IN THE MATTER OF

MIDWEST COLOR STUDIOS, INC., ET AL.

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

Docket C-1107. Complaint, Sept. 12, 1966—Decision, Sept. 12, 1966

Consent order requiring a Chicago firm selling color photographs through door-to-door coupon salesmen to cease using false quality claims and other misrepresentations to sell its pictures.

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 Midwest Color Studios, Inc., a corporation, and Frank J. Blum and Morris Projansky, 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 Midwest Color Studios, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4707 North Broadway, in the city of Chicago, State of Illinois.

Respondents Frank J. Blum and Morris Projansky are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

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

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Illinois to purchasers thereof located in various other

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their color photographs, the respondents and their agents engage in the acts and practices hereinafter set forth.

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

-14.95 VALUE LICENSED -14.95 VALUE

MIDWEST COLOR STUDIOS, Inc.
"Portraits in Natural Living Color"
4707 N. Broadway 784-6240
Chicago, Ill. 60640

Only one certificate per residence will be honored.
PAY AGENT $3.00-1 Child
$4.00-2 or More Children
$5.00-Family Group

BRANCH OFFICES THROUGHOUT THE UNITED STATES

This Certificate Entitles Bearer to Receive

One Beautiful 8 x 10 Color Portrait

INTRODUCTORY OFFER

DAY _____ DATE_____
TIME ____________

Colorful clothing suggested NO Pastels-Please

OUR CAMERAMAN IS PROMPT - PLEASE BE READY.

AGENT ____________

There is no other obligation.

THIS OFFER VALID ON ABOVE DATE ONLY AND IS LIMITED TO ONE CERTIFICATE TO EACH FAMILY. NO REFUND WILL BE MADE. MIDWEST STUDIOS INC. WILL NOT BE BOUND BY ANY REPRESENTATION OR AGREEMENT EXCEPT AS CONTAINED IN THIS CERTIFICATE. MAILING AND HANDLING CHARGE .75¢ ADDITIONAL. THIS AGENT IS SELF-EMPLOYED.

Additional portraits may be purchased at the time proofs are shown

LICENSED LICENSED

If the coupon salesman succeeds in selling the prospect a coupon he generally collects $3 or a somewhat larger or lesser amount. Thereafter, the customer is contacted by a photographer who takes a number of different poses of the subject or subjects to be photographed. After the exposed film has been developed into proof slides, the latter are turned over to a proof passer who exhibits them to the customer for selection. At this time, the proof passer attempts to, and often does induce the customer to place an order for additional photographs.

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

1. That their photographs will portray the true and natural living color of the eyes, hair, complexion and other characteristics of the person or persons photographed.

2. That the purchaser of the photograph incurs no other obligation or charges other than the amounts set forth in large type in the said coupons.

3. That they have a nationwide organization of studios having branch offices located throughout the United States.

4. That their finished photographs will be equal in appearance, quality and workmanship to sample photographs and proof slides exhibited to purchasers and prospective purchasers.

5. That proofs will be shown to customers in approximately two to four weeks from the date the person or persons are photographed.

6. That photographs ordered by customers will be delivered in approximately three to six weeks from the date the proofs are exhibited to them.

PAR. 6. In truth and in fact:

1. Although the photographs are colored in that they are not conventional black and white type, they do not portray the true and natural living color of the eyes, hair, complexion and other characteristics of the person or persons photographed.

2. The purchasers of the photograph do have other obligations than the payment of the amounts set forth in large type in that they are required to pay an additional mailing and handling charge of 50¢ or 75¢ which is set forth in inconspicuous small print at the bottom of the said coupons.

3. Respondents are not a nationwide organization having studios or branch offices located throughout the United States.

4. The photographs offered for sale and sold by respondents are inferior to those which purchasers and prospective purchasers are led to believe they will receive as a result of

viewing the sample photographs and proof slides exhibited by agents of respondents. In all instances the finished prints are far less brilliant and colorful than the samples and slides viewed by purchasers, and in many instances, there is a distortion of features or colors, or both.

5. Respondents do not show the proofs to customers within two to four weeks from the date the person or persons were photographed. In many instances, customers are forced to wait several months for the proofs, in spite of the promises of the agents of respondents.

6. Respondents do not deliver the photographs ordered by the customers within three to six weeks from the date the proofs were exhibited to them. In many instances, customers are forced to wait several months for delivery of photographs which have been fully or partially paid for.

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

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

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

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

DECISION AND ORDER

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

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

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

1. Respondent Midwest Color Studios, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4707 North Broadway, Chicago, Illinois.

Respondents Frank J. Blum and Morris Projansky are officers of the said corporation and their address is the same as that of the said corporation.

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

ORDER

It is ordered, That respondents Midwest Color Studios, Inc., a corporation, and its officers, and Frank J. Blum and Morris Projansky, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photographs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

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

2. That the purchaser of the photograph incurs no obligations or charges other than the purchase price specified on the certificate or otherwise represented by the respondents during the sale of said photographs: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the specified purchase price included all payment obligations incurred by the purchaser.

3. That respondents operate studios or branch offices throughout the United States, or otherwise misrepresenting in any manner the size of respondents' business.

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

5. That proofs will be shown to the customers or that photographs ordered by customers will be delivered within a specified period of time or upon a particular date: *Provided, however,* That it shall be a defense in any enforcement proceeding hereunder for respondents to establish that said proofs were shown and that said photographs were delivered within such time or upon such date; or misrepresenting, in any manner, the period of time within which the proofs will be exhibited or the photographs will be delivered.

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

IN THE MATTER OF

SHINYEI COMPANY, INC.

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

Docket C-1108. Complaint, Sept. 12, 1966—Decision, Sept. 12, 1966

Consent order requiring a New York City importer and distributor of fabrics to cease importing and selling fabrics which are so highly flammable as to be dangerous when worn by individuals, in violation of the Flammable Fabrics Act.

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 Shinyei Company, Inc., a corporation, hereinafter referred to as respondent, has 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 Shinyei Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

The respondent is engaged in the sale and distribution of fabrics, with its office and principal place of business located at 171 Madison Avenue, New York, New York.

PAR. 2. Respondent, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, has sold and offered for sale, in commerce; has imported into the United States; and has introduced, delivered for introduction, transported, and caused to be transported, in commerce; and has 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, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. The aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such constitute unfair methods of competition and unfair and deceptive acts and practices 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 respondent named in the caption hereof, and the respondent 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 respondent with violation of the Federal Trade Commission Act and the Flammable Fabrics Act; 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 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 respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent Shinyei Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 171 Madison Avenue, New York, 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 Shinyei Company, Inc., a corporation, and respondent's officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

(a) Importing into the United States; or

(b) 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 fabric which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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

FINDLAY FASHIONS, INC., ET AL.

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

Docket C-1109. Complaint, Sept. 13, 1966—Decision, Sept. 13, 1966

Consent order requiring a New York City manufacturer to cease misbranding its fur and wool products and falsely invoicing its furs.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Findlay Fashions, Inc., a corporation, and Abraham Schnapper and Abraham Greenbaum, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and 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 Findlay Fashions, Inc., is a corporation organized, existing and doing business under the laws of the State of New York.

Respondents Abraham Schnapper and Abraham Greenbaum are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 237 West 37th Street, New York, New York.

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

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

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

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

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

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

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

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

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

(e) Sample fur products used to promote or effect sales of fur products were not labeled to show the information required under the said Act and Regulations, in violation of Rule 33 of said Rules and Regulations.

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in such fur products.

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

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

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

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the

Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competion in commerce under the Federal Trade Commission Act.

PAR. 9. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, 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. 10. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act 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 wool products stamped, tagged, labeled or otherwise identified by respondents as 100% wool, whereas in truth and in fact said products contained substantially less than 100% wool.

PAR. 11. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain wool products with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool products, exclusive of ornamentation not exceeding 5 per centum of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool when the percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 12. 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 samples, swatches or specimens of wool products used to promote or effect sales of such wool products in commerce, were not labeled or marked to show the information required under Section 4(a) (2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in violation of Rule 22 of the aforesaid Rules and Regulations.

PAR. 13. The acts and practices of the respondents as set forth above in Paragraphs Ten, Eleven and Twelve 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 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, the Fur Products Labeling Act and the Wool Products Labeling Act of 1939; and

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

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

1. Respondent Findlay Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 237 West 37th Street, in the city of New York, State of New York.

Respondents Abraham Schnapper and Abraham Greenbaum are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

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

ORDER

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

A. Misbranding fur products by:

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

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

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

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

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

6. Failing to set forth information required under Sec-

tion 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

7. Failing to affix labels to sample fur products used to promote or effect sales of fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

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

3. Failing to set forth on invoices the item number or mark assigned to each such product.

It is further ordered, That respondents Findlay Fashions, Inc., a corporation, and its officers, and Abraham Schnapper and Abraham Greenbaum, individually and as officers of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding wool products by:

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

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

3. Failing to affix labels to samples, swatches or speci-

mens of wool products used to promote or effect sales of wool products, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(a) (2) of the Wool Products Labeling Act of 1939.

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

IN THE MATTER OF

WINN-DIXIE STORES, INC.

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

Docket C–1110. Complaint, Sept. 14, 1966—Decision, Sept. 14, 1966

Consent order prohibiting the seventh largest national retail grocery chain-store with headquarters in Jacksonville, Fla., from acquiring any retail food or grocery stores in the United States for a period of ten (10) years without the prior consent of the Federal Trade Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that Winn-Dixie Stores, Inc., has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, through its acquisition of the assets and business of Hill Grocery Company, Inc., and of certain assets of Colonial Stores Incorporated, and it appearing that a proceeding by the Commission in respect to such violations would be to the interest of the public, issues this complaint stating its charges as follows:

I

DEFINITIONS

1. "Food stores" are establishments primarily selling food for home preparation and consumption. This definition corresponds to Bureau of Census Major Group Classification No. 54.

2. "Grocery stores" are establishments primarily selling (1) a wide variety of canned or frozen foods, such as vegetables, fruits and soups; (2) dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, spices, sugar, flour, and crackers; and (3) other processed food and nonedible grocery items. In addition, these establishments often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats. This definition corresponds to Bureau of Census Industry Classification No. 541.

II

WINN-DIXIE STORES, INC.

3. Winn-Dixie Stores, Inc., is named a respondent herein and is hereafter referred to as "Winn-Dixie." It is a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 5050 Edgewood Court, Jacksonville, Florida.

4. The principal business of Winn-Dixie is the operation of grocery stores. In 1964, the company ranked seventh in sales among all grocery store chains in the United States, with sales of approximately $905 million. As of July 27, 1964, Winn-Dixie operated 631 retail grocery stores, of which 246 were located in Florida, 89 in North Carolina, 78 in South Carolina, 46 in Georgia, 37 in Louisiana, 77 in Alabama, 29 in Kentucky, 9 in Mississippi, 9 in Tennessee, 9 in Virginia, and 2 in Indiana.

Winn-Dixie has for many years enjoyed a substantial cash flow. During 1964, Winn-Dixie had available to it funds from net earnings of over $20 million and cash flow generated by depreciation and amortization of over $9 million.

5. Prior to July 30, 1962, Winn-Dixie operated 29 grocery stores in northern and central Alabama; including 3 grocery stores in Huntsville, 3 grocery stores in Tuscaloosa and 1 grocery store each in the cities of Florence, Selma and Sylacauga.

6. Winn-Dixie is and for many years has been engaged in commerce, as "commerce" is defined in the Clayton Act.

III

HILL GROCERY COMPANY, INC.

7. Hill Grocery Company, Inc., hereafter referred to as "Hill," was formerly a corporation organized and existing under the laws

of the State of Alabama, with its principal office and place of business located at 230 South 16th Street, Birmingham, Alabama.

8. Prior to July 30, 1962, when Winn-Dixie acquired substantially all of its assets, Hill operated 35 retail grocery stores in northern and central Alabama. For the year ended December 31, 1961, Hill's sales were approximaetly $38 million; its net profit was approximately $1 million; and its total assets exceeded $8 million.

9. Prior to July 30, 1962, Hill ranked first in sales among the grocery store companies in Birmingham, Alabama. It operated 23 grocery stores and accounted for some 15% of all grocery store sales in said city. Prior to July 30, 1962, Hill ranked among the leading grocery store companies in a number of other cities and towns in northern and central Alabama, including Selma, where it operated two grocery stores; in Huntsville, where it operated two grocery stores; and Florence, Sylacauga, and Tuscaloosa, in each of which it operated one grocery store.

10. Prior to July 30, 1962, and for some years past, Hill was engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

COLONIAL STORES INCORPORATED

11. Colonial Stores Incorporated, hereafter referred to as "Colonial," is a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business at 2251 north Sylvan Road, Atlanta, Georgia.

12. The principal business of Colonial is the operation of grocery stores. In 1963, the company ranked thirteenth in sales among all United States grocery chains, with sales of approximately $460 million. At the end of 1963, Colonial operated 446 grocery stores in ten Southeastern and Midwestern states. Colonial has for many years enjoyed a substantial cash flow.

13. Prior to March 4, 1964, when Winn-Dixie acquired Colonial's Birmingham stores, Colonial operated nine grocery stores in that city, ranking sixth among all grocery store chains in Birmingham and accounting for 5.2% of all Birmingham grocery store sales.

14. Colonial is and for many years has been engaged in commerce, as "commerce" is defined in the Clayton Act.

V

NATURE OF TRADE AND COMMERCE

A. *Generally*

15. Food stores account for the largest single segment of retail trade in the United States. In 1963, food store sales were approximately $57 billion, or 23% of all retail trade in the United States. Grocery stores account for by far the largest portion of food store sales. In 1963, the 245,000 grocery stores in the United States represented 77% of the number of food store establishments, and their $55 billion in sales represented over 92% of all food store sales.

16. Grocery stores are recognized as a separate class of retail establishment, distinguished by their trade in a wide variety of food and other high-volume low-markup consumer goods.

17. Concentration in the grocery store industry is high and has been steadily increasing. Between 1949 and 1958, the number of food stores in the nation declined from 350,000 to 245,000. During the same period the share of grocery store sales accounted for by the top twenty companies increased from 26% in 1948 to 34% in 1958. By 1963, the top twenty had increased their share to 37% of all grocery store sales in the United States.

18. Mergers and acquisitions have been responsible for a substantial portion of the increase in concentration in the grocery store industry. Between 1949 and 1958 alone, the nation's top twenty grocery store companies acquired 147 companies operating 1,600 grocery stores with sales of $1.5 billion.

19. The competitive impact of mergers and concentration in the grocery store industry, and of the growth of national chains, has been felt both in local and regional markets on both the selling and buying side of the market.

One of the significant effects of the merger movement and the trend toward concentration in the grocery store industry has been that mergers have become a substitute for the entry of new competition. The merger movement has eliminated potential competition, has tended to remove the threat of entry and the restraining influence which entry has upon noncompetitive behavior, and has tended to discipline the market behavior of smaller competitors reluctant to enter into competitive warfare with chains many times their size and with many times their resources. The merger movement and the trend toward concentration have tended to bring about a deterioration of competition among grocery store chains which face one another in several markets.

On the buying side of the market, suppliers have tended to favor the large chains, including Winn-Dixie, with preferences and advantages over other purchasers by reason of the chains' economic power as large buyers. The merger movement and the trend toward concentration have also weakened the ability of independent grocery store chains to compete and have tended to precipitate additional acquisitions and mergers and the disappearance of such independent chains from the grocery store and food store industries.

20. Winn-Dixie has been in the forefront of the food store and grocery store merger movement. Winn-Dixie alone accounted for some 15% of the $1.5 billion in food store sales acquired between 1949 and 1958, ranking second both in total sales of acquired stores and number of stores acquired. Winn-Dixie has demonstrated a continuing proclivity for the acquisition of other grocery store companies. Between 1954 and 1964, Winn-Dixie acquired the following grocery store companies:

Year	Company Whose Stores Were Acquired	Location	Number of Stores Acquired
1954	Wylie Company	Anniston, Alabama	8
1955	The Penny Stores, Inc.	Meridian, Mississippi	8
1955	Edens Food Stores	South Carolina	33
1955	Ballentine Grocery Stores	South Carolina	15
1955	Dixie Home Stores	North and South Carolina	117
1956	Ketner-Milner Stores, Inc.	North Carolina	24
1956	H. G. Hill Stores, Inc.	New Orleans, Louisiana	42
1958	Southside Markets, Inc.	Louisville, Kentucky	2
1958	George's Inc.	Martinsville, Virginia	2
1959	Anderson's Super Markets	Elizabethtown, Tennessee	2
1960	Guyton Food Stores	Wilmington, North Carolina	2
1962	Marsh Supermarkets*	North Carolina	6
1962	Hill Grocery Co.	Birmingham, Alabama	35
1962	Stop & Shop*	Louisville, Kentucky	1
1964	Colonial Stores*	Birmingham, Alabama	9

(*Partial acquisition)

21. A substantial portion of Winn-Dixie's growth in sales between 1954 and 1964 was the direct result of acquisitions which contributed to the increasing concentration in the grocery store industry described above. Winn-Dixie sales more than quadrupled between 1954 and 1964. Acquisitions accounted for one-third of the total increase in Winn-Dixie's sales during the period.

B. *The Local Markets*

22. *Birmingham.* Birmingham is one of the South's largest industrial cities, ranking as the nation's 24th largest city in 1960. It has demonstrated steady expansion, both in terms of population and economic development. Although Winn-Dixie did not operate any stores in Birmingham prior to 1962, it did operate stores in several nearby markets, such as Tuscaloosa, Sylacauga and Huntsville.

23. In 1962, when Winn-Dixie acquired the Hill stores, Hill ranked first in sales among Birmingham grocery store companies. The following year, the Winn-Dixie-Hill stores in Birmingham accounted for about 15% of all grocery store sales and about 14% of all food store sales in that city.

24. A significant degree of concentration exists in the grocery store business in the city of Birmingham. In 1963, the two leading grocery store chains, including first ranking Winn-Dixie-Hill, accounted for approximately 28% of all grocery store sales, while the leading four chains accounted for approximately 47% of such sales.

25. In 1963, the year before Winn-Dixie acquired Colonial's Birmingham grocery stores, Colonial was the sixth ranking grocery store company in that city, accounting for about 5 percent of all grocery store sales. As a result of the acquisition from Colonial, Winn-Dixie strengthened its leading position to about 20% of all grocery store sales in Birmingham. At the same time, the concentration of grocery store sales by the two leading chains was increased to approximately 34%, and by the leading four chains to approximately 53%.

26. *Huntsville.* Huntsville is among the most rapidly expanding markets in the State of Alabama, both in terms of population and sales. In the decade between 1954 and 1958, grocery store sales nearly tripled in the city of Huntsville and in the Huntsville Standard Metropolitan Area (Madison and Limestone Counties, Alabama). Despite this growth in market opportunities, concentration in the grocery store business increased substantially: the top four grocery store companies increased their share of grocery store sales in the Huntsville Standard Metropolitan Statistical Area from 31% in 1954 to 50% in 1963.

27. In 1962, when Winn-Dixie acquired Hill, Winn-Dixie was already by far the leading grocery store company in the city of Huntsville, operating three grocery stores and accounting for about 22% of all grocery store sales. Hill ranked second, operating

two grocery stores and accounting for about 14% of all such sales. As a result of the acquisition of Hill, Winn-Dixie strengthened its leading position to approximately 36% of all grocery store sales in the city of Huntsville. At the same time, concentration among the two leading grocery store companies was raised to approximately 44%. The corresponding data for the two-county Huntsville Standard Metropolitan Statistical Area show a similar increase in market position and concentration.

28. *Other Local Markets.* In 1962, when Winn-Dixie acquired Hill, both companies operated grocery stores in three other local markets in Alabama. In Sylacauga, Alabama, Hill and Winn-Dixie ranked second and third, respectively. As a result of its acquisition of Hill, Winn-Dixie gained the leading position in Sylacauga, increasing its share of food store sales from about 16% to about 37%. In Selma, Alabama, Hill and Winn-Dixie ranked third and fourth, respectively. As a result of its acquisition of Hill, Winn-Dixie gained the leading position in Selma, accounting for about 17% of all food store sales in the city. Winn-Dixie also gained the leading position in Tuscaloosa, Alabama, by its acquisition of Hill, increasing its sales to about 18% of all food store sales in that city.

