able to operate this plant as a going concern, and has been unable to find such a purchaser, then respondent shall be allowed to sell this plant in any manner, and to any purchaser available to it.

II

It is further ordered, That Union Bag-Camp Paper Corporation shall divest itself within a period not exceeding eighteen (18) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Wagner's Point, Baltimore, Maryland, which was acquired by respondent as a result of its acquisition of The Eastern Box Company, including all assets, properties, rights and privileges, tangible or intangible, acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of the said corrugated box plant and are now used in the manu-

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facture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated shipping containers.

III

It is further ordered, That Union Bag-Camp Paper Corporation shall divest itself within a period not exceeding thirty (30) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Eleventh Street and Britain Avenue, Benton Harbor, Michigan, which was acquired by respondent as a result of its acquisition of River Raisin Paper Company, including all assets, properties, rights and privileges, tangible or intangible, acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of the said corrugated box plant and are now used in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated shipping containers.

IV

It is further ordered, That Union Bag-Camp Paper Corporation shall divest itself, within a period not exceeding thirty-six (36) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of its corrugated box plant located at 4545 West Palmer Street, Chicago, Illinois, including all assets, properties, rights and privileges, tangible or intangible, which are now located at said corrugated box plant and used in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated shipping containers.

V

It is further ordered, That Union Bag-Camp Paper Corporation shall divest itself within a period not exceeding forty-eight (48) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Eaton Rapids, Michigan, which was ac-

quired by respondent as a result of its acquisition of River Raisin Paper Company, including all assets, properties, rights and privileges, tangible or intangible, acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of the said corrugated box plant and are now used in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated shipping containers.

VI

It is further ordered, That Union Bag-Camp Paper Corporation shall divest itself within a period not exceeding sixty (60) months after the service upon it of this order, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Washington, Pennsylvania, which was acquired by respondent as a result of its acquisition of River Raisin Paper Company, including all assets, properties, rights and privileges, tangible or intangible, acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of the said corrugated box plant and are now used in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated shipping containers.

VII

It is further ordered, That pending divestiture, respondent shall not make any change in the plant, machinery, buildings, equipment, or other property of whatever description, which might impair the present capacity of the aforementioned Richmond bag plant for the production of grocers bags and sacks, or which might impair the present capacity of the aforementioned Baltimore, Benton Harbor, Chicago, Eaton Rapids and Washington plants for the production of corrugated shipping containers, unless such capacity is restored prior to divestiture.

VIII

It is further ordered, That none of the assets, properties, rights or privileges, described in Paragraphs I, II, III, IV, V and VI of this

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order, shall be divested, sold or transferred, directly or indirectly, to any person who is immediately following the divestiture, an officer, director, employee, or agent of, or under the control or direction of respondent or any of respondents' subsidiary or affiliated corporations, or who owns or controls, directly or indirectly, one (1) percent of the outstanding shares of common stock of Union Bag-Camp Paper Corporation, or to any purchaser who is not approved in advance by the Federal Trade Commission.

As used in the order, the word person shall include all members of the immediate family of the individuals specified and shall include corporations, partnerships, associations and other legal entities, as well as natural persons.

The divestitures herein ordered shall be made by Union Bag-Camp Paper Corporation in good faith to persons who, insofar as Union Bag-Camp Paper Corporation can reasonably determine, intend to and will operate said properties for the production of corrugated shipping containers or grocers bags and sacks, respectively, except as otherwise provided in Paragraph I(b) of this order.

IX

If any of the properties described in Paragraphs I, II, III, IV, V and VI are not sold or disposed of entirely for cash, nothing in this order shall be deemed to prohibit respondent from retaining, accepting and enforcing a lien, mortgage, deed of trust or other security interest in or to any of the aforesaid properties for the purpose of securing to respondent full payment of the prices, with interest, at which any of said properties are sold or disposed of; but if after bona fide disposal of any of the aforesaid properties in accordance with the provisions of this order, respondent, by enforcement of such security interest regains ownership or control of any such properties, said properties regained shall be redivested, subject to the provisions of this order, within six (6) months from the time of said reacquisition.

X

It is further ordered, That, for a period ending December 31, 1974, respondent shall, in good faith, make available and affirmatively offer to sell, and to the extent such offers are accepted, sell: (i) in each of the years 1965-1969, inclusive, at least 70,000 tons of paper (which is the approximate tonnage of paper sold by Camp Manufacturing Company, Inc., to unaffiliated customers during the calendar year 1955), of which 35,000 tons shall be of paper classified as

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census coarse paper (SIC category 26216), which shall be sold or offered for sale to jobbers, distributors, users and converters of such census coarse paper, and (ii) in each of the calendar years 1970-1974, inclusive, at least 50,000 tons of paper, of which 25,000 tons shall be of paper classified as census coarse paper (SIC category 26216), which shall be sold or offered for sale to jobbers, distributors, users and converters of such census coarse paper. The paper classified as census coarse paper which must, under the terms of this provision, be offered, and to the extent such offers are accepted, sold, shall be made available and offered for sale by respondent, at prices no higher than respondent's published list prices for such paper, and such sales shall be subject to respondent's standard credit requirements, and shall be made at respondent's standard terms and conditions, and shall be of grades, weights, finishes and sizes regularly made by respondent.

XI

It is further ordered, That for a period of ten years after the service upon it of this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the share capital, or assets (other than products sold or purchased in the course of business) of, or any other interest in, any domestic concern, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition, in any state of the United States or the District of Columbia, in the business of manufacturing coarse paper, containerboard, special food board or bleached folding box board, in the business of converting coarse paper into grocers bags and sacks, in the business of converting coarse paper into multiwall shipping sacks, or in the business of converting containerboard into corrugated or solid fibre sheets or shipping containers, without the prior approval of the Federal Trade Commission: *Provided*, That nothing contained herein shall prohibit the purchase by respondent, in the ordinary course of business, of coarse paper, containerboard, special food board, bleached folding box board, or finished products converted from coarse paper or containerboard, or of secondhand machinery or equipment, used or useful in the manufacture or conversion of any of such products, if such machinery or equipment does not constitute a major part of the assets of the seller: *And provided further*, That the prohibitions of this paragraph shall not apply to the acquisition of share capital or assets of any company which is already a subsidiary of Union Bag-Camp Paper Corporation on the date of this order. The term subsidiary as used herein shall mean any

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company in which Union Bag-Camp Paper Corporation owns in excess of 50% of the capital stock.

XII

Jurisdiction shall be retained by the Commission so that respondent may at any time hereinafter petition the Commission for construction or modification of this order, including particularly, but without limitation, Paragraph X, which the Commission will consider, and, on proper showing by respondent, allow to the extent it finds such constructions or modifications to be warranted and consistent with Section 7 of the Clayton Act, as amended.

XIII

Nothing contained in this order shall be considered to have been violated by any action or inaction over which respondent shall have no control, where such action or inaction shall have been occasioned by war, civil insurrection, strikes, embargoes, catastrophies, eminent domain, acts of the sovereign, or acts of God.

XIV

a. *It is further ordered*, That respondent shall within sixty (60) days of the service upon it of this order, submit in writing to the Federal Trade Commission its plan for complying with the provisions of this order, other than Paragraph X, and shall every ninety (90) days thereafter, until the last of the divestitures covered by Paragraphs I, II, III, IV, V and VI herein shall have been completed, submit to the Federal Trade Commission a report, in writing, setting forth in detail the actions taken by respondent in compliance with the terms of this order. There shall be included in such reports a summary, including indications of the identities of prospective purchasers, of contacts and negotiations of representatives of respondent authorized to negotiate with potential purchasers or their representatives, relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy, or indications of interest in the acquisition of the whole or a part of the assets in question.

b. *It is further ordered*, That, commencing June 30, 1965, and every six (6) months thereafter until December 31, 1974, respondent shall submit to the Federal Trade Commission a report in writing, setting forth the actions taken by respondent in compliance with the terms of Paragraph X of this order.

Complaint
IN THE MATTER OF
THE MEAD CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket C-880. Complaint, Feb. 12, 1965—Decision, Feb. 12, 1965

Consent order requiring one of the five largest paper and paperboard companies in the United States, to divest itself absolutely, within five years, of the following seven corrugated box converting plants which it acquired since 1956: (1) corrugator plant located at York, Pa., acquired from York Container Corp., in December 1956; (2) corrugator plant located at Chicago, Ill., acquired from Industrial Container and Paper Corp., in June 1957; (3) corrugator plant located at Grand Rapids, Mich., acquired from Grand Rapids Container Co., Inc., in June 1958, and must install a corrugator machine as specified; (4) corrugator plant located at Baltimore, Md., acquired from Industrial Container Corp., in January 1959; (5) corrugator plant located at North Bergen, N.J., acquired from Gibraltar Corrugated Paper Co., Inc., in March 1959; (6) sheet plant located at Elizabeth, N.J., acquired from Gibraltar Corrugated Paper Co., Inc., in March 1959, which must be reestablished and divested as specified; (7) corrugator plant located at East St. Louis, Ill., acquired from Taylor Container Corp., in March 1964; prohibiting for the next ten years any further acquisitions by respondent in the container board manufacturing or converting industries, without prior approval of the Federal Trade Commission, and to comply with other requirements of the order of divestiture as set forth below.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named above, as hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act as amended (U.S.C., Title 15, Sec. 18), through the acquisition of the stock and assets of 22 corporations, hereinafter more particularly designated and described, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C., Title 15, Sec. 21) charging as follows:

I

Definitions

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Paperboard*—a general term descriptive of a sheet made of fibrous material on a paper machine. Paperboard is commonly made from wood pulp, straw, or waste papers, or any combination thereof.