VI

VIOLATION OF THE CLAYTON ACT

29. On July 30, 1962, Winn-Dixie acquired substantially all of the assets of Hill Grocery Company, Inc., as a going business for a cash consideration of approximately $8.6 million.

30. On March 4, 1964, Winn-Dixie acquired the assets and retail grocery store business of Colonial Stores Incorporated located in Birmingham, Alabama, for a cash consideration of $621,469.

31. The effect of the acquisitions from Hill Grocery Company, Inc., and Colonial Stores Incorporated, as described above, separately, and as the latest in a series of acquisitions described in paragraph 20, may be substantially to lessen competition or to tend to create a monopoly in the food store business or grocery store business throughout the United States or portions thereof, in violation of Section 7 of the Clayton Act, as is more fully described below in paragraph 32.

VII

EFFECTS OF VIOLATIONS CHARGED

32. The effects of the foregoing violations have been or may be the following, among others:

(a) Substantial actual competition between Winn-Dixie and Hill has been eliminated in Birmingham, Huntsville, Sylacauga, Tuscaloosa, Selma and Florence in the State of Alabama;

(b) Substantial actual competition has been eliminated between Winn-Dixie and Colonial in Birmingham, Alabama.

(c) Substantial potential competition between Winn-Dixie and Hill, and between Winn-Dixie and Colonial, has been, or may be, eliminated throughout the State of Alabama and in portions thereof;

(d) The combination of the assets and business acquired from Hill Grocery Company, Inc., and Colonial Stores Incorporated, as well as from other earlier acquisitions, may so increase Winn-Dixie's facilities, technology, financial and market strength as to provide decisive competitive advantages over the remaining independent food store and grocery store operators.

(e) New entry into the food store or grocery store industries in the State of Alabama or in portions thereof may be inhibited or prevented.

(f) Other acquisitions in the food store and grocery store industries in the United States or sections thereof relevant herein may be encouraged or stimulated, thus multiplying the competitive impact of the acquisitions challenged herein. Also, the food store industry and the grocery store industry may thereby be transformed or further transformed from ones comprised of viable, independent locally owned businesses into concentrated industries comprised of national chains.

(g) The acquisitions challenged herein contribute to the over-all trend toward concentration and oligopoly in the food store and grocery store industries described in paragraphs 17 and 18, and thus tend further to bring about the deterioration of the vigor of competition described in paragraph 19.

(h) The members of the consuming public in the sections of the county relevant herein, and throughout the United States, will be denied the benefits of free and unrestricted competition in the food store and grocery store industries.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, to wit: the acquisition of Hill Grocery Company, Inc., and of certain assets of Colonial Stores Incorporated; and the respondent having been furnished thereafter with a copy of a draft of complaint by the Bureau of Restraint of Trade and which draft of complaint, if approved and issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended; 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 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 respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated Section 7 of the Clayton Act, as amended, 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 Winn-Dixie Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 5050 Edgewood Court, Jacksonville, Florida 32203.

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

ORDER

It is ordered, That for ten (10) years from the effective date of this order, respondent shall not, without the prior approval of the Federal Trade Commission, make any acquisition, directly or indirectly, of any retail food or grocery stores in the United States.

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

IN THE MATTER OF

AMERICAN BAKERIES COMPANY

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

Docket C-1111. Complaint, Sept. 14, 1966—Decision, Sept. 14, 1966

Consent order prohibiting one of the Nation's largest wholesale baking companies with headquarters in Chicago from acquiring any domestic producer or seller of bakery products for the next 10 years without prior approval of the Federal Trade Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Bakeries Company has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, through its merger with Langendorf United Bakeries, Inc., issues its complaint charging as follows:

I

DEFINITIONS

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

(a) Bread and bread-type rolls (Bureau of the Census Standard Industrial Classification (S.I.C.) product class 20511): Includes white pan and hearth bread, variety and special breads, such as whole and cracked wheat, rye, raisin, etc.; it also includes hamburger, weiner, kaiser, parkerhouse, brown-and serve rolls, etc. Excluded are sweet yeast items such as sweet rolls, coffee cakes, soft cakes such as pound, layer and fruit, pies, pastries, cookies and doughnuts; biscuits, crackers, pretzels and other "dry" bakery products; frozen bakery products; and chips (potato, corn, etc.).

(b) Perishable bakery products industry (S.I.C. Industry 2051): Includes establishments primarily engaged in manufacturing bread and bread-type rolls, cakes, pies, doughnuts, sweet goods and hand-made cookies. Excluded are establishments primarily engaged in producing biscuits, crackers, pretzels, hard cookies and other "dry" and semiperishable products (S.I.C 2052), frozen bakery products and chips (potato, corn, etc.). Also excluded are establishments manufacturing bakery products primarily for direct sale on the premises to household consumers (classified by the Bureau of the Census as Retail Trade, Industry 5462). The perishable bakery products industry is composed of four sub-industries: wholesale bakeries, grocery chain bakeries, home service bakeries and retail multi-outlet bakeries.

(c) *Wholesale bakeries* (S.I.C. Sub-industry 2051–02): Bakeries selling chiefly at wholesale to other business concerns, including grocers, restaurants, hotels, institutions, and other establishments buying products for resale.

(d) *Grocery chain bakeries* (S.I.C. Sub-industry 2051–03): Bakeries owned and operated by grocery chain store companies and distributing their products through retail grocery stores owned by the same company.

(e) *Home service bakeries* (S.I.C. Sub-industry 2051–04): Bakeries selling chiefly through retail home service routes.

(f) *Retail multi-outlet bakeries* (S.I.C. Sub-industry 2051–06): Retail bakeries selling chiefly through non-baking outlets operated by the same company.

II

AMERICAN BAKERIES COMPANY

2. Respondent, American Bakeries Company, hereafter "American," is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Ten South Riverside Plaza, Chicago, Illinois 60606.

3. The principal business of American is the baking and wholesale distribution of bread and bread-type rolls and cake under the advertised brand names "Taystee," "Merita," "Cookbook," and "Dressel's." American owns and operates 48 baking plants in 45 cities. In 1963, American had total sales of approximately $170 million, of which approximately 72% was bread and bread-type rolls. As of December 28, 1963, American had total assets in excess of $53 million.

4. In 1953, Purity Bakeries Corporation merged with American Bakeries Company. Purity Bakeries Corporation, the surviving company, thereupon changed its name to American Bakeries Company.

5. American's acquisitions and mergers subsequent to the merger in 1953 of Purity Bakeries Corporation and American Bakeries Company are as follows:

Name of Bakery	No. of Plants Acquired	Year Acquired
Stella Baking Company, Danville, Illinois.	1	1959
Matthew Bros., Corp., Wethersfield, Connecticut.	1	1960
Connecticut Pie Co., Wethersfield, Connecticut.	1	1960
Atlas Baking Company, Richmond, Virginia.	1	1962
Grable's Bakeries, Inc., Miami, Florida.	1	1963
Dressel Bakeries, Inc., Chicago, Illinois.	3	1963
Mrs. Hackel's Bakery, Inc. Chicago, Illinois.	1	1964
Langendorf United Bakeries, Inc., San Francisco, California.	18	1964

6. At the time of its merger with Langendorf, American was growing in size and widening the geographic boundaries of its operations.

7. At all times relevant herein, American has been engaged in commerce within the meaning of the Clayton Act.

III

LANGENDORF UNITED BAKERIES, INC.

8. Prior to its merger with American on May 21, 1964, Langendorf United Bakeries, Inc., hereafter "Langendorf," was a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 1160 McAllister Street, San Francisco, California 94100.

9. At the time of the merger, Langendorf's principal business was the baking and wholesale distribution of bread and bread-type rolls, cake and cookies under various advertised brand names, the principal ones of which were: "Langendorf," "Butter Nut," "Holsum," "Barbara Ann," and "Jordan." At the time of the merger, Langendorf operated 18 bakery plants in the Pacific Coast States of California, Oregon and Washington. Eleven of these plants were engaged in the production and sale of bread and bread-type rolls and were located in the following cities: San Francisco, Berkeley, San Jose, Los Angeles, Bell Gardens and San Bernardino, California; Portland, Oregon; and Seattle,

Washington. In 1963, Langendorf was the seventh largest wholesale bakery company in the United States and had total sales of approximately $75 million, of which approximately 70% was bread and bread-type rolls. As of December 28, 1963, its total assets were approximately $18 million.

10. Langendorf's acquisitions and mergers, beginning with the year 1950, are as follows:

Name of Bakery	No. of Plants Acquired	Year Acquired
Hol-Grain Products Co. Seattle, Washington.	1	1950
Keller Baking Co., Portland, Oregon.	1	1952
Grandma Baking Co., Oakland and Los Angeles, California.	2	1955
Peerless Baking Co., San Luis Obispo, California.	1	1955
Cities French Bakeries, Berkeley, California.	1	1956
Jordan Baking Co., Tacoma, Washington.	1	1956
Ruth Ashbrook Bakery of San Francisco San Francisco, California.	1	1958
Golden Crust Bakery, d/b/a Valley Queen Bakery, Watsonville, California.	1	1962

11. Prior to its merger with American, Langendorf was growing in size and widening the geographic boundaries of its operations. It was a financially sound and profitable company.

12. Until its merger into American, Langendorf was engaged in commerce within the meaning of the Clayton Act.

IV

TRADE AND COMMERCE

13. The perishable bakery products industry is one of the most important of the food industries. Bread and bread-type rolls alone account for more than three percent of the average household weekly food budget.

14. Wholesale baking makes up the largest segment of the perishable bakery products industry. In 1958, wholesale bakeries accounted for 76% of the total sales of perishable bakery products; grocery chain bakeries accounted for approximately 10% and home service and retail multi-outlet bakeries accounted for the rest.

15. Bread and bread-type rolls alone make up over 60% of the

production of the perishable bakery products industry and were the principal products of both American and Langendorf.

16. Wholesale bakeries sell almost all of their bread and bread-type rolls through route delivery systems. The distance the products are shipped is limited by the necessity for freshness and by the distance a driver or route salesman can cover and return to the plant in one day. A wholesale bakery's distribution area can in some circumstances be extended through the use of loading stations where bread and bread-type rolls can be delivered to the route trucks on large semi-trailers. The maximum distribution radius thus attainable is approximately 150–300 miles.

17. Sale of bread and bread-type rolls by wholesale bakeries to grocery stores and supermarkets is generally made on a consignment basis. The baker's route salesman delivers fresh goods and picks up and credits the grocer or supermarket operator with the amount of the unsold goods or "stale." The "stale" is returned to the plant for disposal at reduced prices through "thrift" or "day old" stores or for sale as animal feed.

18. Technological and other changes are increasing both the optimum size for a baking plant and the minimum size operation necessary for continuing operation as a viable enterprise. The baking industry has thus seen and can look forward to a further decrease in the total number of establishments.

19. Since 1947 concentration in the perishable bakery products industry has increased substantially. The share of total value of shipments of the perishable bakery products industry in the United States held by the four and eight largest firms is set out below for the years 1947, 1954, 1958 and 1962.

	1947 %	1954 %	1958 %	1962 %
Four Largest	16	20	22	25
Eight Largest	26	31	33	35

Concentration in local areas is far higher and is increasing.

20. A large part of this increase in concentration has been due to acquisitions by large wholesale baking companies. Since 1950 the eight largest wholesale baking companies in the United States have acquired over 60 independent baking companies which operated over 100 plants. Both American and Langendorf made several acquisitions and mergers which are set out at paragraphs 5 and 10 above, and thereby contributed substantially to this trend toward concentration.

21. The Pacific Coast as a whole (the States of California, Oregon and Washington) and the State of California alone represent the most rapidly expanding consumer markets in the United States. The State of California showed a greater absolute increase in population between 1950 and 1960 than any other State in the United States.

22. Since 1950, the number of local and regional bakeries on the Pacific Coast of the United States has declined substantially.

23. The acquisition of other bakers operating on the Pacific Coast by the larger wholesale bakers has contributed substantially to the increase in concentration in the perishable bakery products industry.

24. Prior to the merger of American and Langendorf, the wholesale baking industry on the Pacific Coast comprised Langendorf, which was a strong regional firm, three large national or multi-regional wholesale bakers (Continental Baking Company, Campbell Taggart Associated Bakeries, Inc., and Interstate Bakeries Corp.) and a number of small, predominantly single plant firms.

25. In 1962 Langendorf was the leading producer of bread and bread-type rolls on the Pacific Coast with 16% of the shipments in the Pacific Coast States. Although its plants served only portions of the States of California, Oregon and Washington, Langendorf had 16.3%, 8.2% and 20.4%, respectively, of the sales of bread and bread-type rolls in those States. Its position in local markets was even more substantial. Langendorf's percentage share of the wholesale sales of bread and bread-type rolls in 1962 was approximately 20.9% in California, 10.5% in Oregon, 26.2% in Washington and 20.5% in the Pacific Coast States combined. Continental, Campbell Taggart and Interstate accounted for 41% of the wholesale sales of bread and bread-type rolls on the Pacific Coast in 1962 and ranked second, third and fourth on the Pacific Coast and first, second and fifth among wholesale bakers of bread and bread-type rolls in the United States.

26. Prior to the merger with Langendorf, American was a likely entrant and potential competitor in the Pacific Coast States. It was the third largest wholesale baker in the United States. It was the largest wholesale baker which did not operate on the Pacific Coast and was the most probable wholesale baker to seek entry into that concentrated market.

27. After the merger of American and Langendorf, the four

leading wholesale bakers of bread and bread-type rolls on the Pacific Coast were all multi-plant firms selling in a large number of States outside of, as well as on the Pacific Coast. Among all wholesale bakers in the United States they ranked first, second, third and fifth. Together these firms accounted for approximately 62% of the wholesale sales of bread and bread-type rolls and 48% of all sales of bread and bread-type rolls in the Pacific Coast States.

28. In any given marketing area, comparable products of different bakers will be similar in taste, texture and quality. Wholesale bakers attempt to differentiate their product and create consumer demand through advertising and promotion.

29. The sale of bread and bread-type rolls in grocery stores and supermarkets is strongly influenced by the size and location of display. Various point-of-sale promotional devices are utilized by wholesale bakers, and frequently concessions and inducements are offered by wholesale bakers to obtain preferable location and larger areas for display of their products.

30. Multi-plant, geographically diversified wholesale bakers are better able than their smaller competitors to create consumer demand for their products through advertising and promotion and are in a better position to offer inducements and concessions, such as cash payments, services, free racks, free goods, discounts, allowances and rebates, in order to obtain customers in local markets.

31. The tendency of the consumer to pick bread from the largest display of bread is frequently exploited by some wholesale bakers by over-stocking store shelves with bread of their manufacture, a practice known variously as "plugging" or "slugging the market," "rack loading" or "crowding." This practice results in larger stale returns and short-term decreased profits or losses to the baker engaging in the practice. Other bakers must respond in kind or accept decreased sales and possible loss of shelf space.

32. Multi-plant, geographically diversified wholesale bakers are particularly able to engage in "plugging the market" to the disadvantage of local or less geographically diversified firms which cannot bear decreased profits or losses in their limited markets for extended periods.

33. The ability of large, multi-plant wholesale bakers to absorb high stale returns, grant large concessions and inducements and create strong consumer preference for their brands have raised

substantial barriers to entry of new firms of expansion of existing firms.

34. In the wholesale baking sub-industry the substitution of large national multi-plant companies for smaller local or regional firms has increased the ability of the larger firms to discipline the market behavior of smaller competitors reluctant to enter into competitive warfare with a baker many times their size and with many times their financial resources, and has tended to bring about a deterioration in the vigor of competition among those multi-plant bakers which face one another in several markets.

35. The increasing barriers to entry in the perishable bakery products industry, the increasing degree of concentration (resulting largely from acquisitions and mergers) and the decline in the total number of competitors in this industry have increased the importance of preserving strong regional competitors such as Langendorf, since it is these firms that are best able to compete with the largest national companies.

V

VIOLATION OF SECTION 7 OF THE CLAYTON ACT

36. On May 21, 1964, Langendorf was merged into American through an exchange of stock. Immediately prior to the merger all outstanding shares of Langendorf's stock, common and preferred, had an aggregate value in excess of $16 million.

37. The effect of the merger of Langendorf into American may be substantially to lessen competition or to tend to create a monopoly in the production and sale, and particularly the wholesale sale, of bread and bread-type rolls in the nation, the Pacific Coast States as a whole, the States of California, Oregon and Washington individually, and certain metropolitan areas within said States, in the following ways, among others:

(a) American and Langendorf have each been eliminated as potential entrants into each other's markets.

(b) The restraining influence upon noncompetitive behavior in the Pacific Coast States which existed by reason of the potential entry of American has been eliminated.

(c) Barriers to entry have been further increased.

(d) Langendorf has been eliminated as an independent competitive factor.

(e) Concentration has been preserved and increased.

(f) Existing competitors may restain their competitive efforts for the reasons set out in paragraph 34 above.

(g) Other acquisitions in the baking industry may be encouraged or stimulated, thus multiplying the competitive impact of the instant acquisition.

(h) The members of the consuming public will be denied the benefits of free and unrestricted competition in the production and sale, and particularly in the wholesale sale, of bread and bread-type rolls.

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the 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 American Bakeries Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Ten South Riverside Plaza, in the city of Chicago, State of Illinois, 60606.

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

ORDER

I

It is ordered, That for ten (10) years from the date this Order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal

Trade Commission, any part of the share capital or other assets of any firm, partnership or corporation engaged in the production or sale of bakery products (United States Bureau of Census SIC Codes 2051 and 2052) in the United States.

II

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this Order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this Order.

IN THE MATTER OF

ROYAL OIL CORPORATION ET AL.

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

Docket 6702. Complaint, Jan. 8, 1957—Decision, Sept. 19, 1966

Order reopening and modifying an earlier order, 54 F.T.C. 1292, dated April 7, 1958, requiring a marketer of lubricating oil to cease advertising its product without disclosing that the oil is re-refined or reprocessed, by ordering that such disclosure be made on the front panel or panels of the containers.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Commission on April 7, 1958 [54 F.T.C. 1292], having issued its order to cease and desist against respondents herein providing in part as follows:

> *It is ordered,* That respondent Royal Oil Corporation, a corporation, and its officers, and respondent Irving H. Weil as an officer of said corporate respondent, and respondents Alden C. Jocelyn (erroneously referred to in the complaint as Alden C. Jocelin) and Joseph A. Inciardi, individually and as officers of said corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is

defined in the Federal Trade Commission Act, of lubricating oil, do forthwith cease and desist from:

(1) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container;

(2) Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes, has been manufactured from oil that has not been previously used.

And the Commission having on August 9, 1966, served upon respondents its order to show cause why this proceeding should not be reopened and Paragraph (1) of its order of April 7, 1958, be modified to require a statement of the oil's prior use on the front panel or panels of the oil containers, and

Respondents by their attorney in their answers dated August 20, 1966, and September 8, 1966, having stated that they have no objection to the rewording of the order as proposed in the Commission's order to show cause, and

The Commission being of the opinion that the public interest will be best served by modifying its order of April 7, 1958,

It is ordered, That the proceeding herein be, and it hereby is, reopened and the Commission's order of April 7, 1958 [54 F.T.C. 1292], be, and it hereby is, modified by substituting the following paragraph for Paragraph (1) contained in that order:

(1) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels of the container.

Certification of Record

IN THE MATTER OF

SHIP 'n SHORE, INC., ET AL

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

Docket 8161. Complaint. Nov. 4, 1960—Decision, Sept. 19, 1966

Order modifying an earlier order dated May 16, 1961, 58 F.T.C. 757, which prohibited an Upland, Pa., manufacturer of women's and children's clothing from falsely advertising and labeling certain of its textiles as "madras," by providing that if the fabric does resemble the India madras cloth the term "madras" may be used in any nondeceptive phrase or statement. The order also dismisses the complaint as to individual respondent William Netzky.

CERTIFICATION OF RECORD WITH FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS THEREON, IN CONFORMITY WITH COMMISSION'S ORDER DIRECTING HEARINGS ISSUED MARCH 11, 1966

AUGUST 9, 1966

By petition filed on January 7, 1966, respondents requested that this proceeding be reopened and the order to cease and desist, heretofore issued by the Commission on May 16, 1961, be set aside. In the alternative, respondents requested that they be granted a hearing on their request pursuant to § 3.28(b) (3) of the Rules of Practice. Additionally, the individual respondent requested that the order be set aside as to him in his individual capacity. The Director, Bureau of Deceptive Practices, filed an answer in opposition to the petition.

Upon consideration of the petition to reopen the proceeding and set aside the cease and desist order now in effect therein, the Commission concluded that the pleadings raised substantial factual issues and granted respondents' alternative request for a hearing on the issues presented.

The Commission's decision of May 16, 1961, was based on an agreement containing a consent order. By the terms thereof, respondents agreed to cease and desist from:

> Using the word "madras" or any simulations thereof, either alone or in connection with other words to designate, describe, or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes.

In the petition for reopening, respondents contend that factual conditions have changed to the extent that the public no longer understands the term "madras" to have the meaning ascribed in the order, and that among the purchasing public it is now commonly accepted that the word "madras" is applied to the plaid design scheme of fabric, regardless of whether the fabric is domestic or imported, colorfast or bleeding.

Under the terms of the Commission's order issued March 11, 1966, granting respondents' alternative request for a hearing, the matter was assigned to the undersigned hearing examiner to receive evidence in support of, and in opposition to, respondents' allegation that a change of law or fact, or the public interest, requires: (1) that the order to cease and desist be altered, modified or set aside, and (2) that the order be set aside as to the individual respondent. Said order further provided that the hearing be conducted in accordance with Part 3, subparts C, D, E, and F of the Rules of Practice.

A hearing was held on respondents' petition on June 7, 1966, in Washington, D.C., which had the effect of denying a request for postponement filed on May 31, 1966, on behalf of the Government of India. At the outset of the hearing counsel supporting the complaint and counsel for respondents announced that they had agreed upon a proposed modification of the cease and desist order presently in effect in this proceeding with respect to respondents' use of the word "madras." The modification, as proposed, was formalized in a written "Stipulation and Agreement Containing Proposed Order," dated June 7, 1966, signed by counsel and submitted as Commission Exhibit No. 1.

Under this Stipulation, the following form of order would be entered by the Commission in lieu of Paragraphs 1 and 2 of the order issued by the Commission on May 16, 1961, now in effect, to wit:

1—Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes; provided, however, that the word "madras" may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated.

2—Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in "1," above.

It is seen that the modification of the presently effective order as proposed in the Stipulation does not change or modify the definition or meaning of "madras" as set out in recent decisions of the Commission, but merely adds to the present order a proviso "that the word 'madras' may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated." This provision only incorporates the salient points of the "Statement on Use of the Term Madras" contained in the Commission's News Release on June 26, 1965. The addition of this provision to "1" of the present order would be proper and comport with the public interest.

After the submission of such "Stipulation and Agreement Containing Proposed Order," designated Commission Exhibit No. 1, the hearing proceeded and oral testimony was received from the individual respondent William Netzky with respect to his request that the order to cease and desist be set aside as to him, individually. Proposed findings of fact, conclusions of law, and briefs thereon have been filed by respective counsel. All proposed findings and conclusions not specifically found or concluded herein are rejected. Upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law based thereon, and recommendations:

FINDINGS OF FACT

1. Respondent Ship 'n Shore is a corporation existing and doing business under the laws of the State of Pennsylvania, with its office and place of business located in the city of Upland, Pennsylvania. The corporation has been in business for approximately 50 years and formerly had the name Susquehanna Waist Company. Later, the corporate name was changed to Ship 'n Shore (Tr. 45).

2. Ship 'n Shore is a manufacturer of women's blouses, shirts, knitted shirts, shifts and various types of sportswear. Ship 'n Shore sales range between $25 million and $30 million per year. The company's net worth is in excess of $5 million (Tr. 46).

3. Ship 'n Shore is a closed company whose capital stock is

owned by a relatively small number of individuals. The individual respondent William Netzky is president and a member of the board of directors of the corporate respondent Ship 'n Shore, and is the owner of less than 25 per cent of its capital stock (Tr. 45, 58). The respondent William Netzky has been associated with the company approximately 34 years and it has been his only employer over that period of time (Tr. 53, 56). No member of Netzky's immediate family owns any stock in the company nor is employed by it (Tr. 45, 53, 59).

4. As president of Ship 'n Shore, Inc., Netzky's principal duties are the general administrative supervision of all departments of the company, and he devotes special attention to the financial and marketing aspects of the business (Tr. 47).

5. Ship 'n Shore, Inc., does not maintain an advertising department. All of its advertising is handled by the Mervin and Jesse Levine Agency, an advertising agency located at 1270 Avenue of the Americas, New York, New York. This agency has been handling Ship 'n Shore advertising for 35 years (Tr. 46, 48).

6. Ship 'n Shore's annual budget for advertising and publicity is approximately $1¼ million (Tr. 54). Decisions with respect to advertising the company's products are not made by the individual respondent Netzky, but are made by committees, composed of the officers and their assistants in the various departments of the company, in consultation with representatives of Ship 'n Shore's advertising agency (Tr. 49).

7. The individual respondent William Netzky does not prepare or select the wording contained in company advertising, nor does he direct that any particular words or phrases be used in company advertising (Tr. 59).

8. The individual respondent William Netzky does not control Ship 'n Shore, Inc.'s, advertising, and any participation therein by him is solely in his capacity as a corporate officer. His participation in the supervision of the general business affairs of the corporate respondent is not as an individual but in his official capacity as president of the corporate respondent (Tr. 53–54).

CONCLUSIONS

1. Upon the basis of the entire record it is concluded that modification of Paragraph 1 of the cease and desist order in the form proposed by counsel in the Stipulation (CX No. 1) would be an appropriate disposition of respondent's petition to reopen and set aside the consent order herein, and would satisfy any objections

by the Government of India as to the use of the word "madras." Such a modification merely carries out the recent expression by the Commission in its Statement of June 26, 1965, as to the permissible use of the word "madras" in describing or referring to a fabric or other textile product which is not genuine India madras.

2. It is further concluded that all acts and duties performed by the individual respondent William Netzky were performed in his capacity as president of Ship 'n Shore, Inc. There is nothing in the record to warrant a finding that he did anything in connection with advertising or anything else except in his capacity as an officer of Ship 'n Shore. In a recent Commission decision on the question of joining an officer of a corporation as an individual in a complaint against the corporation on the ground that "he formulates, directs and controls the acts and practices of corporate respondent," including those complained about, the Commission, in *The Lovable Company et al.*, Docket No. 8620 (1965) [67 F.T.C. 1326, 1336], stated:

> To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual.* To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

3. There is nothing in this record to suggest that Mr. Netzky would be likely to engage in these practices in the future as an individual. A cease and desist order directed against the corporate respondent Ship 'n Shore, Inc., and its officers, agents, representatives and employees is sufficient to protect the public interest.

RECOMMENDATIONS

Upon the basis of the entire record in this proceeding, which is hereby certified to the Commission, including the "Stipulation and Agreement Containing Proposed Order," together with the findings of fact and conclusions herein, it is recommended that the following form of order be substituted for the cease and desist order originally issued in this proceeding:

RECOMMENDED ORDER

It is ordered, That respondent Ship 'n Shore, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of blouses, sportswear, or other textile products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes: *Provided, however*, That the word "madras" may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated.

2. Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in Paragraph 1, above.

It is further ordered, That the complaint against the individual respondent William Netzky be, and the same hereby is, dismissed.

Order Reopening Proceedings and Modifying Order to Cease and Desist

The respondents, by petition filed January 7, 1966, requested that this proceeding be reopened and that the order to cease and desist, which issued on May 16, 1961 [58 F.T.C. 757], be set aside. In the alternative, respondents requested that they be granted a hearing on their petition pursuant to § 3.28(b)(3) of the Rules of Practice. Additionally, the individual respondent requested that the order be set aside as to him in his individual capacity.

The Commission, by order issued March 11, 1966 [69 F.T.C. 1110] granted respondents' alternative request and directed hearings before a hearing examiner. The order directed that hearings be conducted for the purpose of receiving evidence to determine whether a change of law or fact, or the public interest requires (1) that the order to cease and desist be altered, modified or set aside or (2) that the order be set aside as to the individual respondent. The order further directed the hearing examiner, upon conclusion of the hearings, to certify the record together with his recommendations, to the Commission, and that the hearing examiner's recommended disposition be treated in the same manner as if it were an initial decision under § 3.21 of the Rules of Practice.

Pursuant to the order of March 11, 1966, the hearing examiner, on August 9, 1966 [p. 631 herein], certified the record together with findings of fact, conclusions and recommendations thereon, to the Commission. The examiner states that the parties have entered into a written "Stipulation and Agreement Containing Proposed Order" and he recommends that the order proposed by the parties be adopted by the Commission in modification of the present order to cease and desist. As to the individual respondent, the examiner concludes on the basis of oral testimony that a cease-and-desist order directed against the corporate respondent, its officers, agents, representatives and employees is sufficient to protect the public interest. Accordingly, he recommends that the complaint be dismissed as to the individual respondent.

The Commission, after due consideration, has determined that the examiner's recommended dismissal of the complaint as to the individual respondent is appropriate.

In considering the examiner's recommended modification of the order to cease and desist, the Commission notes that the proposed modified order, as does the outstanding order, prohibits the use of the term "madras" in such a manner as to lead purchasers to believe, contrary to fact, that any fabric or textile product is true India madras. In addition, the order, if modified as recommended, purports to permit the nondeceptive use of the term "madras" to describe any resemblance or similarity actually existing between the fabric or textile product and true India madras. While the Commission has concluded that modification of the order to accomplish the desired result is justified in the public interest, it is of the opinion that the proposed order is somewhat confusing and should be revised for the purpose of clarity.

On the basis of the foregoing:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist issued in this matter on May16, 1961[58 F.T.C. 757], be, and it hereby is, modified to read as follows:

> *It is ordered,* That respondent Ship 'n Shore, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connec-

tion with the offering for sale, sale or distribution of blouses, sportswear, or other textile products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes: *Provided, however,* That if the fabric or textile product does in fact resemble or is similar to madras fabric, the term "madras" may be used in any phrase or statement to clearly and nondeceptively set forth the actual resemblance or similarity.

2. Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in Paragraph 1, above.

It is further ordered, That the complaint against the individual respondent William Netzky be, and the same hereby is, dismissed.

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

IN THE MATTER OF

RABINER & JONTOW, INC.

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

Docket 8629. Complaint, June 30, 1964—Decision, Sept. 19, 1966

Order requiring a New York City manufacturer of ladies' coats and suits to cease discriminating among its competing retail customers in paying promotional allowances in violation of Section 2(d) of the Clayton Act.

COMPLAINT

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

PARAGRAPH 1. Respondent, Rabiner & Jontow, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 512 Seventh Avenue, New York 18, New York. At various times prior to March 1963, respondent traded under the corporate names of Finger, Rabiner & Jontow, Inc., and Finger & Rabiner, Inc.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale, and distribution of ladies' woolen suits and coats. Respondent sells its products to retail specialty and department stores located throughout the United States. Said products are sold under the trade name of "Bardley" and under private labels. Respondent's sales of its products are substantial, having exceeded $4,100,000 for the fiscal year ending April 30, 1960.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its factory located in the State of New Jersey, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits, or sums of money, sometimes hereinafter referred to as promotional allowances, paid either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities furnished by customers in connection with the offering for sale or sale of respondent's products, including advertising in various forms such as newspapers, fashion maganizes, catalogs, bill enclosures and other types of advertising.

Illustrative of such practices, respondent, during the period 1960 through 1962, made payments and allowances to various customers in various cities, including Boston, Massachusetts; Washington, D.C. and New York, New York, for advertising its products in newspapers, fashion magazines, catalogs, bill enclosures and direct mailers, as follows:

Boston, Massachusetts

Customer	Amount of Allowance	
	1960	1961
R. H. Stearns Company	$549.90	$ 500.00
Jay's	400.00	600.00
Jordan Marsh Company	------	2,200.00

Washington, D.C.

Customer	Amount of Allowance	
	1960	1961
Woodward & Lothrop	$3,520.78	$1,419.91

New York, New York

Customer	Amount of Allowance		
	1960	1961	1962
Best & Co.	$28,722.50	$23,833.50	$35,351.82
Lord & Taylor	2,762.67	3,350.00	3,053.14

During these years, Best & Co. operated a number of branch outlets including those located in Boston, Massachusetts and Washington, D.C. Similarly, Lord & Taylor operated a branch store in Washington, D.C.

Respondent did not make, or offer to make, or otherwise make available such promotional allowances on proportionally equal, or any, terms to all other customers in Boston, Washington, D.C. and New York competing with those who received such allowances.

PAR. 6. The acts and practices of respondent as alleged above are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

Mr. Peter J. Dias, Mr. Myer S. Tulkoff, and *Mr. Thomas W. Smith* for the Commission.

Mr. Erwin Feldman, New York, N.Y., and *Mr. Alexander Kushner,* Jersey City, N.J., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

JULY 16, 1965

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In this proceeding under Section 2(d) of the Clayton Act, as amended,[1] respondent, Rabiner & Jontown, Inc., a New York corporation organized in 1942, which manufactures and sells in interstate commerce women's coats and suits which retail from $70 to $90, defends its admittedly non-proportionalized cooperative advertising payments to favored customers in New York, Boston, and Washington, D.C., in 1960, 1961, and 1962, by asserting that (1) this proceeding is not in the public interest because the entry of a § 2(d) order against respondent would retard, rather than promote, the legislative purposes of the statute; and (2) that its non-proportionalized cooperative advertising allowances were paid in order to meet competition.

Throughout the prehearing conferences and during the hearings, the hearing examiner has reiterated to respondent's counsel that the defense that this proceeding is contrary to the public interest is not of a sort which the hearing examiner is empowered to, or would, within the framework of this particular record, adjudicate. If such defense may be asserted and adjudicated, it can properly be passed upon only by the Federal Trade Commission, itself.

Respondent's answer admitted the material allegations of the complaint, but denied that its advertising payments or allowances to its customers violated Section 2(d) of the Clayton Act. In its answer, the respondent asserts "that in all instances referred to in the complaint, in which it is alleged that respondent made payments or granted allowances to customers for promotion of products of the respondent by means of advertising, in each and every instance, respondent made such allowances in good faith, to meet competition, and in accordance with the provisions" of the Clayton Act (Answer, p. 2). Respondent further asserts "that in every instance where such payments or allowances were made . . . that said payments or allowances were granted for the purpose of defending the respondent's position with its customers" and that respondent "did not engage in such practice for aggressive selling purposes" (Answer, par. 8).

Respondent alleged further that advertising allowances "were so firmly rooted and established that companies similar to respon-

[1] § 2(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

dent were compelled, in order to protect their position as a resource, to grant allowances and payments to their customers to meet such competition" (Answer, par. 9).

It is well established now by judicial authority that a respondent charged with violating Section 2(d) of the Robinson-Patman Act may defend such charge by asserting a § 2(b)[2] or "meeting competition defense." *Exquisite Form Brassiere, Inc., et al.* v. *Federal Trade Commission*, 301 F. 2d 499 (C.A. D.C. 1961).

The discussion in this initial decision will focus principally on the effectiveness with which respondent has presented and proven its meeting competition defense.

Several years ago the Federal Trade Commission conducted an investigation into the garment manufacturing industry in general, and, on the basis of the results of that investigation, concluded that a substantial number of firms engaged in the manufacture and sale in interstate commerce of garments were in violation of Section 2(d) of the Clayton Act (RX 23A–23M). Opportunity has been afforded the various persons, firms, and corporations in the garment industry to avail themselves of the consent procedure provided for in Sections 2.1 through 2.4 of the Commission's Rules of Practice for Adjudicative Proceedings. As a result of the industry-wide investigation and subsequent proceedings, 242 business firms have, as of the time of writing this initial decision, availed themselves of the consent procedure and have signed agreements containing orders to cease and desist which will be made effective by the Federal Trade Commission at a time and under circumstances which the Commission shall, in its discretion, determine to be appropriate.[3] As of the date of the writing of this initial decision, only two of the firms mentioned in the Press Releases have elected to proceed to formal hearing, the *House of Lord's, Inc.*, Docket No. 8631 [69 F.T.C. 44], and the instant proceeding. In the *House of Lord's* proceeding, the hear-

[2] § 2(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmative shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

[3] See FTC News Releases of May 1, 1963, August 12, 1963, January 3, 1964, March 13, 1964, July 16, 1964, July 29, 1964, August 18, 1964, September 25, 1964, November 18, 1964, January 26, 1965, February 27, 1965, and April 14, 1965. (See RX 23A through RX 26D, inclusive; RX 38, RX 39, and RX 40.)

ing examiner found that the cooperative advertising offer was proportionalized, *i.e.*, made available on proportionally equal terms, and there had been no violation of Section 2(d). The complaint was dismissed and oral argument on appeal before the Commission has taken place.

In the instant proceeding, respondent admits and has stipulated that its cooperative advertising payments were not proportionalized, *i.e.*, made available to all its customers on proportionally equal terms, but asserts that such cooperative advertising payments were made in good faith to meet similar practices by its competitors in the industry.

Respondent represents a specialized segment of the garment industry, *i.e.*, women's coats and suits which retail from $70 to $90.[4] Respondent subpoenaed 17 manufacturers whose competition, it asserted, it was meeting when it made its non-proportionalized cooperative advertising payments in Boston, New York, and Washington, D.C., in 1960 through 1962, inclusive.

This record involves for 1960 through 1962 six favored customers in three cities: In New York City, Lord & Taylor, and Best & Co., Inc.; in Boston, Jordan Marsh, Jay's, Inc., and R. H. Stearns Co.; in Washington, D.C., Woodward & Lothrop, Inc. Although seventeen alleged competitors of respondent were subpoenaed, it is interesting to observe that, as to Jay's, Inc., none of the competitors testified to making advertising payments, and, as to R. H. Stearns Co., only one competitor out of seventeen testified as to making advertising payments; only two competitors testified to payments to Jordan Marsh Co.; and possibly three competitors testified to advertising allowances to Woodward & Lothrop, Inc. Such evidence hardly sustains respondent's assertion that its non-proportionalized advertising payments were responsive to industry-wide non-proportionalized payments to its favored customers.

As part of its meeting competition defense, respondent asserts that non-proportionalized cooperative advertising payments are rampant in, and an integral part of, the modus operandi of the garment industry. Complaint counsel did not contest this assertion. The Federal Trade Commission's investigation alluded to above (see RX 24) found such to be the fact. The fact that the garment industry, as such, is engaged in making non-proportionalized cooperative advertising payments does not exculpate or excuse unlawful payments. The criteria used for evaluating meeting

[4] Some testimony places this price range at $60–$110.

competition as a defense to a 2(a) violation include the caveat that price discrimination is not excused on the grounds that it is necessary to combat a general discriminatory pricing system.[5]

Moreover, the Federal Trade Commission in *Flotill Products, Inc.*, Docket No. 7226, in its opinion of June 26, 1964 [65 F.T.C. 1099, 1144], has held:

> But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

The Supreme Court has held, in passing upon a meeting competition defense to a 2(a) violation, ". . . The seller has the burden of bringing himself within the exculpating provision of § 2(b), . . ." *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 514.

Respondent's meeting competition defense will exculpate its non-proportionalized advertising payments only if such discriminatory payments were made in good faith to meet individual competitive situations. Good faith is not present if a seller adopts the unlawful discriminatory practices of a competitor; good faith is not proven in the record if the seller acts entirely on unsupported, unverified verbal statements, nor is good faith established if the seller knew or should have known that his competitor's system was unlawful or inherently illegal. (See cases cited in footnote 5, *supra*.)

> Once the threshold applicability of the meeting competition proviso is resolved, the same criteria governing its use in Section 2(a) price discrimination proceedings would apply to Section 2(d) and 2(e) cases. *Rowe, Price Discrimination Under the Robinson-Patman Act* (1962), page 420.