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(b) *Containerboard*—a type of paperboard used for the manufacture of corrugated board and solid fibre board.

(c) *Corrugated board*—relatively lightweight, rigid sheets made by combining two sheets of containerboard, which serve as the outer plies, together with a third sheet of containerboard which is fluted or corrugated and pasted between the outer plies.

(d) *Solid fibre board*—rigid sheets made by combining sheets of containerboard. Two sheets of containerboard which serve as the outer plies are combined with one or more flat sheets of containerboard between them, to produce a solid sheet whose thickness and weight depend on the number of inner plies.

(e) *Linerboard*—a type or kind of containerboard usually employed as the smooth outer plies in the manufacture of corrugated board or solid fibre board.

(f) *Corrugating medium*—a type or kind of containerboard employed as the fluted or corrugated component of corrugated board.

(g) *Container chip and filler*—a type or kind of containerboard usually employed, in the manufacture of solid fibre board, as the middle plies of the finished board.

(h) *Corrugated products*—articles, primarily comprising corrugated shipping containers and other types of corrugated boxes, manufactured from corrugated board.

(i) *Solid fibre products*—articles, including shipping containers and boxes, made from solid fibre board.

(j) *Corrugator plant*—a manufacturing facility where containerboard is combined into sheets of corrugated board, and such corrugated board is converted into corrugated products.

(k) *Sheet plant*—a manufacturing facility which converts sheets of corrugated board into corrugated products. Sheet plants do not manufacture corrugated board and are indirect, not direct, consumers of containerboard.

II

The Respondent

2. Respondent, The Mead Corporation (hereinafter referred to as Mead), is a corporation organized and existing under the laws of the State of Ohio with its office and principal place of business at 118 West First Street, Dayton, Ohio.

3. Mead is engaged in commerce as “commerce” is defined in the Clayton Act, as amended.

4. Mead is engaged principally in the manufacture, sale and distribution of white paper, paperboard and converted paperboard prod-

ucts. Sales of paperboard and converted paperboard products accounted for approximately 35% of Mead's consolidated net sales in 1962. Mead is integrated at all levels in the production and sale of paper and paperboard products.

5. On the basis of net sales, Mead, as of March 1963, was one of the five largest paper and paperboard companies in the United States. In 1962, it had net sales of \$435,116,370 and its assets totaled \$315,231,807.

6. Converted paperboard products are manufactured by the Mead Container Division of The Mead Corporation and by the Mead Packaging Division of The Mead Corporation. Paperboard is distributed and sold principally through Mead Board Sales, Inc., a wholly owned subsidiary.

7. Mead is the third largest manufacturer of containerboard in the United States. In 1962, Mead produced approximately 237,000 tons of containerboard in containerboard mills located at Harriman, Tennessee; Knoxville, Tennessee; Lynchburg, Virginia; Sylva, North Carolina; and North Bergen, New Jersey.

8. Mead owns a 50% stock interest in Georgia Kraft Company, a joint venture between Mead and Inland Container Corporation. Georgia Kraft Company produced 618,000 tons of linerboard in 1962, and one half of this production, or approximately 309,000 tons, represented the share of this company's production available to, and under the control of, Mead. Georgia Kraft Company owns and operates two containerboard mills, located at Rome, Georgia, and Macon, Georgia.

9. During 1962 Mead and Inland Container Corporation were engaged in another joint venture named Forest Kraft Company. Forest Kraft Company was formed by Mead and Inland for the purpose of constructing and operating a third containerboard mill, in addition to the two containerboard mills already jointly owned by Mead and Inland, which are operated by the Georgia Kraft Company. The Forest Kraft Company mill is being built in Rome, Georgia, adjacent to the site of the Georgia Kraft Company mill already located there. It has been announced that, when completed, this mill will be capable of producing 500 tons of containerboard per day, or in excess of 150,000 tons annually.

10. In 1962, Mead operated 18 plants for the manufacture of corrugated products and solid fibre products. These plants converted approximately 320,000 tons of containerboard during 1962.

11. Mead also owns substantial minority stock interests in two other companies whose plants convert containerboard into corrugated

products and solid fibre products. These two companies converted approximately 40,000 tons of containerboard during 1962.

III

The Nature of Trade and Commerce

12. The manufacture of containerboard is a very substantial industry in the United States. In 1962, approximately nine million tons of containerboard were produced, with a dollar valuation of nearly one billion dollars, based on price levels current during that year.

13. The manufacture of corrugated products and solid fibre products constitutes the largest market for the sale or use of containerboard, accounting in 1962 for approximately 95% of all domestic containerboard consumption. By far the greater part of this containerboard was used in the making of corrugated products, rather than solid fibre products. In 1962, corrugated products accounted for about 98% of the combined shipments of corrugated products and solid fibre products.

14. The production of corrugated products is also a very substantial industry in the United States. In 1962, 120.9 billion square feet of corrugated products were shipped, with a total sales valuation of approximately \$1.9 billion. In 1962, approximately 1.2 billion square feet of solid fibre products were produced with a total sales valuation of approximately \$44 million.

15. Most containerboard manufactured in the United States East of the Rocky Mountains is shipped and sold in this same area. It is economically possible to ship containerboard manufactured within this area to any other point within it. Similarly, containerboard manufactured West of the Rocky Mountains, in the Pacific Coast states, is usually shipped and sold in that same area. Containerboard manufactured in either of these areas is usually not shipped or sold in the other, because of freight costs and other factors.

16. There has been in recent years a significant increase in the level of integration between the containerboard and the corrugated products and solid fibre products industries. This has resulted, in large measure, from acquisitions by containerboard manufacturers of consumers of containerboard, and, to a lesser extent, from acquisitions by corrugated products and solid fibre products manufacturers of suppliers of containerboard. By 1962, a very large proportion of all converting plants for the manufacture of corrugated products and solid fibre products were owned or controlled by producers of the containerboard used as the raw material in these plants. Approximately 65%

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to 75% of all corrugated products and solid fibre products shipments were made by such plants owned or controlled by containerboard producers.

17. The manufacture of containerboard is a relatively concentrated industry. In 1962, the twenty largest manufacturers of containerboard produced approximately 80.5% of all containerboard.

18. The increase in integration between the containerboard and corrugated products industries has produced, in recent years, a concomitant rise in horizontal concentration in the corrugated products industry. As the largest containerboard producing companies have made multiple acquisitions of corrugated products companies, including most of the larger companies in this industry, a greater and greater share of the corrugated products business has been concentrated in the hands of these relatively few containerboard producing companies. In 1962, the twenty largest manufacturers of corrugated products accounted for approximately 67% of total industry shipments.

19. Mead is an important member of the containerboard industry. In 1962, its volume of containerboard sales ranked third among members of the industry, and it produced about 6% of the total industry production of containerboard.

20. Mead is an important member of the corrugated products industry. In 1962, its volume of corrugated products sales ranked third among members of that industry and it made about 4.7% of total industry shipments.

21. In 1955, Mead owned no facilities for the conversion of containerboard into corrugated products. Since 1956, Mead has made its entry into the corrugated products and solid fibre products industries by acquiring 20 corporations engaged in the manufacture of corrugated products and solid fibre products.

IV

Violation of Section 7 of the Clayton Act

22. In 1951, Mead acquired 48.7% of the stock of Jackson Box Company. On December 10, 1956, Mead acquired, in exchange for 85,620 shares of its common stock, the remaining 51.3% of stock of the Jackson Box Company. Through this acquisition, Mead acquired Jackson's Cincinnati, Ohio corrugator plant and obtained ownership interests in four subsidiaries and affiliates of Jackson Box Company, as described in paragraphs 23 through 26 of this complaint.

23. Jackson Box Company owned a 100% interest in the Durham Container Corporation which operated a corrugator plant in Durham, North Carolina. As a result of its acquisition of Jackson Box Company, Mead acquired this 100% interest in Durham Container Corporation.

24. Jackson Box Company owned a 45% stock interest in Delavans, Inc., which operated a corrugator plant in Syracuse, New York. As a result of its acquisition of Jackson Box Company, Mead obtained this 45% interest in Delavans, Inc. In 1959, Mead acquired, for 33,636 shares of its common stock, the remaining outstanding shares of Delavans, Inc.

25. Jackson Box Company owned a 35% stock interest in the Evert Container Corporation which operated a corrugator plant in Milwaukee, Wisconsin. As a result of its acquisition of Jackson Box Company, Mead acquired this 35% stock interest in Evert Container Corporation.

26. Jackson Box Company owned a 49% stock interest in the York Container Corporation which operated a corrugator plant at York, Pennsylvania. As a result of the acquisition of the Jackson Box Company, Mead obtained this 49% stock interest in the York Container Corporation.