In addition to the testimony of Abbe Rabiner, its president, and representatives of its seventeen alleged competitors, respondent

[5] See *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396 (1958); *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948); *F.T.C.* v. *National Lead Co.*, 352 U.S. 419 (1957); *F.T.C.* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2nd Cir. 1951); *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956); *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951); *Corn Products Ref. Co.* v. *F.T.C.*, 324 U.S. 726 (1945).

produced as an expert witness Bernard W. Smith, Associate Professor of Retail Merchandising at the Institute of Retail Merchandising, New York University, New York, New York. Among other things, Professor Smith testified to the universality of cooperative advertising payments in the garment business; that students in his classes are taught to demand cooperative advertising payments from manufacturers if they become buyers; that the average life of a coat and suit manufacturer is less than twenty-five years; that in 1960, 623 firms manufactured women's coats and suits; that by 1963 this number had shrunk to 552, or that 71 firms went out of business between 1960 and 1963; and that the coat and suit business had lost some $18,000,000 in volume, from $698,963,000 in 1960 to $681,000,000 in 1963 (Tr. 948, *et seq.*; the Apparel Manufacturing Industry's Market Planning Service of the National Credit Office issued by Dun and Bradstreet [RX 28, 29 in evidence]).

Mr. Rabiner testified to the unusual vigor and keenness of the competition in his business, and to the necessity of permitting him to continue his advertising payments so that he may stay in business. Mr. Rabiner asserts that he cannot afford to proportionalize his cooperative advertising payments so as to make them available on proportionally equal terms to all of his customers; and that, if the women's coat and suit business generally were required to proportionalize their cooperative advertising payments, only the "giants" in the industry would be able to survive. It is Mr. Rabiner's contention that the order sought in this proceeding, if made applicable on an industry-wide basis, would encourage an oligopolistic industry pattern contrary to the intent of the Robinson-Patman Act. He asserts that only the "giants," who do a very large dollar volume of business and manufacture many different lines of garments, can afford to proportionalize their cooperative advertising payments.

Although the ladies' coat and suit manufacturing business has, in the aggregate, a substantial dollar volume per annum, other than the "giants" alluded to, it is composed chiefly of small businesses whose individual annual dollar volume is not large. Respondent is considered a substantial concern. Its annual dollar volume exceeds $4,000,000, even though its annual sales volume has not increased to any noticeable extent over the last few years.

Professor Smith sought to define competition in the women's coat and suit business in terms of "price lines." The exact nature of competition for the retail customer's dollar spent for $60 to

$90 coats and suits is not precisely delineated nor specifically described in the record. A representative of one of the competitor manufacturers, Modelia, Inc., testified that Modelia uses an "avant garde" styling, and therefore does not compete with the more conventionally styled lines. Several of the firms, who were subpoenaed as "competitors" by respondent, denied that they were competitors in fact.

Where, as here, respondent defends on the grounds that it is meeting competition, the burden of proving the competition, as well as proving the "meeting" of such competition, is upon the party asserting such defense.

Two decisions important to resolving the issues presented in this proceeding were rendered since the record was closed in this proceeding on April 28, 1965. On June 18, 1965, the Federal Trade Commission in *Ace Books, Inc., et al.*, Docket No. 8557, affirmed as 2(d) cease and desist order (Opinion, page 18) [67 F.T.C. 1073, 1129], and, *inter alia,* held:

> It has been recognized that the burden of establishing the Section 2(b) defense is upon the proponent. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505 (1963). Since the defense has the effect of exculpating a discrimination which would otherwise be forbidden, the evidence upon which the defense is predicated must be of sufficient preciseness to permit an informed determination. See *Callaway Mills Co.*, Docket No. 7634, 64 F.T.C. 732 (February 10, 1964); *Cabin Crafts, Inc.*, Docket No. 7639, 64 F.T.C. 799 (February 10, 1964); *cf. Continental Baking Co.*, Docket No. 7630, 63 F.T.C. 2071 (December 31, 1963); *Ponca Wholesale Mercantile Co.*, Docket No. 7864 64 F.T.C. 937 (February 24, 1964). We think the evidence presented here does not permit such a determination. The evidence does not show when respondents' competitors began granting allowances . . . or when respondents themselves initiated the practice. The record fails to establish the rates used by respondents' competitors to compute their allowances or the amounts of such allowances. . . . Respondents failed to show any of the circumstances surrounding the initiation of their allowances to these retailers and made no effort to establish that their allowances did not in fact exceed those of competitors, by reference either to the rates or the total amounts of these allowances. Without evidence of a more specific nature, the Commission is unable to make an informed determination on the various questions which must be resolved and, as a result, is compelled to reject respondents' contention that they have met their burden in establishing the defense.

On July 2, 1965, the United States Court of Appeals for the District of Columbia Circuit in *Exquisite Form Brassiere, Inc., et al* v. *Federal Trade Commission,* No. 18524, 360 F. 2d 492, in an appeal from an opinion of the Federal Trade Commission upon remand (see *supra,* 301 F. 2d 499 (1961), affirmed the opinion of the Commission finding that *Exquisite* had, upon remand, failed to prove its meeting competition defense. *Inter alia,* the Court of Appeals held [7 S.&D. 1293]:

> Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case. Admittedly the Supreme Court has held[4] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition." Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.
>
> We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.
>
> Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the date of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.
>
> [4] *FTC v. A. E. Staley Co.,* 324 U.S. 746 (1945).

In view of this recent decision by the Court of Appeals, it is only necessary to apply "the rationale of Staley" to the record in this proceeding.

Prehearing conferences in this matter were held in New York, New York, on September 21, 22 and 25, 1964; in Washington, D.C., on November 4 and December 8, 1964, and on January 21, 1965. Evidentiary hearings were held in New York, New York, on February 15–18, and March 16–22, 30, 1965; April 1–2, 26, 1965; and were concluded on April 27, 1965.

Proposed findings, conclusions, and briefs have been filed. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He has considered the reliability, credibility and probative value of the witnesses' testimony in making his findings of fact, as well as their respective interest in the outcome of this proceeding. Proposed findings not made herein in the form proposed, or in substantially that form, are rejected. Any motions heretofore made and not previously ruled upon are denied. The undersigned hearing examiner has carefully considered the entire record, including the exhibits, pleadings, and the testimony of the witnesses. Based upon the entire record in this proceeding, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent, Rabiner & Jontow, Inc., a New York corporation since 1942, with its office and principal place of business at 512 Seventh Avenue, New York, New York, has, since its incorporation, traded under the names of Finger, Rabiner & Jontow, Inc., Finger & Rabiner, Inc., and presently as Rabiner & Jantow, Inc., (Answer; Tr. 26, 29, 39). Respondent is now, and has been, since its incorporation, engaged in manufacturing and selling, in interstate commerce, ladies' suits and coats to retail speciality and department stores throughout the United States under the trade names of "Bardley," "Bardley, Jr.," and under private labels. Respondent's sales exceeded $4,000,000 annually during the period involved in this proceeding (Tr. 30–31). Respondent has been under the same management, basically, since it commenced business, and its policy with reference to payment of cooperative advertising allowances has been unchanged (Tr. 50). Respondent's garments retail at a price range from $70 to $90 [6] (Tr. 30), and are designed primarily for spring and fall sale. Its coats are not fur trimmed.

Respondent's garments may be described as updated classic tailored clothes, and not a high style line (Tr. 31–32). (See also the advertisements in CX 10, CX 11, CX 12 [p. 7], CX13, CX 14B.) It sells its products only to retailers, primarily through its showroom at 512 Seventh Avenue, New York City, which is visited by buyers representing these retailers. Traveling salesmen are not

[6] At Tr. 909, respondent's expert, Professor Bernard W. Smith, testified that he had been advised that respondent's retail prices range from $60 to $110. These are the figures in respondent's proposed findings (p. 2, par. 4).

generally utilized by respondent (Tr. 31, 62–63). Abbe Rabiner, respondent's president since its incorporation, has general responsibility for sales, and Mr. Jontow has responsibility for general internal management. Respondent usually has four sales persons, in addition to Mr. Rabiner, in its showroom.

Mr. Rabiner has had primary responsibility for respondent's policies relating to its advertising and promotion policies. The granting of advertising allowances, has been a company policy since the company was organized (Tr. 50).

Respondent causes its products, when sold, to be shipped from its factory in New Jersey to customers located in other States of the United States and in the District of Columbia. Respondent has, at all relevant times, maintained a course of trade in its products in commerce, as "commerce" is defined in the Clayton Act, as amended.

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

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for or in consideration of services or facilities furnished by or through such customers in connection with the offering for sale or sale of respondent's products (Tr. 36–37; CX 4A–CX 7; Prehearing Stipulation and Order dated November 4, 1964, p. 5, par. 2).

By agreement, the evidence in this proceeding has been limited to the years 1960 through 1962, inclusive, and to the cities of Boston, Massachusetts, New York, New York, and Washington, D.C. During these years and in these cities, respondent paid promotional advertising allowances to some of its customers without making such advertising allowances available on proportionally equal terms to all of its customers competing in the sale, at retail, of respondent's products of like grade and quality. Respondent's sales and advertising allowances paid to its favored (F) and nonfavored (N) customers were:

In New York, New York:

Customer	Sales	Advertising Paid
1960:		
(F) Best & Co.	$836,850.00	$28,722.50
(F) Lord & Taylor	192,915.00	2,762.67
(N) B. Altman	14,259.00	None

Customer	Sales	Advertising Paid
1961:		
(F) Best & Co.	$651,212.00	$23,833.50
(F) Lord & Taylor	184,392.00	3,350.00
(N) B. Altman	25,572.00	None
(N) Bonwit Teller	67,338.00	None
1962:		
(F) Best & Co.	641,024.00	35,351.82
(F) Lord & Taylor	104,141.00	3,053.14
(N) B. Altman	23,916.00	None

(Complaint and Answer; CX 24 *in camera*)

In Boston, Massachusetts:

	1960		1961	
	Sales	Advertising Paid	Sales	Advertising Paid
(F) R. H. Stearns Co.	$32,165.00	$549.90	$21,790.00	$500.00
(F) Jay's	31,739.00	400.00	25,738.00	600.00
(F) Jordan Marsh	16,323.00	None	32,718.00	2,200.00
(N) Chas. Sumner, Inc.	2,586.00	None	2,216.00	None
(N) House of Tweed, Inc.	728.00	None	1,209.00	None
(N) Delano's	200.00	None	6,272.00	None
(N) Worth, Inc. (Worth's)	2,829.00	None	4,370.00	None
(N) Leeds, Inc.	3,541.52	None	456.80	None
(N) C. Crawford Hollidge	25,760.00	None	10,719.00	None
(N) Wm. Filene's Sons (Filene's)	9,937.00	None	8,661.00	None

(Complaint and Answer; CX 24 *in camera*)

In Washington, D.C.:

	1960		1961	
	Sales	Advertising Paid	Sales	Advertising Paid
(F) Woodward & Lothrop	$55,270.00	$3,520.78	$36,919.00	$1,419.91
(N) Raleigh Haberdasher	2,590.00	None	5,365.00	None
(N) Dorothy Stead, Inc.	1,688.00	None	847.00	None
(N) Mary Elizabeth Gowns, Inc.	None	None	460.00	None
(N) Jane Dawson Smith	701.00	None	562.00	None
(N) Jenny Shoppe	883.00	None	263.00	None

(Complaint and Answer; CX 24 *in camera*)

In New York City, respondent's payments to Best & Co., Inc., in 1960 approximated 3.43% of sales; whereas, its payments to

Lord & Taylor were 1.43% of sales. In 1961, respondent's payments to Best & Co., Inc., were 3.66% of sales; and to Lord & Taylor, 1.82% of sales. In 1962, the payments or allowances to Best & Co., Inc., approximated 5.51% of sales; and to Lord & Taylor, 2.93% of sales.

In Boston, Massachusetts, the 1960 payments to R. H. Stearns Co. were approximately 1.71% of sales; and to Jay's, Inc., 1.26% of sales. In 1961, the payments to R. H. Stearns Co. were 2.29% of sales; to Jay's, Inc., 2.57% of sales; and to Jordan Marsh Co., 6.72% of sales.

Abbe Rabiner, president of respondent, testified, and it is hereby found, that respondent's advertising payments were individually negotiated on an *ad hoc* basis for each advertisement. Respondent promulgated no plan which set forth the procedure by which its customers might qualify for an advertising allowance. Respondent's payments were not made available on proportionally equal terms even to the favored customers (Tr. 46).

Pursuant to Prehearing Stipulation and Order, dated November 4, 1964 (p. 6, par. 3), it is found that respondent's nonfavored customers did not receive *any* advertising or promotional allowances during the relevant years in the cities in question.

Respondent sold goods of like grade and quality to both its favored and nonfavored customers during the years in question in New York City, Boston, and Washington, D.C. Respondent's favored customers competed in the sale, at retail, of respondent's garments with respondent's nonfavored customers. (Prehearing Stipulation of November 4, 1964, p. 5, par. 1.) The favored customers competed with other favored customers.

It was stipulated, and it is hereby found, that during the relevant years, and in the cities involved, if respondent's nonfavored customers were called as witnesses, they would testify that they were neither offered nor paid advertising or promotional allowances in connection with their purchases for resale of respondent's garments. The Prehearing Stipulation and Order dated January 6, 1965, filed January 21, 1965, names the following customers and witnesses who would so testify:

WASHINGTON, D. C.

Customer	*Witness*
Raleigh Haberdasher	Arthur Levy, Buyer
Dorothy Stead, Inc.	Robert Stead, Vice Pres. & Treasurer Dorothy Stead, President

Mary Elizabeth Gowns, Inc.	Georgia Hayes McClerkin, President Isabelle Henry, Manager
Jane Dawson Smith	Carl Dawson Smith, Partner Jane Dawson Smith, Partner
Jenny Shoppe	Cabot Feldman, Proprietor Lisa Matusek, Buyer

BOSTON, MASSACHUSETTS

Customer	*Witness*
Charles Sumner, Inc.	Sumner Goldman, Treasurer
House of Tweed, Inc.	Helen Hunt, Manager
Delano's	Merrill Delano, President
Worth, Inc.	Joseph Worth, Treasurer
Leeds, Inc.	Florence Rubenstein, Buyer
C. Crawford Hollidge	Grace McNeeley, Buyer
Wm. Filene's & Sons	F. B. Gummere, Asst. to President

NEW YORK, NEW YORK

Customer	*Witness*
B. Altman & Co.	Rudolph Van Gytenbeek, Vice Pres. Barbara Mussett, Buyer Wendy Wardrop, Buyer
Bonwit Teller, Inc.	George Baylis, Vice Pres. (Stipulation limited to years 1960 and 1961 only)

Respondent's procedure for selecting customers for cooperative advertising payments was described by Mr. Rabiner:

Q. Mr. Rabiner, would you tell me how you selected particular customers to whom advertising allowances were paid during those years?

A. This was based purely on the competition that existed with those customers . . . from firms that manufactured similar goods and where these people offered similar offerings of advertising . . . we did the same thing as our competitors did.

Q. Why is it, Mr. Rabiner, that, as the record shows, allowances were given to certain customers and not paid to others?

A. Well, when certain of these customers that you refer to came to me and I knew for a fact that they used the forms of media to advertise ready-to-wear—specifically, our product—and similar merchandise, I naturally worked along with them. Others who did not come to me, . . . so I didn't do anything with them (Tr. 79–80).

Q. Are you saying, then, that you gave allowances only to those customers who came to you?

A. I would say so, pretty much (Tr. 80).

Concerning the payment of allowances for mailing pieces, Mr. Rabiner testified:

Q. In other words, this was a practice which was limited to those stores who had achieved a certain important position with you that engaged in that practice?

A. That is correct (Tr. 101).

Q. And those who didn't have that as a store policy never worked out any such plan for the use of such mailing pieces?

A. To the best of my knowledge, no (Tr. 102).

* * * * * * *

Q. In other words, there is a distinction, therefore, that you are bringing out between certain kinds of retailers who engage in certain practices with whom you worked out programs and those who never engaged in those practices with whom you never worked out any program?

A. That is correct (Tr. 102).

* * * * * * *

If I had to make the same offer to everybody, there isn't enough money not only in my business, but in the whole cloak and suit industry for me to do it. I cannot make the same offer to everybody (Tr. 1126).

* * * * * * *

. . . I try to be as prudent and as careful as I possibly can with the expenditures of my money. Consequently, it becomes very important to us to have the best exposure for our product throughout the country, and in that case it behooves us to choose the particular retailers with whom we feel we can get the best exposure (Tr. 1127–28).

In addition to the testimony of Mr. Rabiner, respondent proffered the testimony of seventeen coat and suit manufacturers, who, it asserted, but did not prove, were its competitors. It is the competition of these seventeen other manufacturers that respondent claimed, but failed to prove, it was meeting. Respondent also proffered the testimony of an expert witness, Bernard W. Smith (Tr. 897–1020), who was an associate professor of retail merchandising at New York University. Professor Smith testified as to the general business conditions and practices in that segment of the garment industry of which respondent is a part—the manufacturers of women's coats and suits.

When pressed to name specifically the competitors, whose allowances it was meeting, respondent was unable to name any (Tr. 99–100).

The practice of paying non-proportionalized, cooperative advertising allowances had been part of the pattern of doing business in the garment industry for years.[7]

[7] See RX 23A–23M; RX 24A–24H; RX 25A–25B; RX 26A–26D, all of which are FTC News Releases, plus FTC News Releases on the same subject issued on March 13, 1964, July 16, 1964, August 18, 1964, November 18, 1964, January 26, 1965, February 27, 1965, and April 14, 1965.

Respondent's cooperative advertising allowances were part of its regular method of doing business and part of its selling techniques, and had been used by respondent ever since it started in business.

RX 32, RX 33, RX 34, RX 35 and RX 36 are copies of a publication entitled "Coatvertising Weekly," and contain reproductions of nationwide coat and suit advertisements appearing in various publicity media. These are 1965 advertisements, but constitute specimens of cooperative advertising which is involved in this proceeding.

The record does not contain any evidence that respondent's cooperative advertising allowances were paid by respondent to meet or match a similar payment by a specifically named competitor who, at the time, was selling competing merchandise to respondent's favored customer. Mr. Rabiner's testimony negates a finding that respondent's cooperative advertising payments were made to meet or match a similar payment made by a competitor. Counsel for respondent has emphasized throughout this record that respondent's cooperative advertising payments were not made in conformity with a "plan," either oral or written.

From its inception, in connection with the sale of its products, at retail, under the trade name "Bardley" or "Bardley, Jr.," respondent paid a portion of the cost of advertisements of its products which its retail customers ran in newspapers, national fashion magazines, store catalogues, direct mailers, and bill enclosures (Tr. 52), ". . . generally on a fifty-fifty basis, at times a little bit more or less on either side" (Tr. 49, 55). Mr. Rabiner and the particular retail customer (*i.e.*, Best & Co., Inc., Lord & Taylor, R. H. Stearns Co., Jay's, Inc., Jordan Marsh Co., or Woodward & Lothrop, Inc.) jointly decided whether the advertisement would appear in a newspaper (*i.e.*, New York Times or New York Herald Tribune) or fashion Magazine (*i.e.*, MADEMOISELLE, HARPER'S BAZAAR or GLAMOUR) (Tr. 49–50). There was no radio or television advertising (Tr. 51). Usually the retail establishment and the trade name, "Bardley," were named in the ad Tr. 51).

There was no real formula or yardstick by which to determine how much of an allowance would be paid by respondent to a favored customer (Tr. 53). "[I]t was based primarily upon the competition that existed within the firms what we did business with" (Tr. 53). Likewise, there was no mathematical formula which related the advertising allowance to the amount of merchandise purchased (Tr. 54). Each time that Mr. Rabiner negotiated an advertising allowance, all of the elements of the advertising promotion were individually negotiated between Mr. Rabiner and his customer, including the determination as to which one of respondent's products would be advertised (Tr. 54).

Respondent confined the sales of its products "to those quality stores that stand for the kind of product that we produce . . ." (Tr. 56). Respondent considers that it makes a quality product and tries to sell to retail establishments which, in the public's mind, sell quality products (Tr. 57–58). In any given area, respondent has a few carefully selected customers which meet this requirement (Tr. 58). Respondent does not sell to other than retailers (Tr. 63).

The favored customers to whom respondent paid its advertising allowances were "For the most part, people I had been doing business with for years, . . . for as many as twenty and twenty-one years" (Tr. 1123). The advertising payments by respondent in the cities and during the years involved represented the continuation of a business practice that respondent had followed for years (Tr. 1123).