27. On December 13, 1956, Mead acquired, in exchange for 273,925 shares of its common stock, the stock of the Atlanta Paper Company which operated a corrugator plant at Atlanta, Georgia.

28. The Atlanta Paper Company owned a 50% stock interest in the Palm Container Company which operated a sheet plant at Miami, Florida. As a result of its acquisition of the Atlanta Paper Company, Mead obtained this 50% interest in Palm Container Company. In 1957, Mead acquired, in exchange for 4,000 shares of its common stock, the remaining outstanding stock of the Palm Container Company.

29. On or about June 1957, Mead acquired, in exchange for 68,200 shares of its common stock, the assets of Industrial Container and Paper Corporation, which operated a corrugator plant at Chicago, Illinois.

30. On October 1, 1957, Mead acquired, in exchange for 40,000 shares of its common stock, the assets of the Shelby Paper Box Co., which operated a corrugator plant at Memphis, Tennessee.

31. On or about January 8, 1958, Mead acquired, in exchange for 70,250 shares of its common stock, the assets of the Ottawa River Paper Company which operated two corrugator plants, one located at Toledo, Ohio, and the other located at Flint, Michigan.

32. On June 23, 1958, Mead acquired, in exchange for 30,000 shares of its common stock, the assets of the Grand Rapids Container Co., Inc., which operated a corrugator plant at Grand Rapids, Michigan.

33. On July 11, 1958, Mead acquired, in exchange for 6,525 shares of its common stock, the stock of Miller Container Corporation, which operated a sheet plant at Louisville, Kentucky.

34. On January 12, 1959, Mead acquired, in exchange for 30,000 shares of its common stock, the assets of Industrial Container Corporation, which operated a corrugator plant at Baltimore, Maryland.

35. On January 7, 1959, Mead acquired, in exchange for 100,650 shares of its common stock, the assets of A & P Corrugated Box Corporation, which operated a corrugator plant at Gardner, Massachusetts, and a small paperboard mill at Lawrence, Massachusetts.

36. On March 20, 1959, Mead acquired, in exchange for 113,000 shares of its common stock, the assets of Gibraltar Corrugated Paper Company, Inc., which operated a corrugator plant at North Bergen, New Jersey, and a small containerboard mill at that same location.

37. Gibraltar Corrugated Paper Company, Inc. owned a 100% interest in Containers, Inc., which operated a sheet plant at Elizabeth, New Jersey. As a result of its acquisition of Gibraltar Corrugated Paper Company, Inc., Mead obtained this 100% interest in Containers, Inc.

38. Prior to 1957, Mead owned a 37.1% interest in Excello Paper Products Co. On August 5, 1957, Mead acquired, in exchange for 55,726 shares of its common stock, the remaining 62.9% of the outstanding shares of Excello Paper Products Co., which operated a containerboard mill at Cincinnati, Ohio.

39. On September 5, 1961, Mead acquired, in exchange for 90,816 shares of its common stock, the assets of Waterloo Container Corp., which operated a corrugator plant at Waterloo, Iowa.

40. Waterloo Container Corporation owned a 100% interest in Waterloo Corrugated Box Company, Inc., which operated a sheet plant at Waterloo, Iowa. As a result of the acquisition of Waterloo Container Corporation, Mead obtained this 100% interest in Waterloo Corrugated Box Company, Inc.

41. Waterloo Container Corporation owned a 100% interest in Fort Dodge Container Corporation, which operated a sheet plant at Fort Dodge, Iowa. As a result of its acquisition of Waterloo Container Corporation, Mead obtained this 100% interest in Fort Dodge Container Corporation.

42. Prior to 1962, Mead owned a 50.005% interest in Southern Extract Co. On January 16, 1962, Mead acquired, in exchange for

45,000 shares of its common stock, the remaining 49.995% of the outstanding shares of Southern Extract Co., which operated a containerboard mill at Knoxville, Tennessee.

43. In March 1964, Mead acquired Taylor Container Corporation, which operated a sheet plant at East St. Louis, Illinois.

44. Prior to their acquisition by Mead, each of the acquired companies was engaged in interstate commerce as "commerce" is defined in the Clayton Act, as amended.

45. The effect of the aforesaid acquisitions of Jackson Box Company, Durham Container Corporation, Delavans, Inc., Evert Container Corporation (a 35% stock interest), York Container Corporation (a 49% stock interest), Atlanta Paper Company, Palm Container Company, Industrial Container and Paper Corporation, Shelby Paper Box Co., Ottawa River Paper Company, Grand Rapids Container Co., Inc., Miller Container Corporation, Industrial Container Corporation, A & P Corrugated Box Corporation, Gibraltar Corrugated Paper Company, Inc., Containers, Inc., Waterloo Container Corp., Waterloo Corrugated Box Company, Inc., Fort Dodge Container Corp., and Taylor Container Corp. by Mead, may be substantially to lessen competition or to tend to create a monopoly, in the manufacture and sale of containerboard, in the United States as a whole, and in that area of the country which consists of all, or any part, of the States of the United States other than the States of Washington, Oregon, California, Idaho, Hawaii and Alaska, in the following ways, among others:

(1) Competition between Mead and other sellers of containerboard has been eliminated or restricted;

(2) Independent purchasers and consumers of containerboard have been eliminated;

(3) A substantial portion of the market for containerboard has been acquired by Mead, thereby foreclosing other manufacturers of containerboard from effectively competing for the containerboard purchases made by such acquired companies;

(4) In an industry already characterized by the existence of a trend towards vertical integration and by the existence of a high degree of vertical integration, the acquisitions have further reduced the number of available independent purchasers and consumers of containerboard;

(5) The trend towards vertical integration between manufacturers of containerboard and manufacturers of corrugated products and solid fibre products has been, or may be, encouraged or stimulated;

(6) The level of integration between the containerboard industry and the manufacturers of corrugated products and solid fibre products has been substantially increased, both as a direct result of the concentration in Mead of the manufacturing and sales activities of the non-integrated companies acquired, and because the trend towards vertical integration between manufacturers of containerboard and manufacturers of corrugated products and solid fibre products has been encouraged or stimulated;

(7) The entry of new competitive entities into the manufacture and sale of containerboard has been made more difficult.

46. The effect of the aforesaid acquisitions of Jackson Box Company, Durham Container Corporation, Delavans, Inc., Evert Container Corporation (a 35% stock interest), York Container Corporation (a 49% stock interest), Atlanta Paper Company, Palm Container Company, Industrial Container and Paper Corporation, Shelby Paper Box Co., Ottawa River Paper Company, Grand Rapids Container Co., Inc., Miller Container Corporation, Industrial Container Corporation, A & P Corrugated Box Corporation, Gibraltar Corrugated Paper Company, Inc., Containers, Inc., Waterloo Container Corp., Waterloo Corrugated Box Company, Inc., Fort Dodge Container Corp., and Taylor Container Corp., by Mead, may be substantially to lessen competition or to tend to create a monopoly, in the manufacture and sale of corrugated products and solid fibre products, in the United States as a whole, and in the area of the country which consists of all, or any part, of the States of the United States other than the States of Washington, Oregon, California, Idaho, Hawaii and Alaska, in the following ways, among others:

(1) Actual or potential competition between Mead and the companies acquired has been eliminated;

(2) Actual or potential competition among and between the companies acquired has been eliminated;

(3) Each of the companies acquired has been eliminated as an independent competitive factor;

(4) In an industry already characterized by the existence of a trend towards horizontal concentration and by the existence of a high degree of horizontal concentration, the level of horizontal concentration has been substantially increased, both as a direct result of the concentration in Mead of the manufacturing and sales activities of all of the companies acquired, and because the trend towards horizontal concentration has been encouraged and stimulated.

(5) The entry of new competitive entities into the manufacture and sale of corrugated products and solid fibre products has been made more difficult;

(6) The actual and potential competitive power of Mead has been enhanced to the point where it threatens the existence of non-integrated manufacturers and sellers of corrugated products and solid fibre products.

47. The effect of the aforesaid acquisitions of A & P Corrugated Box Corp., Excello Paper Products Co., Southern Extract Co. and Gibraltar Corrugated Paper Co. may be substantially to lessen competition or to tend to create a monopoly, in the manufacture and sale of containerboard, in the United States as a whole and in that area of the country which consists of all, or any part, of the States of the United States other than the States of Washington, Oregon, California, Idaho, Hawaii and Alaska, in the following ways, among others:

(1) Actual or potential competition between Mead and the companies acquired has been eliminated;

(2) Actual or potential competition between and among the companies acquired has been eliminated;

(3) Each of the companies acquired has been eliminated as an independent competitive factor;

(4) Concentration in the manufacture and sale of containerboard has been increased.

48. The acquisitions of Jackson Box Company, Durham Container Corporation, Delavans, Inc., Evert Container Corporation (a 35% stock interest), York Container Corporation (a 49% stock interest), Atlanta Paper Company, Palm Container Company, Industrial Container and Paper Corporation, Shelby Paper Box Co., Ottawa River Paper Company, Grand Rapids Container Co., Inc., Miller Container Corporation, Industrial Container Corporation, A & P Corrugated Box Corporation, Gibraltar Corrugated Paper Company, Inc., Containers, Inc., Waterloo Container Corp., Waterloo Corrugated Box Company, Inc., Fort Dodge Container Corp., Taylor Container Corp., Excello Paper Products Co., and Southern Extract Co. constitute violations of Section 7 of the Clayton Act (15 U.S.C. 18), as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the re-

spondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the 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 The Mead Corporation is a corporation organized, existing and doing business under the laws of the State of Ohio with its office and principal place of business located at 118 West First Street, Dayton, Ohio.