In his testimony, Mr. Rabiner emphasized that, if respondent were to make its advertising payments available on proportionally equal terms to all its customers, "there isn't enough money not only in my business, but in the whole cloak and suit industry for me to do it. I cannot make the same offer to everybody" (*supra*, p. 654; Tr. 1126). He testified further that within the present framework of the women's coat and suit business only "A Bobbie Brooks kind of organization, a Jonathan Logan . . ." (*i.e.*, firms with large sales volumes and broad product lines) can afford to offer a proportionalized advertising allowance (Tr. 1127). Respondent's evidence on this part of its defense is inconclusive.

It may well be that manufacturers of ladies' coats and suits, being for the most part small businessmen, cannot afford to make their cooperative advertising payments available to all their customers on proportionally equal terms. It is possible, although not herein found, that the advertising practices delineated in this record, even though unlawful within the caveat of Section 2(d) of the Robinson-Patman Act, may not have had the effect, to date, of lessening competition; creating a monopoly; or injuring, destroying, or preventing competition. Complaint counsel are not required in this 2(d) proceeding to prove an anti-competitive effect in the same manner as would be required if this were a 2(a) proceeding. Complaint counsel have sustained their burden of proof. Indeed, respondent admits that its advertising payments were not proportionalized—made available to all its competing customers on proportionally equal terms— and that respondent's favored and nonfavored customers did, and do, in fact, compete in the sale at retail of respondent's products of like grade and quality.

In the ladies' coat and suit industry, as in other apparel trades, there is increasing concentration (Tr. 1096). ". . . In 1950 some 8,500 manufacturers sold $7 1/2 billion worth of apparel. By the end of 1963 the number of companies had shrunk by 2,000 or more —while dollar volume had passed the $11 billion mark. . . . side by side with a sharp drop in the number of coat and suit firms, there has been an increase in unit output and dollar volume of business. Together, these facts add up to one conclusion: more concentration of business." [8]

Respondent has failed to prove, in spite of its legal burden to do so, that its non-proportionalized advertising payments to its favored customers were made in order to meet specific, individual, competitive situations. The Court of Appeals' recent decision in *Exquisite Form Brassiere, Inc., et al.* emphasizes the necessity for such proof (*supra*, pp. 647–648). Respondent relied upon the generalized testimony of Abbe Rabiner (Tr. 50, 79, 82–83, 85–86, 88), and its expert, Professor Bernard W. Smith (Tr. 897, *et seq.*), for proof of the competitive conditions within its industry. Respondent did not proffer the testimony of any of its customers, favored or nonfavored, to prove which were considered by respondent's customers to be respondent's competitors. Professor Smith's testimony (Tr. 908, *et seq.*) does not help respondent to demonstrate that its non-proportionalized advertising payments were "a specific act aimed at a . . . competitor in 'individual competitive situations, rather than * * * [in] a general system of competition.' " (See *Exquisite Form Brassiere, Inc., et al., supra*, p. 648.) Professor Smith, *inter alia*, testified (Tr. 908–913):

A. [As a general rule]—each store has a clientele which is based, to a large extent, on the income groupings of the people who shop in the store. Thus, we have some stores that cater to lower-middle income groups, some to upper income groups, and some to the wealthy people.

The prices that the stores set will correspond with the ability of each income group to pay. These prices are usually set in what we call price zones. In other words, we find that certain customers will shop in pricing areas, let us say, from forty to sixty dollars, or from sixty to eighty, or eighty to one hundred.

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[8] RX 30, pp. 5–6, Cloak Joint Board, I.L.G.W.U.—Report of the General Manager, dated March 20, 1965.

In other words, a customer of a certain income group, coming into a store, may buy something at sixty dollars, may intend to buy something at sixty, and actually go out with something at seventy dollars, or vice versa: she may go in thinking to buy something for seventy, and find something that she likes at sixty.

So, therefore, stores usually price merchandise in what we call price zones, and then pick a particular price in the price zone on which they specialize for one reason or another. The special price is called the price line, while the zone is the range of prices in which they operate.

Q. Would you have occasion to receive information concerning the retail prices at which goods of Rabiner and Jontow were sold during the years 1961 and 1962?

A. Yes. I made inquires about that. I have found, or I have been advised, that their prices ranged from sixty to $110 at retail.[9]

Q. On the basis of your knowledge and experience, what type of stores would handle merchandise of that quality and price line?

A. Well, actually, the better departments of Gimbel's, Macy's, Lord and Taylor, Altman's, Saks—

HEARING EXAMINER GROSS: You mean Saks 34th or Saks Fifth?

THE WITNESS: No, Saks Fifth—although even Saks 34th would handle the lower end of those prices; they would go in the sixty dollar price.

In other words, the prices, the top prices of the popular stores, would over lap the low prices of the better stores. So that actually most of the big department stores in New York and specialty stores in New York would handle those price ranges.

By Mr. Feldman:

Q. Could you tell us what retail price lines of merchandise would compete with the price lines of Rabiner and Jontow which you have just testifed to?

A. Well, I would say that any merchandise from about $49 to $125 would be in competition with that range of merchandise.

Q. These price zones are established practices and principles of retailing in this country which you have just testified to, the use of price zones?

A. I don't know whether the word "established is the right word. They are practices, because *different stores will have their own definitions of "price zones."*

Q. But *the principle of price zones would vary from different types of stores, wouldn't it?*

A. That's right. (Italics supplied.)

Included in this initial decision are six charts which constitute a finding or resume, in abbreviated form, of the evidence elicited by respondent from its seventeen "competitor" witnesses concerning these competitors' sales and allowances on cooperative advertising payments to respondent's favored customers. Usually, the

[9] This contradicts Mr. Rabiner's testimony. (See footnote, *supra*, p. 649.)

testimony does not contain the exact dollar amount of such competitors' sales and advertising payments to respondent's favored customers.

Respondent's competitors were understandably noncooperative. They vigorously resisted revealing any more of their confidential business information than was absolutely essential. In some instances, such competitors had made a full report to the Federal Trade Commission concerning their advertising practices. Some had negotiated consent agreements with the Commission; others were in the process of doing so. None of respondent's competitors, individually, paid to respondent's favored customers the large cooperative advertising allowances that respondent paid.

LORD & TAYLOR

Manufacturer	1960			1961			1962		
	Sales	Allowances	References	Sales	Allowances	References	Sales	Allowances	References
Glenhaven, Ltd.	$15,659.13	$ 35.00	RX 20A, Tr. 160, 162	$13,383.27	$ None	RX 20A, Tr. 162	$46,668.55	$ 238.03	RX 20A, Tr. 165–166, 162
Buddy Bates Corp.	Yes	None	Tr. 218, 219	Yes	None	Tr. 218, 219	Yes	None	Tr. 218, 219
Barberini, Ltd.	None	None	Tr. 196, 199	None	None	Tr. 196, 199	None	None	Tr. 196, 199
Suitmaster Classics, Inc.	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250
Lumay Coat Company, Inc.	29,000.00	None	Tr. 322, 316	42,000.00	None	Tr. 322, 316	90,000.00	202.00	Tr. 322, 316–318
Modelia, Inc.	Yes	6,700.00 for 3 years	Tr. 355	Yes	6,700.00 for 3 years	Tr. 355	Yes	6,700.00 for 3 years	Tr. 355
Towncliffe, Inc.	Yes	1,945.20	Tr. 394, RX 9B	Yes	2,952.77	Tr. 394, RX 9D	Yes	831.60	Tr. 394
Zelinka-Matlick, Inc.	Yes	None	Tr. 435, 437, 448	Yes	None	Tr. 435, 437, 448	Yes	None	Tr. 435, 437, 448
David Crystal, Inc.	Yes	None	Tr. 624, 637, RX 13A–J	Yes	1,317.00	Tr. 624, 637, RX 13D, I	Yes	750.00	Tr. 624, 637, RX 13F
Briarbrook, Inc.	Exact Amount Not In Record	211.00	Tr. 589, RX 12	Exact Amount Not In Record	None	Tr. 589, RX 12	Exact Amount Not In Record	207.37	Tr. 589, RX 12
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	5,606.68	Tr. 657, RX 19	Yes	8,358.00	Tr. 657, RX 19	Yes	7,828.88	Tr. 657, RX 19
Linker & Company	Yes [1]	None	Tr. 714	Yes [1]	None	Tr. 714	Yes [1]	None	Tr. 714
Devonbrook, Inc.	None	None	Tr. 786, RX 21	None	None	Tr. 786, RX 21	None	None	Tr. 786, RX 21
Handmacher-Vogel, Inc.	Yes	2,191.49	Tr. 507, RX 11A	Yes	745.58	Tr. 507, RX 11A	Yes	632.98	Tr. 507, RX 11A
Country Tweeds, Inc.	Yes	[2]	Tr. 1159, Tr. 1168	Yes	4,299.99	Tr. 1159, 1167, 1174	Yes	4,014.72	Tr. 1159, 1167, 1174
Jack Feit, Inc.	Yes	[2]	Tr. 1199, 1194	Yes	3,783.95 for 1961 & 1962	Tr. 1199	Yes	3,783.95 for 1961 & 1962	Tr. 1199

[1] Total sales by Linker & Company to Lord & Taylor for the entire period was approximately $15,000.
[2] No figures for 1960.
* Exhibits which are underlined were received "In Camera."

BEST & CO.

Manufacturer	1960			1961			1962		
	Sales	Allowances	References	Sales	Allowances	References	Sales	Allowances	References
Glenhaven, Ltd.	$ None	$ None	Tr. 131, 145, RX 20A, B	$ None	$ None	Tr. 131, 145, RX 20A, B	$ None	$ None	Tr. 131, 145, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218	None	None	Tr. 218	None	None	Tr. 218
Barberini, Ltd.	None	None	Tr. 196, 199	None	None	Tr. 196, 199	None	None	Tr. 196, 199
Suitmaster Classics, Inc.	None	None	Tr. 249	None	None	Tr. 249	None	None	Tr. 249
Lumay Coat Company, Inc.	None	None	Tr. 321	None	None	Tr. 321	None	None	Tr. 321
Modelia, Inc.	Yes	350.00	Tr. 355, 370	Yes	None	Tr. 355, 370	Yes	None	Tr. 355, 370
Towncliffe, Inc.	Yes	1,200.00	Tr. 394, 396, RX 9C	Yes	2,847.00	Tr. 394, 396, RX 9C	Yes	1,950.00	Tr. 394, 396
Zelinka-Matlick, Inc.	None	None	Tr. 437, 448	None	None	Tr. 437, 448	None	None	Tr. 437, 438
Handmacher-Vogel, Inc.	None	None	Tr. 504–505, 526, RX11	None	None	Tr. 504–505, 526, RX 11	None	None	Tr. 504–505, 526, RX 11
David Crystal, Inc.	Yes	8,250.38	Tr. 624, RX 14A–Z 10	Yes	6,184.08	Tr. 624, RX 15A–Z 10	Yes	7,409.50	Tr. 624, RX 16A–Z 2
Briarbrook, Inc.	[1]	None	Tr. 589, RX 12, RX 31	[1]	None	Tr. 589, RX 12, RX 31	[1]	None	Tr. 589, RX 12, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	None	None	Tr. 659	None	None	Tr. 659	None	None	Tr. 659
Linker & Company	None	None	Tr. 714	None	None	Tr. 714	None	None	Tr. 714
Devonbrook, Inc.	68,000.00 [2]	7,750.00 [3]	Tr. 787, 800, RX 21	74,000.00 [2]	11,100.00 [3]	Tr. 787, 800, RX 21	74,000.00 [2]	8,650.00 [3]	Tr. 787, 800, RX 21
Country Tweeds, Inc.	Yes	None	Tr. 1159, 1168	Yes	None	Tr. 1159, 1168	Yes	None	Tr. 1159, 1168
Jack Feit, Inc.	None	None	Tr. 1198, 1199	None	None	Tr. 1198, 1199	None	None	Tr. 1198, 1199

[1] No evidence relating to sales to Best & Co.
[2] Sales to Best & Co. by Devonbrook, Inc. only.
[3] Advertising allowances to Best & Co. by Devonbrook, Inc. and all its affiliates.
* Exhibits which are underlined were received "In Camera."

JAY'S

Manufacturer	1960			1961		
	Sales	Allowances	References	Sales	Allowances	References
Glenhaven, Ltd.	$ None	$ None	Tr. 145, 157, RX 20A, B	$ None	$ None	Tr. 145, 157, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218, 258	None	None	Tr. 218, 258
Barberini, Ltd. [1]	—	—	—	—	—	—
Suitmaster Classics, Inc.	None	None	Tr. 249, 250	None	None	Tr. 249, 250
Lumay Coat Company, Inc.	None	None	Tr. 318–319, 322	42,000.00	None	Tr. 318–319, 322
Modelia, Inc.	None	None	Tr. 372, 374	None	None	Tr. 372, 374
Towncliffe, Inc.	[2]	None	Tr. 423	[2]	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 437, 438, 448	Yes	None	Tr. 437, 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504–505, 526, RX 11A	None	None	Tr. 504–505, 526, RX 11A
David Crystal, Inc.	[2]	None	Tr. 637, RX 13A–J	[2]	None	Tr. 637, RX 13A–J
Briarbrook, Inc.	[2]	None	Tr. 588–589, RX 31	[2]	None	Tr. 588–589, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	None	Tr. 659–660	Yes	None	Tr. 659–660
Linker & Company	[2]	None	Tr. 714	[2]	None	Tr. 714
Devonbrook, Inc.	[2]	None	RX 21	[2]	None	RX 21
County Tweeds, Inc.	Yes	None	Tr. 1159, 1169	Yes	None	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

[1] Barberini, Ltd. was not in business during 1960 and 1961.
[2] No evidence relating to sales to Jay's.
* Respondent's exhibits which are underlined were received "In Camera."

R. H. STEARNS COMPANY

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$ None	$ None	Tr. 145, 157, RX 20A, B	$ None	$ None	Tr. 145, 157, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218, 258	None	None	Tr. 218, 258
Barberini, Ltd.[1]	—	—	—	—	—	—
Suitmaster Classics, Inc.	None	None	Tr. 249, 250	None	None	Tr. 249, 250
Lumay Coat Company	800.00	None	Tr. 318–319, 321	None	None	Tr. 318–319, 321
Modelia, Inc.	None	None	Tr. 372	None	None	Tr. 372
Towncliffe, Inc.	[2]	None	Tr. 423	[2]	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 438, 448	Yes	None	Tr. 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504, 526, RX 11A	None	None	Tr. 504, 526, RX 11A
David Crystal, Inc.	[2]	None	Tr. 624–625, 637–640	[2]	None	Tr. 624–625, 637–640
Briarbrook, Inc.	[2]	None	Tr. 588–589, RX 31	[2]	None	Tr. 588–589, RX 31
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	1,559.10	Tr. 659, 662, RX 17	Yes	1,339.60	Tr. 659, 662, RX 17
Linker & Company	Yes	None	Tr. 714, 721	Yes	None	Tr. 714, 721
Devonbrook, Inc.	[2]	None	RX 21	[2]	None	RX 21
Country Tweeds, Inc.	Yes	None	Tr. 1159, 1169	Yes	None	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

[1] Barberini, Ltd. was not in business during 1960 and 1961.
[2] Evidence of dollar amount of sales to R. H. Stearns, if any, not in record.
* Exhibits which are underlined were received "In Camera."

JORDAN MARSH COMPANY

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$20,541.94	$ None	Tr. 145, 164, RX 20A, B	$34,434.90	$ None	Tr. 145, 164, RX 20A, B
Buddy Bates Corp.	17,500.00	None	Tr. 256, 258	6,000.00	None	Tr. 256, 258
Barberini, Ltd.[1]	—	—	—	—	—	—
Suitmaster Classics, Inc.	9,000.00	None	Tr. 250	25,000.00	100.00	Tr. 250, RX 7
Lumay Coat Company, Inc.	None	None	Tr. 318–320	None	None	Tr. 318–320
Modelia, Inc.	Yes	None	Tr. 372	Yes	None	Tr. 372
Towncliffe, Inc.	[2]	None	Tr. 423	[2]	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 448, 438	Yes	None	Tr. 448, 438
Handmacher-Vogel, Inc.	None	None	Tr. 526, 504, RX 11A	Yes	None	Tr. 526, 504, RX 11A
David Crystal, Inc.	[2]	None	Tr. 624–625, 637–640	[2]	None	Tr. 624–625, 637–640
Briarbrook, Inc.	[2]	150.00	Tr. 589, RX 12, RX 31	[2]	None	Tr. 589, RX 12, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	None	Tr. 659–660	Yes	None	Tr. 659–660
Linker & Company	[2]	None	Tr. 714	[2]	None	Tr. 714
Devonbrook, Inc.	Yes	None	Tr. 787, RX 21	Yes	None	Tr. 787, RX 21
Country Tweeds, Inc.	Yes	[3]	Tr. 1159, 1168	Yes	6,700.00	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

[1] Barberini, Ltd. was not in business during 1960 and 1961.
[2] Evidence of dollar amount of sales to Jordan Marsh not in record.
[3] No figures available for 1960.
* Exhibits which are underlined were received "In Camera."

WOODWARD & LOTHROP

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$36,349.52	$ 100.00	Tr. 164, RX 20A	$44,010.60	$ None	Tr. 164, RX 20A
Buddy Bates Corp.	1,500.00	None	Tr. 257–258	700.00	None	Tr. 257–258
Barberini, Ltd.[1]	—	—	—	—	—	—
Suitmaster Classics, Inc.	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250
Lumay Coat Company, Inc.	None	None	Tr. 318–319, 321	None	None	Tr. 318–319, 321
Modelia, Inc.	Yes [2]	None	Tr. 378, 379	Yes [2]	None	Tr. 378, 379
Towncliffe, Inc.	None	None	Tr. 422	None	None	Tr. 422
Zelinka-Matlick, Inc.	Yes	None	Tr. 437, 438, 448	Yes	None	Tr. 437, 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504–505, 526, RX 11A	None	None	Tr. 504–505, 526 RX 11
David Crystal, Inc.	None	None	Tr. 612, 624–625, 637–640	None	None	Tr. 612, 624–625, 637–640
Briarbrook, Inc.	[3]	None	Tr. 588–589, RX 31	[3]	None	Tr. 588–589, RX 31
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	None	None	Tr. 659	None	None	Tr. 659
Linker & Company	None	None	Tr. 714, 722	None	None	Tr. 714, 722
Devonbrook, Inc.	22,000.00	None	Tr. 787, RX 21	6,000.00	None	Tr. 787, RX 21
Country Tweeds, Inc.	Yes	[4]	Tr. 1159	Yes	1,190.23	Tr. 1159, 1168
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

[1] Barberini, Ltd. was not in business during 1960 and 1961.
[2] Total volume of sales to Woodward & Lothrop for the entire period was $45,150.00.
[3] No evidence relating to sales to Woodward & Lothrop.
[4] No figures available for 1960.
*Respondent's exhibits which are underlined were received "In Camera."

Respondent has failed to prove by a preponderance of reliable, probative, and substantial evidence that garments manufactured by its seventeen "competitors," or any of them, did, in fact, compete with respondent's garments for the business of its favored customers, or for the retail customers' dollars. The burden of proving this competition was upon respondent. The price zones testimony of Professor Smith (Tr. 897, *et seq.*), standing alone, does not prove such competition. Representatives of most of the competitors who were subpoenaed denied competition with the Rabiner & Jontow lines. Not one of respondent's customers was called to testify as to competition between respondent and other manufacturers.

Evidence of competition between respondent and the firms which it subpoenaed may be summarized:

Glenhaven, Ltd.

Bernard Gold, vice president and general sales manager for the past seven years, appeared on behalf of Glenhaven, Ltd., 512 Seventh Avenue, New York, New York (Tr. 122, *et seq.*). This firm manufactures ladies' suits (no coats), which retail from $30 to $40. Occasionally, some of its items may retail for as much as $60. It sells to retail department stores and specialty shops (Tr. 130). There is little price competition between the Glenhaven and Rabiner & Jontow lines (Tr. 125–126). Respondent's garments retail at higher prices. Mr. Gold testified (Tr. 190):

Q. Are you a competitor, is Glenhaven a competitor of Rabiner & Jontow?
A. I don't believe so, no, sir.

Mr. Gold further testified that, although Glenhaven did make advertising allowances to some of its customers during 1960, 1961, and 1962 (Tr. 145), it did not pay any such allowances to Best & Co., Inc., Jordan Marsh Co., Jay's, Inc., and R. H. Stearns Co. It paid $100 to Woodward & Lothrop, Inc. in 1960; $35 to Lord & Taylor in 1960; and $238 to Lord & Taylor in 1962.