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

ORDER

I

It is ordered, That The Mead Corporation shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at North Bergen, New Jersey, which was acquired by respondent as a result of its acquisition of Gibraltar Corrugated Paper Company, Inc., including all rights, title, interests, assets and properties acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of said plant for use in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated products: *Provided*, That said plant shall be divested by respondent in good faith to a person or persons who, insofar as respondent can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products: *And provided further*, That pending the divesti-

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ture of said plant, respondent shall not make any change in the plant, machinery, building, equipment, or other property of whatever description which might impair the present capacity for the production of corrugated products by said plant, unless such capacity is fully restored prior to divestiture.

II

It is ordered, That The Mead Corporation shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at East St. Louis, Illinois, which was acquired by respondent as a result of its acquisition of Taylor Container Corporation, including all rights, title, interests, assets and properties acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of said plant for use in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated products: *Provided,* That said plant shall be divested by respondent in good faith to a person or persons who, insofar as respondent can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products: *And provided further,* That pending the divestiture of said plant, respondent shall not make any change in the plant, machinery, building, equipment, or other property of whatever description which might impair the present capacity for the production of corrugated products by said plant, unless such capacity is fully restored prior to divestiture.

III

It is ordered, That The Mead Corporation shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Chicago, Illinois, which was acquired by respondent as a result of its acquisition of Industrial Container and Paper Corporation, including all rights, title, interests, assets and properties acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of said plant for use in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by

the purchaser, as a going concern in the manufacture and sale of corrugated products: *Provided*, That said plant shall be divested by respondent in good faith to a person or persons who, insofar as respondent can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products: *And provided further*, That pending the divestiture of said plant, respondent shall not make any change in the plant, machinery, building, equipment, or other property of whatever description which might impair the present capacity for the production of corrugated products by said plant, unless such capacity is fully restored prior to divestiture.

IV

It is ordered, That The Mead Corporation shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of the corrugated box plant located at Baltimore, Maryland, which was acquired by respondent as a result of its acquisition of Industrial Container Corporation, including all rights, title, interests, assets and properties acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of said plant for use in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated products: *Provided*, That said plant shall be divested by respondent in good faith to a person or persons who, insofar as respondent can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products: *And provided further*, That pending the divestiture of said plant, respondent shall not make any change in the plant, machinery, building, equipment, or other property of whatever description which might impair the present capacity for the production of corrugated products by said plant, unless such capacity is fully restored prior to divestiture.

V

It is further ordered, That The Mead Corporation shall reestablish in or near Elizabeth, New Jersey, or at a location designated by a purchaser approved by the Commission, a sheet plant with facilities and equipment which are substantially equivalent to the facilities and equipment at Elizabeth, New Jersey, owned by Containers, Inc., which was acquired by respondent as a result of its acquisition of

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Gibraltar Paper Company, Inc., and which facilities and equipment are capable of converting five thousand tons of corrugated board into corrugated products per year, and shall divest itself absolutely and in good faith, subject to the prior approval of the Commission of such reestablished plant in a manner contemplating the operation of this plant by the purchaser as a going concern in the manufacture and sale of corrugated products; and said reestablished plant shall be divested by respondent in good faith to a person or persons who, insofar as it can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products.

VI

It is further ordered, That The Mead Corporation shall install a corrugator machine in the sheet plant located at Grand Rapids, Michigan, which was acquired by respondent as a result of its acquisition of the assets of the Grand Rapids Container Co., Inc., so that said Grand Rapids plant, with the corrugator machine installed, shall be capable of converting approximately eighteen thousand tons of containerboard into corrugated products and shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of such corrugated box plant located at Grand Rapids, Michigan. Said divestiture shall include all rights, title, interests, assets and properties acquired by respondent as a result of said acquisition, which are now located at said plant and used in the manufacture of corrugated shipping containers, together with such machinery and equipment as has been added to or placed on the premises of said plant, including the corrugator machine referred to above, for use in the manufacture of corrugated shipping containers, in a manner contemplating the operation of this plant, by the purchaser, as a going concern in the manufacture and sale of corrugated products: *Provided,* That said plant shall be divested by respondent in good faith to a person or persons who, insofar as it can reasonably determine, intend to and will operate said plant as a going concern for the production of corrugated products: *Provided further,* To facilitate the sale of said plant and accomplish the objectives of this Order, Mead may, at its option, negotiate with prospective purchasers for the sale of said plant prior to installation of a corrugator machine as above referred to, but on the condition that said prospective purchasers are advised that Mead is obligated to and will install, prior to said purchase or at a time specified by the purchaser, and subject to the approval of the Federal Trade Commission, a corru-

gator machine in said plant capable of converting approximately eighteen thousand tons of containerboard into corrugated products per year.

VII

It is further ordered, That The Mead Corporation shall divest itself, absolutely and in good faith, subject to the prior approval of the Commission, of all of its stock in York Container Corporation, acquired by said respondent as a result of the acquisition in 1956 of Jackson Box Company by respondent: *Provided,* That such approval shall not be required if Mead sells such stock to the present owners of the remaining share capital of York Container Corporation.

VIII

It is further ordered, That none of the stock, assets and properties, described in Paragraphs I, II, III, IV, V, VI and VII of this Order, shall be divested, sold or transferred, directly or indirectly, to any person who, after such divestiture, is an officer, director, employee or agent of, or under the control or direction of respondent or any of respondent's subsidiary or affiliated corporations, or who owns or controls, directly or indirectly, one (1) per cent of the outstanding shares of common stock of The Mead Corporation, or, subject to Paragraph VII, to any purchaser who is not approved in advance by the Federal Trade Commission.

As used in this Order, "person" or "persons" shall include all members of the immediate families of the individuals specified and corporations, partnerships, associations and other legal entities as well as natural persons.

IX

With respect to the seven specific corrugated box plant divestitures ordered herein, The Mead Corporation shall make every reasonable effort to accomplish divestiture of all of its interest in one of the seven plants herein ordered to be divested within one year from the date of service upon Mead of this Order; a second plant within two years of that same date; a third and fourth plant within three years of that same date; a fifth and sixth plant within four years of that same date; and a seventh plant within five years of that same date.

X

If any of the assets or stock described in Paragraphs I, II, III, IV, V, VI and VII are not sold or disposed of entirely for cash,

nothing in this Order shall be deemed to prohibit respondent from retaining, accepting and enforcing a lien, mortgage, deed of trust or other security interest in or to any of the aforesaid assets or stock for the purpose of securing to respondent full payment of the prices, with interest, at which any of said properties are sold or disposed of; but if after bona fide disposal of any of the aforesaid assets or stock in accordance with the provisions of this Order, respondent, by enforcement of such security interest regains ownership or control of any of such assets or stock, said assets or stock regained shall be redivested, subject to the provisions of this Order, within six (6) months from the time of said reacquisition.

XI

It is further ordered, That for a period of ten years after the service upon it of this Order, The Mead Corporation shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the share capital, or assets (other than products sold or purchased in the course of business), of, or any other interest in, any domestic concern, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition, in any state of the United States or the District of Columbia, in the business of manufacturing containerboard, or in the business of converting containerboard into corrugated products, without the prior approval of the Federal Trade Commission: *Provided,* That nothing contained herein shall prohibit the purchase by respondent in the ordinary course of business, of second hand machinery or equipment, used or useful in the manufacture or conversion of any of such products, if such machinery or equipment does not constitute a major part of the assets of the seller.

XII

It is further ordered, That respondent shall within sixty (60) days of the service upon it of this Order, submit in writing to the Federal Trade Commission its plan for complying with the provisions of this Order, and shall every ninety (90) days thereafter, until the last of the divestitures covered by Paragraphs I, II, III, IV, V, VI, and VII herein shall have been completed, submit to the Federal Trade Commission a report, in writing, setting forth in detail the actions taken by respondent in compliance with the terms of this Order. There shall be included in such reports a summary, including indications of the identities of prospective purchasers, of contacts

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and negotiations of representatives of respondent authorized to negotiate with potential purchasers or their representatives, relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy, or indications of interest in the acquisition of the whole or a part of the assets in question.

IN THE MATTER OF
STUPELL ORIGINALS, INC., TRADING AS
STUPELL ENTERPRISES, ETC.

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

Docket 8603. Complaint, Nov. 1, 1963—Decision, Feb. 18, 1965

Order requiring a New York City toy distributor, to cease falsely representing in its display material and on packages containing its toy "Puncherino" that the goggles in the packages have yellow glass or other protective material when no such protective material is present, and failing to make an affirmative disclosure that goggles may fail to protect users' eyes from injury.

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 Stupell Originals, Inc., a corporation, trading as Stupell Enterprises and Carole Stupell Exclusives, and Carole Stupell and Harry Mervis, 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 Stupell Originals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1749 First Avenue, New York 28, New York. Said corporation trades under the names Stupell Enterprises and Carole Stupell Exclusives, at the same address.

Respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of said corporate respondent, including the acts and practices herein-

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after set forth. Their addresses are the same as that of said 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 a variety of items of merchandise, including a toy product designated as "Puncherino," to wholesale distributors, jobbers 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, said toy 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 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. The toy product aforesaid is a device consisting of a plastic ball which, when inflated, measures approximately seven inches in diameter, to which is attached a rubber string or band. The other end of said string or band is attached to the center portion of a pair of plastic goggles to be worn over the eyes of the user. The ball is punched rhythmically away from the face and retracts towards the face of the user. For protection of the user's eyes, the goggles contain vertical plastic bars approximately 1/16th of an inch in width and spaced approximately 5/16th of an inch apart. The goggles contain no glass or other material.

PAR. 5. In the course and conduct of respondents' business as aforesaid, and for the purpose of inducing the purchase of said toy product, respondents have made, or have caused to be made, certain statements, depictions and representations concerning the operation and safety of use of said toy product. The package in which the product is sold contains a depiction of a boy and girl, each wearing the goggles and striking the ball with their hands, and the following wording:

NEW!
PUNCHERINO
FUN! HEALTHY!

Advertising circulars distributed to retailers contain the same depiction and wording.

PAR. 6. By and through the use of the aforesaid statements and depictions, and others similar thereto but not specifically set out herein, respondents have represented to prospective purchasers, and have placed in the hands of retailers and others the means and

instrumentalities for representing, directly or by implication, that said toy product is hazard-free and is safe for use by the purchaser, including children.

PAR. 7. In truth and in fact said toy product is not hazard-free nor is it safe for use by the purchaser, including children, due to the possibility of injury to the user's eyes or face resulting from the rubber band breaking and piercing the spaces between the plastic bars on the goggles.

Therefore, the statements, depictions and representations, as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive. In addition, the container in which said product is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on said container.

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 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' merchandise 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.

Mr. William S. Hill supporting the complaint.

Mr. Milton H. Mandel of *Mandel & Permutt*, New York, N. Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JULY 23, 1964

The complaint in this proceeding issued by the Commission on November 1, 1963, charges the respondents named in the caption

Initial Decision

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hereof with false, misleading, and deceptive representations in violation of Section 5 of the Federal Trade Commission Act.

The respondents answered and denied the violations alleged. Hearings have been held and counsel for the parties have filed proposed findings of fact, conclusions of law and order. These have been considered. The matter is now before the hearing examiner for the issuance of an initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Stupell Originals, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1749 First Avenue, New York, New York. Said corporation trades under the names of Stupell Enterprises and Carole Stupell Exclusives, at the same address.

2. The individual respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of the corporate respondent. Their addresses are the same as that of the corporate respondent.

3. During the years 1961 and 1962, the respondents named in Paragraphs 1 and 2 hereof were engaged in the offering for sale, sale, and distribution of a toy product designated as "Puncherino" to wholesale distributors, jobbers and retailers, for resale to the public. Total sales of said product during the years 1961 and 1962 amounted to approximately 378,240 units, having a total wholesale value of approximately 71,900. As of July 9, 1963, the respondents had on hand approximately 141,398 units of said toy product and an additional 190,944 units were stored in a bonded warehouse subject to withdrawal by respondents.

4. In the course and conduct of their business, respondents have caused said toy product, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and during the years 1961 and 1962, maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The toy product "Puncherino" which is the subject of this proceeding consists of a plastic ball which, when inflated, measures

approximately 7 inches in diameter, to which is attached a rubber string; the other end of the string is attached to the center portion of a device shaped like goggles. The goggles are intended to be worn over the upper part of the face, covering the eyes and surrounding area of the face. The goggles received in evidence at the hearing (CX 11) appear to be of a rubberized plastic material, molded in one piece. The goggles do not contain any glass or transparent plastic material over the portion which covers the eyes, as do the usual eye-glasses or goggles. Instead, in each side or portion of the goggles which covers each eye are four vertical bars, approximately 1/16th of an inch in width and placed approximately 5/16th of an inch apart. These vertical bars are of the same material as the rest of the goggles and appear to have been molded or formed with the rest of the goggles in one original manufacturing operation. The goggles are held in place on the face by an adjustable elastic band attached to each end of the goggles and extended around the back of the head.

6. When sold by respondents to wholesale distributors, jobbers and retailers, and when resold to the public, the toy "Puncherino," which includes the deflated plastic ball, rubber string, and goggles, is contained in a transparent plastic package or container (CX 11). The deflated plastic ball is folded over the goggles, and while the toy remains in the package, the goggles are not visible from the outside of the package. Attached to the top of the package is a folded sheet of heavy paper, or cardboard, approximately 4 x 7 inches in size. On the front side of the paper is a depiction of a boy and girl, each wearing goggles and striking the ball with their hands, and the following wording:

NEW!
PUNCHERINO
FUN! HEALTHY!

On the other side of the sheet of paper are instructions for inflating the ball.

7. The appeal of the toy "Puncherino" is principally to children. After the components have been removed from the container, the plastic ball inflated as directed, and the goggles placed on the face of the user, secured by the elastic band, the ball is intended to be struck or punched by either one or both fists, successively, in a repetitive sequence. The resiliency of the rubber string is intended to permit the ball, when struck, to travel away from the goggles and then retract toward the goggles, and the ball struck again and so on, successively, similar to striking a punching bag.

8. The first charge in the complaint is that, through the depiction on the package as above described, and through advertising circulars distributed to retailers containing the same depiction and wording, respondents have represented to prospective purchasers, and have placed in the hands of retailers and others, the means and instrumentalities for representing, directly or by implication, that said toy product is hazard-free and safe for use by the purchasers, including children; whereas, the toy "Puncherino" is not hazard-free, due to the possibility of injury to the user's eyes resulting from the rubber string breaking and retracting into the spaces between the four vertical bars on the goggles.

9. The second charge in the complaint alleges that the container in which the toy is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of the toy as directed on the container. In other words, it is the contention of complaint counsel that the toy is latently dangerous and, by reason of the provisions of the Federal Trade Commission Act, the respondents owe a duty to the purchaser to warn him of possible injury to the eyes from use of the toy by a marking or writing on the package that the goggles might not protect the eyes of the user in case of breakage of the rubber string.

10. The facts are not in dispute. The respondents do not deny the possibility of injury to the eye of the user of the toy "Puncherino" in case of breakage of the rubber string. However, the respondents do deny that they have represented, through the wording or the depiction on the package, or in advertising circulars, either directly, or by implication, that the toy "Puncherino" is hazard-free and safe for use by purchasers, including children. Respondents readily admit that a rubber string will eventually break and in such event could retract and the loose end of the rubber string penetrate one of the open spaces between the vertical bars of the goggles, possibly striking and injuring the eye. Respondents say that a casual look at the goggles and rubber string attached thereto (CX 11), the depiction of the boy and girl, each wearing goggles, attached to the package, and the depictions of the boy and girl wearing goggles as shown on the advertising circulars (CX 2 and CX4) relied on by complaint counsel, negate any suggestion that the goggles afford protection to the eyes in case of the breaking or snapping of the rubber string attached to the ball. Respondents say that the possibility of the rubber string entering the open spaces between the four vertical bars in the event of break is made obvious to the prospective pur-

chaser by the picture of the goggles displayed on the folded sheet of paper attached to the package containing the toy and also the pictures shown on the advertising circulars (CX 2 and CX4). Respondents say that the pictures of the goggles reproduced on these exhibits plainly show that the space between the vertical bars on the goggles is many times the size of the rubber string, thus making obvious the possibility of the rubber string entering one of the open spaces between the vertical bars of the goggles in case the rubber string should break, striking the eye and causing possible injury to the eye.

11. In support of the allegations of the complaint, Commission counsel offered several exhibits, including the toy "Puncherino" (CX 11), in the plastic container as sold to the public, with the 4 x 7 inch sheet of heavy paper attached to the top of the container bearing the depiction of the boy and girl, each wearing goggles, striking the ball with their hands, and the marking,

NEW!
PUNCHERINO
FUN! HEALTHY!

contained thereon, and copies of two advertising circulars, CX 2 and CX 4. Complaint counsel also offered the testimony of four witnesses, the individual respondent Carole Stupell; Mr. David N. Aberman, an attorney and counsel for Toy Manufacturers of the U.S.A., Inc.; Mr. Muft Ogut, an electrical engineer employed by Good House-keeping Institute; and Miss Dorothy Elizabeth Rencken, Assistant Director of the Consumer Service Bureau of *Parents' Magazine*.