On occasion Eastman Kodak would give Glenhaven money to promote the sale of garments made from Kodel, and the Wool Bureau would allocate funds to promote the sale of garments made from wool. These monies were given to Glenhaven, which, in turn, allocated them to the retail firms (Tr. 148). Glenhaven suggested that the fabric advertising be carried in local newspapers (Tr. 151). Glenhaven used its own advertising funds to promote a particular line (Tr. 153), and a particular fabric.

During 1960, 1961, and 1962, Glenhaven placed institutional advertising in the fashion magazines, such as Mademoiselle, Glamour, Harper's Bazaar, and Vogue (Tr. 174). Such advertisements contained the names of the stores at which Glenhaven's advertised garments could be purchased. Glenhaven would notify these stores that their names would appear in the advertisements (Tr. 175). Mr. Gold, with his sales staff, selected the store whose name appeared in the institutional ads in the fashion magazines (Tr. 176). As many as five or six Glenhaven customers might be listed in a single ad (Tr. 180). The ad showed the garment, the name of the company, and the names of stores at which the garment was availble (Tr. 181).

When Glenhaven spent its own money for advertising, it was on a "promotional basis for a particular fabric group to a particular city. In some of the cases of the fiber money we would offer it to the whole country" (Tr. 183).

Respondent has failed to prove that Glenhaven suits compete for the retail consumers' dollars with suits manufactured by Rabiner & Jontow. Respondent has failed to prove that, at the level at which Glenhaven suits are purchased by retail firms for resale, they compete in fact with "Bardley" (Rabiner & Jontow) garments.

Respondent has further failed to prove that the advertising allowances, which respondent paid to its favored customers, were granted to meet or match similar or identical advertising allowances paid by Glenhaven to such favored customers.

Barberini, Ltd.

Kermit Bass, president, appeared on behalf of Barberini, Ltd., 512 Seventh Avenue, New York, New York (Tr. 192, *et seq.*). This firm manufactures and sells for resale ladies' coats and suits which retail from $80 to $150 (Tr. 193). Barberini, Ltd. was incorporated and first commenced to do business in May 1962. During the years involved in this proceeding, Barberini did not sell its products to any of respondent's favored customers in any of the relevant trading areas (Tr. 193, 196). Barberini granted no advertising allowances to respondent's favored customers (Tr. 198–99, 204).

Respondent failed to establish for the years here involved any competition whatsoever between respondent and Barberini, Ltd.

Buddy Bates Corp.

Buddy Bates, president, appeared on behalf of Buddy Bates Corp., 250 West 39th Street, New York, New York (Tr. 210, et seq.). This corporation manufactures ladies' coats and suits (Tr. 210), which ordinarily retail from $60 to $150, and during the years 1960 through 1962, retailed from $50 to $110 (Tr. 212, 215). During these years, Buddy Bates' suits retailed principally at $50, $55, $59, and $69 (Tr. 302–303). Mr. Bates testified that there is a basic style difference between Buddy Bates' garments and those manufactured by respondent (Tr. 304). He was not too familiar with the Rabiner & Jontow line, but he did not consider Rabiner & Jontow to be a competitor, nor has it been represented to him as a competitor by any of Buddy Bates' customers (Tr. 215–16, 304). No advertising allowances were paid by Buddy Bates to respondent's favored customers during the years involved (Tr. 219).

Respondent has failed to establish by reliable, probative, and substantial evidence in this record that the non-proportionalized cooperative advertising payments, which it made to its favored customers during the years in question, were made to meet or match similar payments by Buddy Bates, Inc.

Suitmaster Classics, Inc.

Harry Snyder, president, appeared on behalf of Suitmaster Classics, Inc., 221 West 37th Street, New York, New York (Tr. 247, *et seq.*). This company manufactures ladies' suits retailing from $40 to $50 (Tr. 248, 254). During the years in question, it sold to Jordan Marsh Co., Woodward & Lothrop, Inc., Best & Co., Inc., and Lord & Taylor (Tr. 249). It paid $100 to Jordan Marsh Co. in 1961. Suitmaster's volume item in its line was a man-tailored, one-button suit which retailed at $39.98 (Tr. 251–54). Suitmaster gave only one form of advertising allowance, *i.e.*, one dollar per suit to all persons who purchased and advertised the one-button suit. Mr. Snyder testified (Tr. 254–55):

Q. Were you in competition with Rabiner and Jontow during 1960 through 1962?

A. . . . As far as Rabiner and Jontow, I believe they make higher-priced suits. . . .

I would say that my competition would be, in my eyes, the people who make suits at my price level. . . .

Q. Would you therefore consider yourself in competition with a firm whose retail price range is from seventy dollars to ninety dollars?

A. Not in my eyes, no, sir.

Respondent failed to prove by reliable, probative, and substantial evidence in this record that its advertising payments to its favored customers were made to meet or match similar payments by Suitmaster Classics, Inc.

Lumay Coat Company, Inc.

Sidney Malvin, secretary-treasurer, appeared on behalf of Lumay Coat Company, Inc., 230 West 38th Street, New York, New York (Tr. 311, *et seq.*). This company manufactures and sells ladies' coats and suits (Tr. 311), popular-priced fashion garments, retailing from $70 to $90 (Tr. 313). The company has made no attempt to promote the Lumay trade name (Tr. 313–14, 323–24). Of the respondent's six favored customers and during the years involved, Lumay paid only $202 to Lord & Taylor in 1962. Lumay's sales to Lord & Taylor for the three years involved were $29,000 in 1960; $42,000 in 1961, and $90,000 in 1962, a total of $161,000—with a $202 allowance on one job lot (Tr. 322). Mr. Malvin testified (Tr. 336–37):

Q. Are you familiar with the product manufactured and sold by Rabiner & Jontow?

A. Yes, sir.

Q. Is yours a competitive item from the point of view of style?

A. No.

* * * * * * *

Q. And they [respondent] make coats and suits?

A. Yes.

Q. Out of a typical fabric like you do, woolen fabrics?

A. Woolen fabrics. That is where the similarity ends.

* * * * * * *

In my opinion, they [respondent] make a classic coat, a classic suit. Ours [Lumay] is a little more fashion.

Q. Therefore, you don't consider that there is any competition at retail?

A. I don't think so, no.

* * * * * * *

(Continuing) I would say our merchandise doesn't compete. I think the merchandise they make, the type of merchandise we make, complement one another.

Respondent has failed to prove by reliable, probative, and substantial evidence that its advertising payments to its favored customers during the years involved were made to meet or match similar payments by Lumay Coat Company, Inc., to the same favored customers.

Modelia, Inc.

Gunther Oppenheim, president, appeared on behalf of Modelia, Inc., 205 West 39th Street, New York, New York (Tr. 346, *et seq.*). This company manufactures ladies' coats (Tr. 346), which retail the spring line from $60 to $165, and the winter line from $70 to $300 (Tr. 348–49). Some of the firm's winter coats are fur lined (Tr. 349), and Mr. Oppenheim characterized their styling as high-fashion, avant garde—a "gimmick operation" (Tr. 357). The firm specializes in novelty products. Mr. Oppenheim's opinion is that Modelia is a "trend-setter" of the industry with respect to introducing new fabrics (Tr. 357–58). He testified:

In a sense, I don't believe there is one single company in the entire trade which I consider competition (Tr. 366–67).

Q. Is it your position that . . . a coat which sells for the same price as the one which you sold to the store would not be in competition with you if it was on the racks?

A. No, our styling conception is completely different. This is a well known fact (Tr. 367).

* * * * * * *

Q. You had no competition?

A. I do not feel that I had any competition (Tr. 368).

* * * * * * *

Q. Mr. Oppenheim, was Rabiner & Jontow your competitor during 1960, 1961 and 1962?

A. I do not consider them a competitor of ours (Tr. 390).

The record shows that Modelia granted a total of $6700 advertising allowances to Lord & Taylor for the years 1960, 1961 and 1962 (Tr. 355), and $350 to Best & Co., Inc., for the three years. After Mr. Oppenheim testified that the Modelia line does not compete with the Rabiner & Jontow line of garments, it was incumbent upon respondent to place in this record some reliable, probative, and substantial evidence to prove that Mr. Oppenheim was in error. Respondent has failed to do this. The record does not support a finding that the non-proportionalized advertising allowances paid by respondent to its favored customers, and particularly to Best & Co., Inc., and Lord & Taylor, were given to meet or match a similar or identical advertising payment by Modelia, Inc.

Towncliffe, Inc.

Howard B. Herbert appeared on behalf of Towncliffe, Inc., 512 Seventh Avenue, New York, New York (Tr. 391, *et seq.*). This company manufactures ladies' coats and suits (Tr. 391). Their suits retail at $70 to $125, and the coats retail from $90 to $125 (Tr. 392). The firm markets under the names, "Towncliffe" and "Towntree" (Tr. 392). They manufacture conservative, well-made, tailor type garments (Tr. 393). Towncliffe's suits are made of wool, cotton, and silk (Tr. 399), while respondent utilizes primarily wool (Tr. 1119, 1141–42). Towncliffe made the following advertising payments to two of respondent's favored customers during the periods involved:

Lord & Taylor

1960	$1945.20
1961	$2952.77
1962	$ 831.60

Best & Co., Inc.

1960	$1200.00
1961	$2847.00
1962	$1950.00

(Tr. 395.)

However, the evidence does not support a finding that respondent's advertising payments to Lord & Taylor and Best & Co., Inc., during the years in question were made to meet or match advertising payments made by Towncliffe. Most of the time Towncliffe deferred to the decision of its customer who was going to run the ad (Tr. 399). Towncliffe had no advertising budget as such (Tr. 400). During 1960, 1961, and 1962, if Towncliffe engaged in advertising, it was either cooperative or editorializing advertising (Tr. 401).

There is no evidence to show which of Towncliffe's products were promoted by Lord & Taylor and Best & Co., Inc.

The Towncliffe representative testified:

Q. The evidence in this case shows that Rabiner & Jontow's retail price range is from $70 to $90. Your [Towncliffe's] price range runs higher. Do you consider yourself in competition as to your entire price range? (Tr. 425–26.)

A. . . . we wouldn't be in competition from $90 to $125. I would say we are in competition from $70 to $90 (Tr. 426).

Respondent has failed to prove that its non-proportionalized advertising allowances to its favored customers were granted to meet or match similar Towncliffe advertising allowances for products which competed at the retail level with respondent's products for the consumers' dollars, and competed for sales to the favored customers.

Zelinka-Matlick, Inc.

David Zelinka appeared on behalf of Zelinka-Matlick, Inc. 512 Seventh Avenue, New York, New York (Tr. 433, *et seq.*). This firm manufactures ladies' coats and suits (Tr. 433). Its spring coats retail from $80 to $110 and the spring suits from $80 to $130 (Tr. 433–34). Its winter coats retail from $90 to $200, and winter suits from $90 to $200 (Tr. 434). The firm manufactures high-style fashion garments (Tr. 435, 480). Mr. Zelinka testified that his firm does not compete with respondent. He testified that it makes "a higher priced line than Rabiner & Jontow" (Tr. 481). The two lines overlap price wise at the very lowest level. Even there, Mr. Zelinka denied that Rabiner & Jontow garments competed with Zelinka-Matlick garments. Mr. Zelinka opined that the same price range is only one of several elements which cause competition between different manufacturers of ladies' coats and suits (Tr. 480–82).

After Mr. Zelinka's denial that there was competition between the Rabiner & Jontow line and the Zelinka-Matlick line, the burden was then upon respondent to prove by a preponderance of reliable, probative, and substantial evidence that such competition does and did exist. Such proof has not been made. Respondent's act of naming Zelinka-Matlick, Inc., as a competitor does not constitute proof of the fact. Respondent has not proven that its advertising allowances to its favored customers were granted to meet or match similar allowances by Zelinka-Matlick, Inc. to the same favored customers.

Handmacher-Vogel, Incorporated

Edward Halpert, vice president and treasurer, appeared on behalf of Handmacher-Vogel, Incorporated, 533 Seventh Avenue, New York, New York (Tr. 493, *et seq.*). It manufactures and sells in interstate commerce women's suits. Its "Handmacher" suits retail from $60 to $100. Its "Weathervane" unlined suits retail from $30 to $50 (Tr. 494). Its garments cover a "broad spectrum of suit styling" (Tr. 496) with emphasis on high style.

The only one of respondent's favored customers to whom Handmacher-Vogel granted advertising allowances during the years here involved was Lord & Taylor. The allowances were: for 1960, $2191.49; for 1961, $745.58; and for 1962, $632.98 (RX 11 *in camera*).

Of the nine payments to Lord & Taylor by Handmacher-Vogel, seven were used to advertise the spring and summer line which retails from $30 to $50. (RX 11B, RX 11G, RX 11H, RX 11I, RX 11J and RX 11L, all *in camera.*) This line does not compete price wise with the Rabiner & Jontow line which retails, as previously found, from $70 to $90.

Handmacher-Vogel's advertising payments were not made according to a plan, but were negotiated separately at the time they were made (Tr. 516). In some instances, Handmacher-Vogel paid the full cost of the ad. In other instances, it paid only a part of such cost (Tr. 517). Handmacher-Vogel's advertising payments were not based upon the volume of business done with a customer, nor the importance of the retailer in terms of prestige. It was negotiated at a particular instance in time (Tr. 519). The retailer took the initiative in attempting to secure Handmacher-Vogel's advertising allowances (Tr. 520). Handmacher-Vogel refused some requests, and granted others (Tr. 520–21).

Handmacher-Vogel advertises generally in Vogue, Harper's, and Mademoiselle. These ads sometimes featured the names of the Handmacher-Vogel accounts in a particular city (Tr. 555).

Respondent has failed to prove that its advertising payments to its favored customers were made to meet or match similar payments by Handmacher-Vogel, Incorporated to the same customers.

Briarbrook, Inc.

Bertram Barber, president, appeared on behalf of Briarbrook, Inc., 512 Seventh Avenue, New York, New York (Tr. 568, *et seq.*). This company is a manufacturer of ladies' suits (Tr. 570). Briarbrook's spring suits retail from $60 to $110; summer suits from $40 to $55; and the fall suits from $70 to $125 (Tr. 570–71). The suits can be described as "fashion" or style garments (Tr. 571). Mr. Barber's testimony does not prove that Briarbrook is in fact in competition with Rabiner & Jontow (Tr. 580–599). Evidence was elicited concerning Briarbrook advertising allowances to Jordan Marsh Co. and Lord & Taylor (two of respondent's favored customers [RX 12; Tr. 600–601]). Mr. Barber was unable to testify as a certainty that the payments were in fact advertising allowances (Tr. 599). His testimony does not prove that respondent's advertising payments to its favored customers were made to meet or match similar or identical payments by Briarbrook to the same favored customers.

Respondent failed to establish the existence of competition between respondent and Briarbrook, Inc., for sales to respondent's favored customers. Respondent, likewise, did not introduce any specific evidence that its garments and the Briarbrook garments did and do, in fact, compete for the retail purchasers' dollars.

David Crystal, Incorporated

Harold Cohen, comptroller, appeared on behalf of David Crystal, Incorporated, 498 Seventh Avenue, New York, New York (TR. 606, *et seq.*). He has been its comptroller since July 1, 1963 (Tr. 607). David Crystal is primarily a manufacturer of a classic line of ladies' suits that sell under the trade name of "David Crystal" (Tr. 613).

HEARING EXAMINER GROSS: Would you characterize the general styling of David Crystal, Inc. as pretty similar to the line of Rabiner & Jontow?

THE WITNESS: Well, I don't propose to be a fashion man. But from my information with people in the industry and people in my company, it appears that Rabiner and Jontow and David Crystal's styling is very similar. (Tr. 612.)

Mr. Cohen had been comptroller of David Crystal, Incorporated, only since July 1, 1963, and was not qualified to testify specifically to the competition, if any, between respondent and David Crystal for the coat and suit business of the respondent's favored customers. Mr. Cohen produced papers which are in evidence as RX 13A–13J, RX 14A–14Z10, RX 15A–15Z10, and RX 16A–16Z2, all *in camera*. The exhibits, plus Mr. Cohen's testimony, support a finding that David Crystal made cooperative advertising payments to some of respondent's favored customers, as follows:

	1960	*1961*	*1962*
Lord & Taylor		$1317.00 (RX 13D–13I, *in camera*)	$750.00 (RX 13F *in camera*)
Best & Co.	$8250.38 (RX 14A–14Z10, *in camera*)	$6184.08 (RX 15A–15Z10, *in camera*)	$7401.50 (RX 16A–16Z2, *in camera*)

Some of the David Crystal exhibits (RX 13A through RX 16Z2, *in camera*) indicate, and it is found, that many of the advertising allowances, which made up the five general totals given above, were paid to promote David Crystal's garments which were not competitive to respondent's garments. At the outset of Mr. Cohen's testimony, he testified that Mr. Vincent Draddy, president of David Crystal, would be best qualified to testify concerning its competition, if any, with respondent within the framework of respondent's "meeting competition defense." Mr. Draddy was not thereafter subpoenaed.

The record does not contain substantial and probative evidence that respondent's advertising payments to its favored customers were made in response to a specific, competitive situation to meet or match similar or identical advertising payments by David Crystal, Incorporated, to the same favored customers. The evidence also fails to establish that the garments manufactured by respondent competed with the garments manufactured by David Crystal, Incorporated, for sales to the favored customers, or for sales to retail customers.

Davidow Suits

Archibald Davidow, one of its principal stockholders and officers, appeared on behalf of Davidow Suits, 205 West 39th Street, New York, New York (Tr. 650, *et seq.*). This company manufactures and sells women's suits for resale at retail under the label "Davidow" for a price of $125 and up (Tr. 652–53). Prior to 1960, Davidow Suits developed a cooperative advertising plan which was offered to all Davidow customers throughout the country (Tr. 657). Davidow has been very selective in its marketing and sells to very few marketing outlets in each marketing area (Tr. 657). Davidow may also give only one of these very few outlets the exclusive right to buy and resell a specified style in a particular area (Tr. 658). Davidow has many styles in its line, and it has marketed generally by giving exclusive styles where advertising "is put on it" (Tr. 659). Although many Davidow styles are carried by more than one retail outlet in a marketing area, if a style is advertised, it will usually be available only at the retail outlet which advertises it (Tr. 659).

The Davidow cooperative advertising plan was made available to all Davidow customers throughout the country (Tr. 659). Davidow made no sales to Best & Co., Inc., in New York City in

1960, 1961 and 1962; nor to Woodward & Lothrop, Inc. in Washington, D.C., in 1960 and 1961; and it did not offer to sell its products to these establishments, and it did not pay nor offer to pay any advertising allowances to them (Tr. 659). In 1960 and 1961, Davidow did not pay any advertising allowances to Jay's, Inc., nor to Jordan Marsh Co. in Boston (Tr. 660). Jay's and Jordan Marsh were offered Davidow's advertising plan, but refused it (Tr. 660). Pursuant to the plan, payments were made in 1960 and 1961 to R. H. Stearns Co. in Boston—$1,559.10 in 1960, and $1,339.60 in 1961 (RX 17 *in camera*); and to Lord & Taylor in New York City, $5,606.68 in 1960; $8,358 in 1961; and $7,828.86 in 1962 (RX 19 *in camera*). Davidow's letter offering its cooperative advertising plan to its customers is in evidence as RX 18 *in camera*.

In 1960, Davidow Suits paid advertising allowances to the extent of 50% of the cost of the advertising actually expended by Lord & Taylor. Payments were made based upon tear sheets of the advertisement, plus a stated sum for production costs (Tr. 663). Lord & Taylor's advertising department did the art work for the advertisement. Later Davidow changed its arrangement with Lord & Taylor from that of paying 50% of the cost of the advertisement to a basis of paying 5% of anticipated sales during the course of a year. Mr. Davidow testified that his firm has received more benefit from the 5% of sales arrangement than from the former 50% of cost plan (Tr. 664–65). Davidow's 5% arrangement with Lord & Taylor was not duplicated with any other Davidow customer in Boston, New York City, or Washington, D.C. Davidow paid for all its advertising in fashion magazines (Tr. 669).

Davidow's cooperative advertising plan, exemplified by RX 18 *in camera*, was offered to all Davidow customers (Tr. 673).