12. Miss Stupell identified various exhibits which were offered and received in evidence, including CX 11, the toy "Puncherino". The substance of her testimony was, and it is found, that: Miss Stupell purchased her initial stock of "Puncherino" in Italy in 1960, and the latest purchase was in June, 1961; for the past two or three years, up to the date of the hearing on March 24, 1964, sales of the toy have accumulated less than \$3,000. Most of the sales of the toy "Puncherino" were made during the years 1961 and 1962, which, as previously found, amounted to approximately 378,240 units. Thus, all of respondents' stock of the toy "Puncherino" were purchased more than two years prior to the date of the hearing on March 24, 1964. Miss Stupell also testified that the so-called goggles are not goggles in the real sense of the word, but are only intended as a support for the rubber string to which the plastic ball is attached; are not intended to afford protection to the user, and have more

sales appeal than would a plain band around the head. She stated that "a child likes a mask no matter what kind of a mask it is" (Tr. 13).

13. The next witness offered by counsel supporting the complaint was Mr. David N. Aberman, attorney and counsel for Toy Manufacturers of the U.S.A., Inc., a trade association composed of approximately 400 American toy manufacturers. Mr. Aberman was offered as a toy safety expert. Counsel for respondents did not admit the qualifications of the witness as a toy safety expert, and, upon questioning, Mr. Aberman voluntarily stated that he did not consider himself to be a technical expert on the safety of toys. The witness was then excused.

14. The next witness offered by complaint counsel was Mr. Mufit Ogut, an electrical engineer employed by Good Housekeeping Institute. Mr. Ogut testified that the Institute has laboratories which investigate and test products, including toys, to be advertised. The testing includes the safety of the product to be advertised. Mr. Ogut examined the toy "Puncherino" as contained in the plastic container (CX 11) and gave it as his opinion that, "when the ball is inflated and hit hard, there is a possibility that the rubber band might snap and retract back and go through the vertical bars and possibly hurt the eye" (Tr. 50-51). On cross-examination, Mr. Ogut further testified that, aside from any expert knowledge from his training and experience as an electrical engineer, it was perfectly obvious from looking at the toy "Puncherino" that, if the rubber string attached to the ball should break or snap, the end of the rubber string could penetrate between the vertical plastic bars of the goggles very easily; expert knowledge was not necessary to recognize this was so. Mr. Ogut further testified that the vertical bars of the goggles would not afford any protection to the eye of the user in the event the rubber string should break and retract toward the face of the user.

15. The last witness offered by complaint counsel was Miss Dorothy Elizabeth Rencken, Assistant Director of the Consumer Service Bureau of *Parents' Magazine*, New York, New York. Miss Rencken testified that she holds an AB Degree in Home Economics from Douglas College, New Brunswick, New Jersey; and a Masters Degree in Home Economics from Teachers College, Columbia University, New York, New York. Miss Rencken was asked to examine CX 11, the "Puncherino" toy involved in this proceeding, and give an opinion as to whether the toy in operation, as shown on the package, would or would not be dangerous. The answer of Miss Rencken was:

A. The product, as I have examined it and as I can see it pictured on the package I think, in my opinion, presents a potential hazard to any child that might be using it.

Q. Would you please state the basis for your conclusion?

A. On the frame of the eye piece, which covers the child's eye, there is a small piece of elastic here, which even under normal usage could conceivably enter a portion of the glasses here. (Tr. 63-64)

Miss Rencken further testified that, from looking at the toy (CX 11), it was plainly evident that the rubber band was much smaller than the spaces between the vertical bars on the goggles, and she was convinced that the rubber string could penetrate through the open spaces between the vertical bars of the goggles, and that there was no deception therein. Miss Rencken further testified that, by looking at CX 4, the picture of a child wearing the goggles and punching the plastic ball (CX 11), it was evident "that the apertures between the upright bars are much wider than the rubber band depicted on that picture" (Tr. 73).

16. In order to obviate the necessity of hearings in Baltimore, Maryland; Detroit, Michigan; and Eagle Pass, Texas, counsel supporting the complaint and counsel for respondents entered into a stipulation concerning the testimony of certain witnesses residing in those cities. The general effect of this testimony would be that one adult and two children received injuries to their eyes while using the toy "Puncherino" in the prescribed manner, when the rubber string broke and retracted between the vertical bars of the goggles striking an eye of the user. Said stipulation further provides that each of said witnesses would testify that no representation was made as to the safety of the toy product "Puncherino" at the time of its purchase. Accordingly, it is found that the witnesses named in said stipulation would have testified as stated therein, if they had appeared at the hearings.

17. After careful examination and consideration of the evidence, this hearing examiner is of the opinion that the allegations of the complaint have been established. This determination is based largely upon the depiction of the goggles worn by the boy and girl which are depicted on the paper attached to the top of the package containing the toy "Puncherino" (CX 11). This depiction of the goggles, unlike the depictions of the goggles contained on the advertising circulars CX 2 and CX 4, appear to afford protection to the eyes of the user. The vertical bars on the goggles depicted on CX 11 appear to be sufficiently close together so as to afford protection to the eyes of the user in case of breakage of the rubber string. This

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depiction is on the front of the package in which the toy is sold to the public. This depiction of the goggles is what the purchaser sees at the time of purchase of the toy "Puncherino." He does not see the goggles themselves. The goggles are not visible from the outside of the package. Although the vertical bars on the goggles are approximately 1/16th of an inch in width and are placed approximately 5/16th of an inch apart, this circumstance is not discernible from the depiction of the goggles shown on the package containing the toy (CX 11). The plastic package containing the toy "Puncherino" is sealed while on display for sale to the public, and the purchaser is not aware of the relative size of the rubber string and the open spaces between the vertical bars of the goggles until after purchasing the toy and removing the goggles from the container. After removal from the container, however, a casual glance at the goggles themselves (CX 11) will immediately indicate to the viewer that the goggles will not protect the eyes of the user in the event the rubber string should break and retract into one of the open spaces between the vertical bars on the goggles (CX 11). On the other hand, the depictions of the goggles shown on the advertising circulars CX 2 and CX 4 are much larger than on CX 11. On the advertising circulars CX 2 and CX 4, the relative size of the rubber string as compared to the size of the open spaces between the vertical bars of the goggles make evident the possibility that the end of the rubber string might penetrate one of the spaces between the vertical bars of the goggles and strike the eye of the user in case the rubber string should break. This impression created by the depictions on CX 2 and CX 4 is substantiated by the testimony of two expert witnesses offered by complaint counsel, Mr. Ogut and Miss Rencken. Their testimony is discussed in Paragraphs 13 and 14 hereof, and will not be repeated.

18. By and through the depiction of the goggles on the plastic package containing the toy as displayed for sale to the public, respondents thereby represented to prospective purchasers and placed in the hands of retailers and others the means for representing, directly or by implication, that said toy "Puncherino" can be used as illustrated without danger or risk of injury to the eyes of the user. The evidence shows, and it is found, that the toy "Puncherino" cannot be used as illustrated without danger or risk of injury to the eyes of the user due to the possibility of the rubber string breaking and penetrating one of the open spaces between the vertical bars on the goggles. Also, the plastic package in which the toy is contained, displayed and sold is misleading and deceptive for the reason

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that it fails to reveal material facts with respect to the possibility or risk of physical injury which may result from use of the toy as illustrated on the package or container.

CONCLUSIONS

1. The use by the respondents of the false, misleading and deceptive depictions on the package as found herein has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said depictions are true and into the purchase of substantial quantities of said toys by reason of said erroneous and mistaken belief.

2. The aforesaid acts and practices of respondents as found herein are 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.

3. In view of the fact that the depiction of the goggles shown on the package containing the toy "Puncherino," as it is displayed for sale, falsely represents that the goggles afford protection to the eyes of the user in the event the rubber string attached to the ball should break, respondents should be required to clearly indicate on the package in which the toy is sold that the goggles may not protect the eyes of the user from possible physical injury.

4. With respect to respondents' contention that they are not selling the toy at the present time and that current sales are not substantial, the evidence shows that respondents' stock of the toy on hand is substantial, that their sales of the toy in 1961 and 1962 were substantial, and that respondents may resume sales of the toy at any time in the future. Under such circumstances, respondents have not shown good reason why an order to cease and desist from the practices complained about should not be entered to protect the public interest.

ORDER

It is ordered, That respondents Stupell Originals, Inc., a corporation, trading as Stupell Enterprises, Carole Stupell Exclusives, or under any other name, and its officers, and Carole Stupell and Harry Mervis, 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 a toy product designated "Puncherino," or any other product of similar construction or having substantially

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similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that such toy product can be used without danger or risk of injury to the eyes of the user.

(2) Failing to clearly and conspicuously disclose on the package or container in which the toy product is sold that the goggles may fail to protect the eyes of the user from injury.

(3) Furnishing or placing in the hands of jobbers, retailers or dealers in said toy product the means and instrumentalities by and through which they may deceive or mislead the public in the manner or as to the things hereinabove prohibited.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

Respondents are charged with falsely representing that their toy product is safe for use by purchasers and with failing to reveal material facts with respect to the risk of injury resulting from the use of said product, in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that the allegations were sustained and ordered respondents to cease and desist from the unlawful practices. Respondents have appealed from this decision.

The toy product, designated "Puncherino," consists of a plastic ball which, when inflated, measures approximately 7 inches in diameter, to which is attached a rubber string. The other end of the string is attached to the center of a pair of goggles made of a rubberized plastic material. The goggles do not contain any glass or transparent plastic material in the eyepieces. Instead, in each section which covers the eye, there are four vertical bars, with spaces between them, which are of the same material as the rest of the goggles. As depicted on the package in which the toy is sold, the ball is to be punched or slapped away from the goggles and retracts toward the goggles, in the same manner as a punching bag.