There is not any reliable, probative, and substantial evidence that respondent's non-proportionalized advertising payments to its favored customers in New York City, Boston, and Washington, D.C., were made in good faith to meet or match identical or similar payments by Davidow Suits to the same customers.

Linker & Company, Inc.

Maurice Linker, president, appeared on behalf of Linker & Company, Inc., 512 Seventh Avenue, New York, New York (Tr. 706, *et seq.*). He has been in the ladies' garment business for twenty-five years (Tr. 707). From 1960 to 1963, its garments retailed from $49 to $69 (Tr. 708). During these years, the company did not use its funds to advertise its products (Tr. 710). Linker never received any money from any textile, fur or fiber company to be used in cooperative advertising (Tr. 713). During the three year period, Linker sold about $15,000 to Lord & Taylor, and $500,000 to Peck & Peck. One specialized $1,000 advertising allowance was paid to Peck & Peck over the three year period. Linker made garments to Peck & Peck specifications. It did not seek to build up its own label. The garments, which Linker made for Peck & Peck, were classic—basic (Tr. 718). The styles of the merchandise manufactured by Linker for Peck & Peck were usually "confined" to Peck & Peck only, and not sold to other Linker customers (Tr. 721).

Linker sold R. H. Stearns Co. in Boston, but gave them no advertising allowances (Tr. 721). Linker gave no advertising allowances to the stores it sold in Washington, D.C. (Tr. 722).

Respondent's non-proportionalized advertising payments to its favored customers were not made to meet or match similar or identical advertising payments by Linker & Company, Inc., to the same favored customers.

Cuddle Coat, Inc.

Justin Lipman, vice president, appeared on behalf of Cuddle Coat, Inc., 500 Seventh Avenue, New York, New York (Tr. 725, *et seq.*). A Cuddle Coat advertisement in The New York Times' magazine section of February 28, 1962, in which the name of the manufacturer and retailer (Lord & Taylor) appeared, is in evidence as RX 37. Cuddle Coat, Inc., a division of Petite Miss Co., manufactures and sells highly styled, untrimmed coats which retail from $50 to $75. It caters to smaller girls' and misses' sizes (6 to 14 or 5 to 13)—the younger market (Tr. 731). During the years from 1960 to 1962, the firm sold Woodward & Lothrop, Inc. in Washington, D.C.; R. H. Stearns Co. in Boston; and Lord & Taylor in New York City (Tr. 729). Cuddle Coat mentioned the names of some of its retail outlets in its ads (RX 37; Tr. 737). During the years 1960 to 1962, it did not make cooperative advertising payments to its retail store customers (Tr. 735). Mention of the retail establishments in its ads was for the purpose of giving Cuddle Coat prestige—not the retail outlet (RX 37; Tr. 736).

In addition to Lord & Taylor, Cuddle Coat sold in New York City to Franklin Simon, Macy's, Gimbel Bros., and Bonwit Teller. It did not pay any advertising allowances to anyone (Tr. 743, 749). It was not Cuddle Coat's policy during the pertinent years to give money toward advertising (Tr. 747).

The Cuddle Coat representative testified that The New York Times' magazine section requires 60 days lead time for the placement of fashion advertisements, and fashion magazines require 90 days lead time.

In the fashion magazines, Vogue, Mademoiselle, and Harper's, Cuddle Coat usually did not mention the retail establishments selling its merchandise.

A one page color advertisement in The New York Times' magazine section cost Cuddle Coat about $5,000. Cuddle Coat usually ran such advertisements in The New York Times' magazine section about twice a year (Tr. 737). Unlike respondent's procedures, Cuddle Coat advertisements were not worked out in consultation with its retail store customers; nor were its retail store customers asked to cooperate (Tr. 738–39). Cuddle Coat's advertising policy was totally different in purpose and execution from respondent's advertising policy. A retail store was mentioned in the Cuddle Coat ad strictly as a matter of "convenience," so that the Cuddle Coat office "wouldn't be badgered by telephone calls and letters in New York City" inquiring where the Cuddle Coat in the advertisement might be purchased (Tr. 740). At the time Cuddle Coat mentioned Lord & Taylor in its advertisements in The New York Times, it was also selling in New York City to Franklin Simon, Macy's, Gimbel Bros., and Bonwit Teller, as above found.

Since Cuddle Coat didn't give advertising allowances to any of its customers (Tr. 743), respondent's advertising allowances could not have been made to meet or match those of Cuddle Coat. Respondent's evidence fails to prove that its non-proportionalized advertising payments to its favored customers were made in good faith to meet or match similar advertising payments made by Cuddle Coat, Inc., to the same favored customers.

Devonbrook, Inc.

Morton Cytron, comptroller and assistant secretary, appeared on behalf of Devonbrook, Inc., 1400 Broadway, and 500–512 Seventh Avenue, New York, New York (Tr. 769, *et seq.*). This company has the following subsidiaries: Devonshire Junior, Inc.; Brandshire, Inc.; Devshire, Ltd.; Heart Throb, Inc.; Devonaire, Ltd.; Devonknit, Inc.; and Miss Devon, Inc. Devonbrook stock is publicly held, and traded over the counter (Tr. 770). The principals in the company are Sigfried Alper, Owen Alper, and William Alper—"a father, brother and son" combination. The company manufactures and sells junior dresses and suits, which retail in the fall season from $23.75 to $42.75 (Tr. 770). In the spring season, the line retails at $17.75 to $39.75 (Tr. 771).

Devonbrook and its subsidiaries did not use traveling salesmen. They sold from their showrooms at the addresses stated above.

In 1960, 1961, and 1962, the companies did not participate in national advertising, as such (Tr. 777).

If one of the Devonbrook customers would feature a particular Devonbrook garment in an advertisement, Devonbrook would give the retail outlet an allowance equal to a dollar per garment, provided the retailer mentioned the Devonbrook name, and submitted tear sheets as proof that the advertisement had been run. The average cost to Devonbrook of such advertisements would be about $200 to $300. Most of such advertisements were run in The New York Times (Tr. 778–79). The Devonbrook customer usually submitted a debit memo with a tear sheet of the ad attached (Tr. 779). If a Devonbrook customer spent $2,000 on an advertisement and sold only ten Devonbrook garments, such customer would have been paid only $10. So the burden was on Devonbrook's retail outlets to be very astute in selecting the Devonbrook merchandise to be advertised (Tr. 780). The "Devonbrook look . . . is accepted in the junior market as young, fashionable and popularly priced" (Tr. 781).

During the years involved in this proceeding, Devonbrook did not engage in national advertising of any kind (Tr. 782). Devonbrook has learned that, when the customers advertise its products in the local newspapers, they get the best results (Tr. 783).

Devonbrook did no business with Lord & Taylor during the years involved. Devonbrook's only advertising payments to any of respondent's favored customers for the relevant years were to Best & Co., Inc., as follows: 1960—$7,750; 1961—$11,100; and 1962—$8,650 (RX 21 *in camera*).

Respondent's non-proportionalized advertising payments to its favored customers were not made to meet or match specific or similar payments by Devonbrook to the same customers. The evidence will not support a finding that respondent's garments and Devonbrook's garments competed with each other for the patronage of retail establishments, or for retail customers' dollars.

Country Tweeds, Inc.

Harry Glassman, controller, appeared on behalf of Country Tweeds, Inc., 250 West 39th Street, New York, New York (Tr. 1158, *et seq.*). This company manufactures ladies' coats which retail from $75 to $225, roughly (Tr. 1159). During the relevant years, Country Tweeds would cooperate with stores generally for newspaper advertising where Country Tweeds would pay 50% of their ads usually, and sometimes more, up to the amount of a commitment which it would make to such customers at the beginning of the season (Tr. 1160). After a particular retail establishment had spent the amount which Country Tweeds had allocated to it, all further advertising was at the retail establishment's own expense (Tr. 1160).

During the relevant years, Country Tweeds advertised in Life, Vogue, Harper's Bazaar, and "maybe one or two others" (Tr. 1161). Some of Country Tweeds' retail stores may have been mentioned, but Country Tweeds "were then told" that they could not mention the names of some of their customers without mentioning all, so they stopped mentioning any names (Tr. 1161–62).

During 1960, 1961, and 1962, Country Tweeds never received any allowance from any textile fiber house or textile company to be used in advertising their products (Tr. 1166).

Country Tweeds paid Lord & Taylor a $4,299.99 advertising allowance in 1961, and $4,014.72 in 1962 (Tr. 1167). They paid Woodward & Lothrop, Inc., $1,190.23 in 1961 (Tr. 1168), and $1,641.98 in 1962 (Tr. 1169); and paid $6,700 to Jordan Marsh Co. for cooperative advertising in 1961, and $2,979 in 1962 (Tr. 1169).

During the years in question, Country Tweeds provided their customers mailing pieces, brochures, with the company name upon them without charge. Country Tweeds furnished such mailing pieces to those customers who requested them. All their customers did not request them (Tr. 1169). Their free mailing pieces were made known to their customers "by word of mouth" (Tr. 1170). Their 1961 advertising payment to Lord & Taylor of $4,299.99 included a $1,350 figure for advertising in a Lord & Taylor catalogue (Tr. 1170).

Mr. Glassman testified (Tr. 1173):

Q. Do you know the company Rabiner & Jontow?
A. I frankly never heard of them until I received this subpoena.

Country Tweeds make a "prestige" garment which they sell to "prestige" retail establishments (Tr. 1174). They have a few customers in each retail market (Tr. 1175). In 1960 and 1961, Country Tweeds sold to Woodward & Lothrop, Inc., exclusively, in Washington, D.C., and to Jordan Marsh Co., exclusively, in Boston (Tr. 1175–76).

The evidence fails to prove that during the years involved Rabiner & Jontow, Inc., competed with Country Tweeds, Inc., for sales to respondent's six favored customers, or that Country Tweeds' garments competed with respondent's garments for the dollars of the ultimate consumer—the retail purchaser. Although Country Tweeds, Inc., paid advertising allowances to some of respondent's favored customers during the years involved, the hearing examiner cannot find from the evidence that respondent's non-proportionalized advertising allowances were paid to meet or match a similar payment by Country Tweeds, Inc., "in 'individual competitive situations, rather than * * * [in] a general system of competition.'" (See *Exquisite Form Brassiere, Inc., et. al., supra,* p. 648.)

Jack Feit, Inc.

Due to the illness of its president, Lillian Hertzberg, its bookkeeper, appeared on behalf of Jack Feit, Inc., 530 Seventh Avenue, New York, New York (Tr. 1191, *et seq.*). This company manufactures coats and suits, mostly suits, which retail from $70 to $125 (Tr. 1202). She testified that the only advertising allowance paid by Jack Feit to any of respondent's favored customers during the years 1961 and 1962 was $3,783.95 paid to Lord & Taylor (Tr. 1199, 1203). Jack Feit sold its garments to some of respondent's other favored customers, but did not pay any advertising allowances to these others. It did not make its cooperative advertising payments pursuant to any published plan (Tr. 1204).

The evidence in this record fails to establish that respondent's non-proportionalized advertising allowances paid to its favored customers were paid to meet or match a specific, similar payment by Jack Feit, Inc., to the same favored customers.

Respondent failed to prove that Jack Feit, Inc., competes with it in the sale of coats and suits to respondent's favored customers. Respondent failed, likewise, to prove that Jack Feit's garments compete with Rabiner & Jontow's garments for the dollars of the ultimate consumer—the retail purchaser.

CONCLUSIONS OF LAW

Respondent, Rabiner & Jontow, Inc., 512 Seventh Avenue, New York, New York, a New York corporation, which has been doing business continuously since 1942, manufactures and sells in interstate commerce ladies' coats and suits under the trade names of "Bardley," "Bardley, Jr.," and under private labels. Respondent's products are sold for resale at retail.

Respondent has been, at all relevant times, and now is, engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

Respondent has been, and now is, in competition with other persons, firms and corporations who manufacture and sell for resale at retail similar lines of ladies' coats and suits.

The Federal Trade Commission has jurisdiction over Rabiner & Jontow, Inc., and the subject matter of this proceeding. This proceeding is in the public interest.

In the course and conduct of its business in commerce during the years 1960, 1961, and 1962, in the cities of New York, New York, Boston, Massachussets, and Washington, D.C., respondent paid non-proportionalized advertising allowances to its favored customers, as hereinabove found, without making such payments available to all of its other, nonfavored, customers who competed with its favored customers in the sale at retail of respondent's products of like grade and quality.

Respondent represents that segment of ladies' coat and suit manufacturers, whose garments usually sell at retail basically in the price range between $70 and $90.

Respondent's non-proportionalized advertising payments did, and do, constitute a violation of Section 2(d) of the Clayton Act, as amended, and should be enjoined.

Respondent has failed to prove by reliable, probative, and substantial evidence that its garments compete with the garments of the "competitors," whom it subpoenaed, for sales to the retail establishments who purchase respondent's garments, or for sales to the ultimate consumer—the retail buyer.

Respondent has failed to prove by reliable, probative, and substantial evidence that its advertising payments were made in good faith to meet or match the same or similar advertising payments made by any one or more of its competitors to the same customers to whom respondent made its advertising payments.

Respondent's evidence fails to bring its non-proportionalized advertising payments within the criteria established by the Federals Trade Commission in its opinion in *Flotill Products, Inc.*, Docket No. 7226 (*supra*, p. 645); *Ace Books Inc., et al.*, Docket No. 8557 (*supra*, p. 647); and *Exquisite Form Brassiere, Inc., et al.* v. *Federal Trade Commission* (C.A.D.C. No. 18524) 360 F. 2d 492 (*supra*, pp. 647–648).

Counsel supporting the complaint have proven the material allegations of the complaint by reliable, probative, and substantial evidence, and respondent has failed to prove that its unlawful, non-proportionalized advertising payments were made to meet a specific payment of a competitor in an individual competitive situation, rather than in a general system of competition.

ORDER

Now, therefore, it is ordered, That respondent Rabiner & Jontow, Inc., a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION
SEPTEMBER 19, 1966

BY REILLY, *Commissioner:*

This matter is before the Commission on the appeal of respondent, Rabiner & Jontow, Inc., from an initial decision of the hearing examiner holding that respondent had violated subsection (d) of section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

The complaint herein alleged that respondent, a manufacturer of ladies' suits and coats, had granted promotional allowances to certain of its customers without making such allowances available on proportionally equal terms to other customers competing in the sale of respondent's products. The respondent admitted many of the material allegations of the complaint in its answer but claimed as an affirmative defense that in every instance in which it granted promotional allowances it did so in good faith to meet competition. The hearing examiner found, primarily on the basis of respondent's admissions and stipulations of fact, that during the years 1960 through 1962 respondent had granted advertising allowances to certain favored customers located in the cities of Boston, Massachusetts, New York, New York, and Washington, D.C.; that other customers competing in the sale, at retail, of respondent's products did not receive any advertising or promotional allowances during this period; that allowances granted by respondent were individually negotiated on an *ad hoc* basis for each advertisement; that respondent had no plan whereby competing customers might qualify for an advertising allowance; and that respondent's payments were not made available on proportionally equal terms even among favored customers.

To establish the claim that its allowances were justified under the 2(b) proviso as good faith efforts to meet allowances furnished by competitors, respondent called as witnesses the president of the corporation, Abbe Rabiner, representatives of 17 coat and suit manufacturers, and an associate professor of retail merchandising at New York University who testified as an expert witness. The examiner rejected this defense, holding that respondent had failed to prove through the testimony of these witnesses that its non-proportionalized advertising payments were made in order to meet comparable payments in specific, individual, competitive situations. The examiner found in this connection that the testimony of Rabiner and the expert witness related only to general competitive conditions in that segment of the garment industry of which respondent is part and not to the issue of whether respondent's discriminatory payments were made defensively in good faith response to promotional payments offered to its customers by competing garment manufacturers. The examiner also found that respondent had failed to prove through the testimony of the 17 manufacturers' representatives that it was in fact competing with those particular manufacturers in the distribution of its products. He also found that none of these manufacturers, individually, paid to respondent's favored customers the large cooperative advertising allowances that respondent paid. He concluded from his review of the record that there was no evidence that respondent's allowances were granted to meet or match a similar payment by a specifically named competitor who, at the time, was selling competing merchandise to respondent's favored customers.

In its appeal from the initial decision respondent does not contest the examiner's finding of a *prima facie* violation of 2(d). It contends, however, that the complaint should be dismissed on two grounds, the first being lack of public interest in the proceeding and the second, that its allowances were made in good faith to meet competition.

Respondent's "public interest" argument is based primarily on the undisputed fact that violations of 2(d) have been widespread in the wearing apparel industry. This argument, as we understand it, is not that the Commission should have made no attempt to correct these illegal practices but that the Commission has gone about it in the wrong way. The respondent is, of course, well aware of the Commission's efforts to secure industrywide compliance with section 2(d). See *In the Matter of Abby Kent Co., Inc.*, Docket No. C–328, *et al.* [68 F.T.C. 393]. An investigation undertaken by the Commission in 1961 disclosed that a large number of garment manufacturers were discriminating among competing customers in the granting of advertising and promotional allowances. The Commission thus having reason to believe that violations of section 2(d) existed throughout the industry made the determination, after considering and rejecting other proposed remedial approaches, that a general correction of these practices could best be accomplished by affording members of the industry an opportunity to sign consent agreements containing orders to cease and desist from granting discriminatory allowances. Subsequent thereto, the Commission during a period of approximately two years accepted agreements and orders from 298 apparel producers including those significant sellers who were granting the largest amounts of allowances to the greatest number of buyers. On August 9, 1965, all outstanding orders were made effective, the Commission having determined at that time that this particular phase of the wearing apparel inquiry was for the most part terminated and that "The few unresolved matters do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under order." *Abby Kent, supra.* The Commission further pointed out that its enforcement program in this industry would, when necessary, be supplemented by formal proceedings against selected buyers who knowingly induce or receive discriminatory allowances.

Although cognizant of the foregoing facts, respondent now asks us to reconsider our enforcement policy in the light of the decision in the *Max Factor* and *Shulton cases*.[1] In these two cases complaints charging two cosmetic manufacturers with violating section 2(d) were dismissed, the Commission having found that the respondents were only two among a very large number of suppliers participating in special promotional events sponsored by a single buyer. We held in our opinion that the entry of cease and desist orders against these particular respondents would not be an equitable and fully effective method of eliminating the discriminatory practices and that in the circumstances shown to exist the "enforcement policy best calculated to achieve the ends contemplated by Congress" was one based on Section 5 of the Federal Trade Commission Act and directed at the recipient of the discriminatory allowances.

Respondent contends that on the basis of our holding in *Max Factor* and *Shulton* we should dismiss the complaint against it and bring suit against its favored customers under Section 5 for inducing discriminatory allowances. This argument is rejected. Our disposition of the two cases relied upon by respondent cannot be interpreted as a policy decision to proceed only against buyers who induce 2(d) violations rather than against the seller who has violated 2(d). The fact that in a given industry or market buyers may be largely responsible for inducing discriminatory practices is not sufficient reason for suing them to the exclusion of the supplier. It may be that more often than not large buyers are responsible for a seller's discriminations. And Congress was fully aware of this fact when it passed the Robinson-Patman Act. The Act nevertheless is directed against the seller as well as the buyer. In any event, our enforcement policy must be guided by the circumstances as we see them which will also take into account the respective effectiveness of the various remedies available to us. For example, proceeding against buyers under Section 5 would certainly be indicated where such a suit against one or two buyers would have the same remedial effect as a multitude of actions

[1] Docket Nos. 7717 and 7721, July 22, 1964 [66 F.T.C. 184].

against sellers under 2(d). *Grand Union* v. *F.T.C.*, 300 F. 2d 92 (2nd Cir. 1962), *American News Co.* v. *F.T.C.*, 300 F. 2d 104 (2nd Cir. 1962), *Giant Food Inc.* v. *F.T.C.*, 307 F. 2d 184 (D.C. Cir. 1962), *R. H. Macy & Co., Inc.* v. *F.T.C.*, 326 F. 2d 445 (2nd Cir. 1964).