The complaint charges that the toy is not safe due to the possibility of injury to the user's eyes or face resulting from the rubber string breaking and piercing the spaces between the plastic bars on the goggles.

When sold to the public, the toy is packaged in a transparent plastic container with a heavy sheet of paper attached thereto which,

in addition to setting forth instructions for use and for inflating the ball, also depicts a boy and a girl each wearing the goggles and striking the ball with their hands, accompanied by the following wording:

NEW PUNCHERINO FUN HEALTHY

Respondents do not deny the possibility of injury to the eye of the user should the rubber string break. Moreover, there is stipulated testimony of injury to the eyes of two children, ages 6 and 7, as a result of the rubber string breaking and retracting through the space between the vertical bars. There is similar stipulated testimony of an adult who was demonstrating the toy to his 6-year-old daughter. In addition, complaint counsel introduced the testimony of two witnesses, both of whom are engaged in the testing of toys, one for Good Housekeeping Institute and the other for Parents' Magazine. Both of these witnesses testified that there is a possibility of injury to the eye through the use of this toy.

The examiner found that, as packaged, the deflated plastic ball is folded over the goggles; and while the toy remains in the package, the goggles are not visible from the outside of the package. In their appeal respondents contend that the hearing examiner erred in so finding. In this regard there is no dispute that the toy which was introduced in evidence at the hearing had been removed from the bag for testing prior thereto. Thus, respondents contend that since the examiner did not have the toy as originally packaged before him, there is no basis in the record for his finding. They state that, in fact, the goggles are clearly visible in the original package and that since the examiner's order is based on an erroneous finding, the order must fall.

At the oral argument on this matter, on December 16, 1964, respondents' counsel offered to introduce as an exhibit the Puncherino toy allegedly packaged in the manner in which it is sold to the public, *i.e.*, with the goggles placed on top of the folded ball where they can be seen by the purchaser. The Commission accepted the toy (Exhibit A) with the express understanding from respondents' counsel that it could be used for the purposes of deciding this case.

We turn first to a consideration of the charge that respondents have falsely represented that the toy is hazard-free and is safe for use by the purchaser, including children. The examiner ruled that the picture on the paper attached to the package is deceptive whereas display posters (CX 2 and CX 4) are not. His conclusion is based on the finding that the vertical bars on the goggles pictured on the

package appear to be sufficiently close together so as to afford protection to the eyes whereas on the posters the relative size of the rubber string as compared to the size of the open spaces between the vertical bars make evident the possibility that the end of the rubber string may penetrate one of the spaces. We have considered both of these pictorial representations and we are of the opinion that they have a capacity to deceive notwithstanding the space pictured between the bars. Specifically, we refer to the fact that the goggles are pictured on the package and on the poster (CX 2) as containing yellow glass or some other transparent protective material in the eyepieces in addition to the bars. A prospective purchaser cannot determine what this toy is or how it works unless he examines these pictures. Even though the goggles themselves are visible in the package, it is reasonable to assume that protective coverings for the eyepieces, as pictured, are provided. Since the deflated plastic ball is folded in the bag, there is no means by which the customer can tell that the represented shielding has not been enclosed.

The examiner's failure to consider this aspect of the picturizations is obviously in error. We find that by picturing their goggles as having a covering in the eyepieces in addition to the bars, respondents have represented that the toy is safe. Since there is no dispute as to the danger which may result from the breaking of the rubber string, our order will prohibit such representations.

We turn next to a consideration of the charge that respondents' failure to reveal the risk of injury resulting from the use of the toy is deceptive. As previously mentioned, the examiner's ruling that this charge has been sustained is based on his finding that the goggles are not visible in the package when sold to the public. However, respondents contend that since in the exhibit introduced at the oral argument, the prospective purchaser can see that the space between the bars on the goggles is wider than the thickness of the rubber string, the risk of injury is obvious and patent and that therefore no disclosure should be required.

Respondents' argument must be rejected for several reasons. First, while the risk of injury to the eye from the rubber string breaking may be obvious to the person who pauses to consider such possibility, we seriously doubt that the ordinary purchaser would dwell on this eventuality.¹ This is particularly true in the case of children to whom

¹ "The Commission may employ its expertise and envision an advertisement as it would be seen by the public generally 'which includes the ignorant, the unthinking and credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.'" *Nirco Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 342 (7th Cir. 1960), cert. denied, 364 U.S. 833.

the toy is offered. The price of \$1 or less at which this toy is sold is well within the reach of this class of customer. Moreover, the possibility of the rubber string breaking is certainly not obvious. A very minute examination of the package discloses a small knot in the rubber string at the end which is attached to the plastic ball. Not only is the simple method of attachment not clearly visible, it cannot be ascertained without attempting to unfold the ball in the bag that there is no other means by which the string is secured. Additionally, we think it well within the realm of possibility that in view of modern manufacturing techniques, even a person who pauses to consider may well believe that in a toy which retracts toward the eyes of the user, the retracting element is more than a mere rubber string but is made of some material which will not so readily break.

This toy is designed and intended to be used in such a manner that the rubber string and the ball retract toward the face and eyes of the user. We hold that respondents' failure to disclose that the goggles will not protect the users' eyes is an unfair and deceptive practice.

In reaching this conclusion, the Commission is not laying down a new rule, which would require all sellers to warn the public that their products might break and to list all of the conceivable hazards which might result to the users if their products break, without regard to whether or not the risk of breakage and the consequences therefrom are discernible. The Federal Trade Commission Act imposes no requirement of disclosing the risks of breakage where those risks are obvious or apparent, for in such a case non-disclosure is not deceptive. We merely apply to the facts here the well-established rule that where breakage is likely to occur in the normal use of the product, and the hazards of such breakage are not apparent or obvious, at least to many consumers, non-disclosure of such risk is deceptive and therefore unlawful. The danger that the rubber string attached to the ball in the "Puncherino" toy will break and, in breaking, injure the user's eye may be obvious to a member of this Commission who has carefully examined the toy and heard extensive arguments and discussion on the question, but we do not think it is obvious to a young child who goes into a toy store and buys "Puncherino" with his dollar.

Most consumers expect and assume, in the absence of some indication to the contrary, that a product marketed to the general public is safe for the use for which it is sold. This assumption and expectation is, we think, especially widespread in the case of products in-

tended for the use of children. Few would imagine that any manufacturer would place on the market a dangerous toy without warning the purchaser of the danger. Thus, at least where the danger is not an obvious one immediately apparent even to the casual purchaser or user, it is an unfair and deceptive trade practice to market such a product without clear disclosure of the danger. "Puncherino" is a dangerous toy, and while the danger is obvious once one's attention is directed to it, we think there are very few purchasers, especially children, who would realize the danger before or at the time of purchase. Whether or not the Commission has the power to ban the sale in interstate commerce of unsafe products as such, it plainly has the power and the duty to prevent the sellers of such products from failing to disclose that they are unsafe, thereby unfairly and deceptively exploiting the consumer's normal expectation that a product placed on the market with no restriction whatever as to its sale is reasonably safe for its intended use.

Finally, respondents contend that there is insufficient evidence to support the examiner's finding that they have maintained a substantial course of trade in this toy product in commerce. Thus, they argue that the record fails to establish that there is sufficient public interest in this proceeding as required by Section 5(b) of the Federal Trade Commission Act.

This argument is without substance. The examiner found, and it is not disputed, that in 1961 and 1962, respondents sold about 378,240 units of this toy product. As of July 9, 1963, respondents had on hand approximately 141,398 units and an additional 190,944 units were stored in a bonded warehouse. Invoices in the record show sales of over 7,800 units of this toy in a few months in 1961 and 1962 from respondents' place of business in New York to customers located in New Jersey, Massachusetts, Pennsylvania and Wisconsin. These invoices are a sufficient indication of interstate sales to warrant a finding that such sales were substantial. Moreover, the extent of the public interest is not controlled entirely by the sales in commerce. In a proceeding such as this, which involves the failure to disclose risk of injury to the eyes through use of the product involved, there can be no doubt as to the interest of the public even though sales in commerce may be relatively small.

On the basis of the foregoing, respondents' appeal is denied. The initial decision is set aside and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

Commissioner Jones concurred in part and dissented in part, and has filed a separate opinion.

CONCURRING IN PART AND DISSENTING IN PART

By JONES, *Commissioner*:

I concur in the Commission's conclusion that a cease and desist order should issue against respondent by reason of the fact that respondent falsely represented in its display material and on the package containing respondent's toy that the goggles contained in the packaged toy have yellow glass or other protective material when in fact no such protective material is present.

I do not agree with the Commission's conclusion that respondent has further misrepresented its product because of its failure to make an affirmative statement on its package and display material that the goggles may fail to protect the user's eyes from injury caused by the possibility of the rubber string breaking and penetrating one of the open spaces between the vertical bars on the goggles.

Respondent has made no affirmative representation that its toy is either safe or nonbreakable or hazard-free in the event it does break. Thus it is respondent's *silence*, not its affirmative statements, about its products which is found by the Commission to be misleading. Deceptions by silence have heretofore been limited by the Commission and the courts to a narrow and definable range of situations. Thus sellers have been required to disclose the true properties of their products where the appearance of those products, absent disclosure, would mislead the public (e.g., simulated wood products which are in fact paper,¹ fabrics which look like wool but are in fact rayon,² or oil products which are not crude oil but in fact used oil³). Similarly, silence respecting the foreign origin of a product has been deemed misleading where the public will assume domestic origin absent disclosure.⁴ In the category of hazardous products—a situation most closely analogous to the Commission's decision here—sellers have been required to disclose the nature of any hazard attaching to the normal use of the product where such hazard is latent, *i.e.*, not apparent to or discernible by the purchaser. Thus the presence of toxic materials in a photographic film brush or in plastic

¹ *Haskelite Mfg. Corp. v. F.T.C.*, 127 F. 2d 765 (7th Cir. 1942).

² *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953).

³ *Mohawk Refining Corp. v. F.T.C.*, 263 F. 2d 818 (3d Cir. 1959), *cert. denied*, 361 U.S. 814 (1959).

⁴ *Segal v. F.T.C.*, 142 F. 2d 255 (2d Cir. 1944); *Manco Watch Strap Co., Inc., et al.*, 60 F.T.C. 495 (1962).

metal menders which can cause injury to the user in the course of his normal use of the product has been required to be disclosed.⁵ Similarly, sellers of plastic toy playhouses or of flammable rayon products were required to disclose the hazards of asphyxiation or fire which inhered in these products and which, absent disclosure, could not be known or detected by the purchaser.⁶

In the instant case, however, respondent's toy does not by its appearance convey any deceptive or false impression to the prospective customer about its safeness or nonbreakable properties. In fact every feature of the toy to which the Commission refers, *i.e.* the fact that the ball is affixed to the goggles by a rubber string and the fact that the rubber string is thin and might break, is clearly visible to the customer. Moreover, respondent not only placed a picture of the toy being used on its package but it sold its toy in a transparent envelope so that every customer was able to see the actual toy itself as well as the picture of how it was used.

The Commission, therefore, in reaching its conclusion respecting respondent's deception here, in my view is laying down a new rule despite its disclaimer of any such intention. Since I can conceive of no way by which respondent could have disclosed more vividly the exact properties of its toy which the Commission now claims are concealed and not detectable, I cannot agree that its decision here is merely following the established principle that where risks exist and are not discernible, nondisclosure of them is deceptive.

Accordingly, I am forced to conclude that if the Commission's instant interpretation of what constitutes deception in the sale of toys is followed by it in future cases, all sellers of children's toys will have to place an affirmative warning on their toys that the toys might break and that such sellers will, in addition, have to disclose all the conceivable hazards which might result to the users if their products break. This is manifestly an impossible burden to place on sellers. Nor is such a burden necessary to impose on sellers in order to protect consumers. Where, as here, the risks inhering in the use of respondent's toy are apparent from even the most casual inspection, the Commission should stay its hand. It is obvious that the Commission can never protect *all* consumers from their own inattention. Moreover, it is doubtful that these consumers who will not "pause to consider" the eventuality of the risks, even though apparent, will be likely to pause any more attentively to consider

⁵ *Nuclear Products Co.*, 49 F.T.C. 229 (1952); *The Martin-Senour Co.*, F.T.C. Docket C-209, August 31, 1962.

⁶ *Novel Mfg. Corp.*, 60 F.T.C. 1748 (1962); *Fisher & De Ritis*, 49 F.T.C. 77 (1952).

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such risks by reason of any additional statement concerning such risks which the Commission might require to be placed on the packaged toy. Yet these are the very consumers whose inattentiveness the Commission relies upon as the reason for requiring an affirmative disclosure.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on November 1, 1963, charging them with engaging in unfair and deceptive acts and practices and unfair methods of competition in the sale of a toy product. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of the allegations of the complaint were received into the record. Respondents did not introduce any testimony or other evidence in defense of the charges. In an initial decision filed on July 23, 1964, the hearing examiner found that the charges had been sustained by the evidence and issued his order to cease and desist.

The Commission having considered respondents' appeal from the initial decision and the entire record in this proceeding, and having ruled on said appeal, and having determined that the initial decision should be vacated and set aside, the Commission further finds this proceeding is in the public interest and now makes its findings as to the facts, conclusions and order, which together with the accompanying opinion, shall be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Stupell Originals, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1749 First Avenue, New York, New York. Said corporation trades under the names of Stupell Enterprises and Carole Stupell Exclusives, at the same address.

Individual respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

2. Respondents have been engaged in the offering for sale, sale and distribution of a toy product designated "Puncherino" to wholesale distributors, jobbers and retailers, for resale to the public. Total

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sales of said product during the years 1961 and 1962 amounted to approximately 378,240 units, having a total wholesale value of approximately \$71,900. As of July 9, 1963, respondents had on hand approximately 141,398 units of said toy product and an additional 190,944 units were stored in a bonded warehouse subject to withdrawal by respondents.

3. In the course and conduct of their business, respondents have caused said toy product, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States. Invoices in the record establish that during the years 1961 and 1962, respondents maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. The toy product "Puncherino" consists of a plastic ball which when inflated measures approximately 7 inches in diameter, to which is attached a rubber string. The other end of the string is attached to the center of a device shaped like goggles. The goggles are made of a rubberized plastic material and are intended to be worn over the upper part of the face, covering the eyes. The goggles do not contain any glass or transparent material in that portion which covers the eyes. Instead, in each section which covers the eyes there are four vertical bars, with spaces between them. The vertical bars are of the same material as the rest of the goggles, are about 1/16th of an inch in width, and are placed about 5/16ths of an inch apart.

5. When sold by respondents to wholesale distributors jobbers and retailers, and when resold to the public, the toy which includes the deflated plastic ball, the rubber string and goggles, is contained in a transparent plastic bag. Attached to the top of the package is a folded sheet of heavy paper approximately 4 x 7 inches in size. On the front of the paper is a depiction of a boy and a girl, each wearing the goggles and using the toy, and the following wording:

NEW PUNCHERINO FUN HEALTHY

6. The appeal of the toy "Puncherino" is principally to children. After the components have been removed from the container, the plastic ball inflated as directed, and the goggles placed on the face of the user, the ball is intended to be struck or punched rhythmically away from the face. The resiliency of the rubber string is intended to permit the ball, when struck, to travel away from the goggles and then retract toward the goggles.

7. The complaint charges that, by the use of certain statements and depictions, respondents have represented that said toy product is hazard-free and safe for use by the purchaser, including children. The complaint further charges that the container in which the toy is sold is misleading in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on the container.

8. Respondents do not deny the possibility of injury to the eyes of the user in case of breakage of the rubber string. Stipulated testimony establishes that two children, ages 6 and 7, sustained injury to their eyes as a result of the rubber string breaking and retracting through the space between the vertical bars of the goggles. There is similar stipulated testimony of an adult who was demonstrating the toy to his 6-year-old daughter. The testimony of two witnesses who are engaged in testing toys for private concerns further establishes the likelihood of injury to the eyes through the use of this toy.

9. On the paper attached to the package (CX 11 and Exhibit A) and on a display poster (CX 2), the goggles are pictured as containing yellow glass or other transparent protective material covering the eyes of the user. Additionally, on the goggles pictured on the package, the space between the vertical bars appears to be sufficiently narrow so as to prevent entry of the rubber string. By and through the use of these depictions, respondents have represented that the goggles afford protection to the eyes of the user in case of breakage of the rubber string. Such representations are false, misleading and deceptive.

10. In the package introduced by respondents' counsel, the goggles are visible. However, the possibility of the rubber string breaking is not readily apparent nor is such possibility likely to be considered by the prospective purchaser. Neither the manner in which the string is attached to the ball nor the fact that the string is made of rubber rather than some more durable material can be readily ascertained. Moreover, the prospective purchaser is unable to determine that no protective shielding for the eyepieces has been provided in the package.

This toy is offered to children and retails at one dollar or less. It is intended to be used in such a manner that the rubber string retracts toward the eyes of the user. In view of the intended use of the toy and the representations made, respondents' failure to disclose on the package that the goggles may fail to protect the user's eyes is misleading and deceptive.

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11. By and through the use of the foregoing practices, respondents have placed in the hands of retailers and others the means and instrumentalities for misleading and deceiving the public into believing that said toy product is safe for use by the purchaser.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Stupell Originals, Inc., a corporation, trading as Stupell Enterprises, Carole Stupell Exclusives, or under any other name, and its officers, and Carole Stupell and Harry Mervis, 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 a toy product designated "Puncherino," or any other product of similar construction or having substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that such toy product can be used without danger or risk of injury to the eyes of the user.

(2) Failing to clearly and conspicuously disclose on the package or container in which the toy product is sold that the use of such toy product involves a danger or risk of injury to the eyes of the user if the rubber string should break.

(3) Furnishing or placing in the hands of jobbers, retailers or dealers in said toy product the means and instrumentalities by and through which they may deceive or mislead the public in the manner or as to the things hereinabove prohibited.

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

Commissioner Jones concurring in part and dissenting in part.