Furthermore, we fail to detect any similarity in the circumstances under which this case was brought and those of the *Max Factor* and *Shulton* cases. Our investigation of the wearing apparel industry had disclosed the likelihood that in many instances department and specialty store chains had been responsible for the discriminatory allowances. In other instances it seemed likely that it was the suppliers themselves who had initiated the practice. Being fully aware of the existing situation, the Commission made the determination long before it brought suit against respondent that the elimination of the discriminatory practices could best be achieved by proceeding against the suppliers. It has executed this policy by securing consent agreements from all but a few firms, which include the respondent, where the facts disclosed by the investigation gave it reason to believe that 2(d) was being violated. Thus the factual situation here is diametrically opposite that shown to exist in the cosmetic cases. Here a decision not to dispose of the case on the merits would not only be unfair to suppliers already under order but would tend to weaken the Commission's entire enforcement program in this industry.

Respondent also asserts that the proceeding is not in the public interest because small manufacturers cannot afford to make promotional payments on the same basis or in the same amount as their larger competitors. It states in this connection that some large apparel manufacturers have set up programs providing for proportionalized allowances of up to 50 percent and higher of the buyers' cost of advertising and further claims that it would be impossible for it to grant such large payments on proportionally equal terms to all of its competing customers. As found by the hearing examiner the evidence on this point is inconclusive. But even if respondent were able to prove its inability to duplicate the lawful promotional programs of the very large apparel manufacturers there is nothing in the record to indicate that respondent could not establish its own nondiscriminatory promotional plan and, when necessary to meet competition, deviate from that plan by paying to certain customers the same amount as the larger competitor whose allowance it is meeting.

In its appeal from the examiner's holding that its discriminatory promotional payments were not granted in good faith to meet competitors' allowances, respondent in effect concedes that it has failed to make out a meeting competition defense under established legal criteria. It contends in this connection that there is a difference between price discrimination and the granting of discriminatory allowances and that the Commission, therefore, should utilize different standards for determining the sufficiency of the meeting competition defense in 2(d) cases as distinguished from those involving *prima facie* violations of 2(a).

Respondent has failed to suggest any standards or tests for determining whether, and under what circumstances, an advertising allowance has been properly granted to meet in good faith a competitor's allowance although it obviously believes that the practice of making promotional payments on a discriminatory basis for 20 odd years without attempting to establish a nondiscriminatory program comes within the realm of permissible behavior. It does suggest however the elimination of one element of proof required in a meeting competition defense to a 2(a) violation and that is proof that the discriminatory payment was made in response to a payment offered by another seller in an actual competitive situation. This element of proof, however, goes to the "actual core" of the meeting competition defense which "consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 242.

Respondent's argument, as we understand it, is that the granting of promotional allowances is a legitimate method of competing and that in an industry in which the practice of granting allowances is widespread a seller should be permitted to grant disproportionate allowances to meet competition generally without showing that any particular payment was made to meet a specific competitive offer. There is, of course, nothing inherently unlawful about promotional allowances. Cooperative advertising has traditionally been regarded as a legitimate method of sales promotion. Congress has found however that a sales promotional allowance "becomes unjust when . . . the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 15–16 (1936). Consequently, the basic purpose of 2(d) was to insure that competing purchasers from the same seller would receive allowances on a nondiscriminatory basis. This purpose would be defeated if a seller could justify discriminations by the general showing that its competitors were granting promotional allowances and that it would be competitively disadvantaged by failure to utilize allowances as a method of sales promotion. If this were the rule, all sellers could justify discriminations in the granting of promotional allowances merely by showing the general use of such allowances by others in the industry and the value of such allowances as a competitive tool. The granting of promotional allowances would then be governed by a broad reading of 2(b), not by 2(d) which requires that promotional payments be made available on proportionally equal terms.

The meeting competition defense, however, is an exception to the prohibitions of the statute and, as such, must be strictly construed. *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission,* 106 F. 2d 667 (3rd Cir. 1939), *United States* v. *Scharton,* 285 U.S. 518, *Spokane & I.E.R. Co.,* v. *U.S.,* 241 U.S. 344. In cases brought under both 2(a) and 2(d), therefore, a discrimination may be justified as a good faith "meeting of competition" only when the seller is otherwise complying with the applicable subsection and the particular discrimination is made in a genuine defensive response to another seller's offer in a specific transaction.[2] In other words, a seller who has made no attempt to comply with the substantive requirements of the Act is precluded from claiming that his discriminations were made in good faith to meet competition.[3] We have held therefore that a seller engaging in cooperative advertising must do so through a comprehensive, nondiscriminatory program, and that after such a program has been established, deviations from it in the form of more generous allowances may be excused in individual instances shown to be good faith attempts to meet promotional allowances furnished by competitors. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 1965 Trade Cas. ¶ 71,491 [7 S. & D. 1291].

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[2] It is for this reason that the Commission and the courts have consistently held that discriminations made generally to meet competition do not come within the meeting competition defense. "Section 2(b) permits a single company to sell one customer at a 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' " *Federal Trade Commission* v. *Cement Institute, et al.,* 333 U.S. 683, 725.

[3] See in this connection *Federal Trade Commission* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746, wherein one of the reasons given by the Court for rejecting the 2(b) defense was that respondents had "never attempted to establish their own nondiscriminatory price system, and then reduced their price when necessary to meet competition."

Respondent's argument that the hearing examiner erred in dismissing its 2(b) defense is rejected. We are of the opinion that respondent has failed to establish that its discriminatory allowances were made in good faith to meet competitors' allowances for the reasons set forth in the initial decision.

Respondent's appeal is denied. The hearing examiner's intial decision will be adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

DISSENTING OPINION

SEPTEMBER 19, 1966

BY ELMAN, *Commissioner*:

This case is part of the Commission's program, initiated in 1962, to eliminate discriminatory promotional allowances in the wearing apparel industry through the imposition of orders upon a number of suppliers. I will not repeat here in detail my reasons for believing that that program has been neither effective nor equitable. See *Abby Kent Co., Inc.*, Docket No. C-328 (August 9, 1965) (dissenting opinion) [68 F.T.C. 393, 407].

As the Commission recognizes, violations of Section 2(d) have been widespread in the wearing apparel industry; department and specialty store chains to a large extent have been responsible for discriminatory allowances in the industry; and individual suppliers, like respondent, have felt compelled to grant such allowances because of general competitive conditions in the industry. The wearing apparel industry is highly fragmented, consisting of thousands of manufacturers, most of them very small in relation to the chain and department store buyers. For most manufactuers, the buyer is in the driver's seat; whatever he wants in the way of advertising or promotional allowances, the buyer is usually in a good position to get.

Respondent is one of the two suppliers, out of the group of about 300 sued by the Commission, which refused to sign 2(d) consent orders. The suppliers which signed such orders represent only a fraction of the entire industry, and only eight of the outstanding orders are directed against members of respondent's particular segment of the industry—ladies' coats and suits. As respondent points out, more than 500 of its direct competitors are not under order. It is not hard to see why an enforcement policy designed to place even a substantial number of suppliers under order can accomplish little. The ability of large and powerful buyers to exact discriminatory allowances from suppliers not under order remains unimpaired. Even if the Commission could be sure of full compliance with the outstanding orders, this basic gap would not be plugged. Moreover, the impression persists that issuance of these orders has had little or no effect in eliminating discriminatory allowances in the industry. According to industry spokesmen, "there is a great missing step between the law and its enforcement" and "the Commission orders have not deterred some leading retailers from continuing to demand and receive discriminatory advertising allowances." (*New York Times*, July 10, 1966, sec. 3, p. 1.) In view of the general competitive conditions prevailing in the industry and the Commission's limited capacity to police outstanding orders, many suppliers under order apparently feel that they must continue to grant discriminatory allowances.

The Commission's enforcement policy is deficient in yet another respect. If, as seems to be assumed, many department and specialty store chains have a practice of inducing and receiving discriminatory promotional allowances, that practice is surely not confined to ladies' coats and suits or to any other single line or product. Department stores nowadays sell almost everything under the sun. Even if the Commission were to place under order every supplier in the wearing apparel industry—and no one suggests that it should or could—large department and chain store buyers would still be able to obtain discriminatory allowances on all the other products they carry. Thus, the imposition of orders on cloak-and-suiters like respondent does not even make a dent in the problem of alleged abuses of buying power by large retailers. The issuance of this order, like the other orders against suppliers, has moved the Commission no closer to its goal of eliminating prevalent illegal and discriminatory promotional allowances—whether in the ladies' coat and suit industry, the wearing apparel industry generally, or in any other industry making products sold in chain or department stores.

I think it is also inequitable to issue this order against respondent. The Commission holds that it is not a defense that these allowances were granted in response to general competitive conditions in that segment of the garment industry of which respondent is part. Again, I will not repeat here my reasons for believing that the Commission's interpretation of the 2(b) defense imposes an impossible and unrealistic burden on sellers. See, *e.g.*, *National Dairy Products Corp.*, Docket No. 7018 (decided July 28, 1966) (dissenting opinion) [p. 215 herein]; *Tri-Valley Packing Co.*, Docket No. 7225 (decided July 28, 1966) (dissenting opinion) [p. 290 herein]. In order to satisfy the Commission that it was meeting competition in good faith, a respondent must prove that the "payments were made in order to meet comparable payments in specific, individual, competitive situations"; it is not enough to show that it acted defensively in response to "general competitive conditions" prevailing in the segment of the industry in which it does business. To prove its good faith, a respondent must come forward with "documentation" or "specific evidence" showing that it used "reasonable diligence in verifying the existence" of a comparable allowance offered by a particular competitor.

As applied to the circumstances existing in the wearing apparel industry, these requirements of proof make the 2(b) defense unavailable, as a practical matter, to any supplier against which the Commission determines to proceed. Whatever the technical justification for the Commission's position, we should recognize the actual commercial consequences. In this industry, as the Commission has recognized, discriminatory allowances are both "widespread" and "secretive." *Abby Kent Co., Inc., supra*. To bar a single seller, or only some sellers, from granting allowances in an industry where the practice has become an everyday competitive necessity, and where it derives from the covert exertion of pressure by large and powerful buyers, means that such sellers will have to compete at a substantial disadvantage. In this industry, if a chain or department store buyer tells a seller that he wants a promotional allowance, the seller need not be informed whether the buyer has already received a specific offer of a comparable allowance from a specific competitor; he knows well enough from general conditions prevailing in the industry that the buyer can and will obtain such an allowance, whether from the seller or a competitor, and unless the seller grants the requested allowance he will lose the account. What more does he have to know in order to meet competition in good faith?

For these reasons and others I have elaborated elsewhere, it seems to me to be a serious mistake in the allocation of its enforcement resources for the Commission to have channeled, and to be continuing to channel, its energies primarily in the direction of imposing 2(d) orders on a relatively small number of suppliers in scattered segments of the wearing apparel industry. It would have been, and still would be, far more effective and more equitable for the Commission to pursue an enforcement policy realistically designed to accomplish the central objective of the Robinson-Patman Act, *i.e.*, "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 168. I would follow here the general enforcement policy—aimed primarily at alleged abuses of buying power—which was stated not too long ago in *Max Factor* and *Shulton* (Docket Nos. 7717 and 7721, July 22, 1964) [66 F.T.C. 184].

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal:

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

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

Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

PHILIP MORRIS ORIGINALS, LTD., ET AL.

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

Docket C-1112. Complaint, Sept. 19, 1966—Decision, Sept. 19, 1966

Consent order requiring a New York City manufacturer of men's slacks to cease misbranding and falsely guaranteeing its wool and textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, 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 Philip Morris Originals, Ltd., a corporation, Saul Devorkin, individually and as an officer of said corporation, and Philip Morris Devorkin, individually and as manager and principal stockholder of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and 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. Respondent Philip Morris Originals, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 19 West 36th Street, New York, New York. Said corporate respondent manufactures and sells men's slacks composed of woolen and synthetic fibers, and blends thereof.

Individual respondent Saul Devorkin is an officer, and Philip Morris Devorkin is manager and principal stockholder of the said corporation and they formulate, direct and control the acts, practices and policies of the said corporation. Their office and principal place of business is the same as that of said corporation.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, 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 by the respondents 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 men's slacks stamped, tagged, labeled, or otherwise identified by respondents as "55% Dacron, 45% Wool," whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by the respondents 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 as to their country of origin.

Among such misbranded wool products, but not limited thereto, were men's slacks stamped, tagged, labeled, or otherwise identified, with such terms as "Creazione Italiane" and "DEL'ORSO di ROMA," thereby representing that such slacks were of Italian origin, whereas in truth and in fact such products were not of Italian origin.

PAR. 5. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified, as to their method of manufacture.

Among such misbranded wool products, but not limited thereto, were men's slacks stamped, tagged, labeled, or otherwise identified, with such terms as "Hand Needled," thereby representing or implying that such slacks were substantially hand-sewn, whereas in truth and in fact such products were not substantially hand-sewn.

PAR. 6. Certain of said wool products were further misbranded by the respondents 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, as to their construction or composition.

Among such misbranded wool products, but not limited thereto, were men's slacks stamped, tagged, labeled, or otherwise identified, with such terms as "genuine Raeford 2/80's, 2 Ply—80's quality," thereby representing or implying that such slacks were of two-ply construction or composition, whereas in truth and in fact, such slacks were not of two-ply construction or composition.

PAR. 7. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding 5% of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool present in the wool product when said percentage by weight of such fiber was 5% or more; and (5) the aggregate of all other fibers.

PAR. 8. 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 respective common generic names of fibers present in such wool products were not used in naming such fibers in the required information, in violation of Rule 8 of said Rules and Regulations.

PAR. 9. The acts and practices of the respondents as set forth above were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 10. 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, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and 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 had 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 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. 11. The respondents furnished false guaranties that certain of their textile fiber products were not misbranded or falsely invoiced, in violation of Section 10(b) of the Textile Fiber Products Identification Act.

PAR. 12. The acts and practices of respondents, as set forth in

Paragraphs Ten and Eleven 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 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, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act; and

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

The Commission, having reason to believe that the respondents have violated 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 Philip Morris Originals, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 19 West 36th Street, New York, New York.

Respondent Saul Devorkin is an officer and Philip Morris Devorkin is manager and principal stockholder of the said corporation. 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 respondents Philip Morris Originals, Ltd., a corporation, and its officers, and Saul Devorkin, individually and as an officer of said corporation, and Philip Morris Devorkin, individually and as manager and principal stockholder of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment or shipment in commerce, of men's slacks composed in whole or in part of wool, or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

A. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying any such wool product as to the character or amount of constituent fibers included therein.

B. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying any such wool product as to the country of origin of such wool product.

C. Setting forth on labels affixed to any such wool product such terms as "Creazione Italiane" and "DEL'ORSO di ROMA," or any words, terms, depictions, or symbols of similar import, connoting Italian origin when such wool product is not of Italian origin.

D. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying any such wool product as to the method of manufacture of such wool product.

E. Setting forth on labels affixed to any such wool product such terms as "Hand Needled," or any words, terms, depictions, or symbols of similar import, connoting the product to be substantially hand-sewn, when such wool product is not substantially hand-sewn or hand stitched.

F. Falsely or deceptively stamping, tagging, labeling or otherwise identifying any such wool product as to the construction or composition of such wool product.

G. Setting forth on labels affixed to any such product such terms as "genuine Raeford 2/80's 2 Ply—80's quality," or any words, terms, depictions, or symbols of similar import, connoting two-ply construction or composition, when such wool product is not of a two-ply construction or composition.

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

I. Failing to set forth the common generic name of fibers in naming such fibers in the required information on stamps, tags, labels, or other means of identification attached to wool products.

It is ordered, That respondents Philip Morris Originals, Ltd., a corporation, and its officers, and Saul Devorkin, individually and as an officer of said corporation, and Philip Morris Devorkin, individually and as manager and principal stockholder of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture 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 furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced.

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

IN THE MATTER OF

LU MAR FASHIONS, INC., ET AL.

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

Docket C–1113. Complaint, Sept. 19, 1966—Decision, Sept. 19, 1966

Consent order requiring a New York City clothing manufacturer to cease misbranding its fur and wool products and falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lu Mar Fashions, Inc., a corporation, and Louis Marangione and William Gordon, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and 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 Lu Mar Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Louis Marangione and William Gordon are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products and wool products with their office and principal place of business located at 265 West 37th Street, New York, New York.

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

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

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

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

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

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

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

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

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

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

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

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

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

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

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

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 8. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, 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. 9. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act 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 wool products labeled or tagged by respondents as 100% Wool, whereas in truth and in fact said products contained substantially less than 100% Wool.

PAR. 10. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, was a wool product with a label on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding 5% of the total weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool present in the wool product when said percentage by weight of such fiber was 5% or more; and (5) the aggregate of all other fibers.

PAR. 11. The acts and practices of the respondents as set forth in Paragraphs Nine and Ten, 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 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, the Fur Products Labeling Act and the Wool Products Labeling Act of 1939; and

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

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

1. Respondent Lu Mar Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of

business located at 265 West 37th Street in the city of New York, State of New York.

Respondents Louis Marangione and William Gordon are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Lu Mar Fashions, Inc., a corporation, and its officers, and Louis Marangione and William Gordon, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

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

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

3. Failing to set forth on labels the item number or mark assigned to each such fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information re-

quired to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

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

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

4. Failing to set forth on invoices the item number or mark assigned to each such fur product.

It is further ordered, That respondents Lu Mar Fashions, Inc., a corporation, and its officers, and Louis Marangione and William Gordon, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment or shipment in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding wool products by:

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

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

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

IN THE MATTER OF

FREDERICKS FURS, INC., ET AL.

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

Docket C-1114. Complaint, Sept. 19, 1966—Decision, Sept. 19, 1966

Consent order requiring a Surfside, Fla., furrier to cease misbranding, falsely invoicing, and advertising its fur products.

COMPLAINT

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

PARAGRAPH 1. Respondent Fredericks Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida.

Individual respondents Jerry Lindenbaum and Sidney Gelfand are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereafter set forth.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 9565 Harding Avenue, city of Surfside, State of Florida.

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

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the true animal name of the fur used in any such fur product.

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

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

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

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

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in any such fur product.

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

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

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

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Miami Herald, a newspaper published in the city of Miami, State of Florida.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the true animal name of the fur used in any such fur product.

PAR. 8. By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder by representing, directly or by implication through statements appearing in newspapers such as "Was $3650–Now $1900 "that the prices of such fur products were reduced from the actual bona fide prices at which the respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the amount of such purported reductions constituted savings to purchasers of respondents' fur products. In truth and in fact the alleged former prices were fictitious in that the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents' fur products as represented.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in that the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 10. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission, having reason to believe that the respondents have violated 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 Fredericks Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 9565 Harding Avenue, Surfside, Florida.

Respondents Jerry Lindenbaum and Sidney Gelfand are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Fredericks Furs, Inc., a corporation, and its officers, and Jerry Lindenbaum and Sidney Gelfand, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

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

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

3. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

4. Failing to set forth on labels the item number or mark assigned to each such fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

3. Failing to set forth on invoices the item or mark assigned to each such fur product.

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

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

2. Uses the word "was" or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresents the prices at which such merchandise has been sold, or offered for sale by respondents.

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

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

D. Failing to maintain full and adequate records disclosing the facts upon which pricing claims and representations of the types described in subsections (a), (b), (c), and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act, are based.

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

IN THE MATTER OF

MOHAWK REFINING CORPORATION ET AL.

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

Docket 6588. Complaint, July 17, 1956—Decision, Sept. 23, 1966

Order modifying a cease and desist order dated February 14, 1958, 54 F.T.C 1071, requiring a processor of lubricating oil to cease advertising its product without disclosing that it is re-refined or reprocessed, by ordering such disclosure be made on the front panel or panels of the container.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Commission on February 14, 1958 [54 F.T.C. 1071], having issued its order to cease and desist against respondents herein providing as follows:

> *It is ordered,* That respondents, Mohawk Refining Corporation, a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> (1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;
>
> (2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

And the Commission on August 10, 1966, having served upon respondents its order to show cause why this proceeding should not be reopened and its order of February 14, 1958, be modified to read as follows:

It is ordered, That respondents, Mohawk Refining Corporation, a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale, or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container;

(3) Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes, has been manufactured from oil that has not been previously used.

And respondents by their attorney having filed an answer dated September 7, 1966, opposing said modification, and

The Commission being of the opinion that neither the order to show cause nor the answer thereto raises any substantial issue of fact requiring resolution, and

The Commission for the reasons set forth in its order to show cause being of the opinion that the public interest will be best served by reopening the proceeding herein and modifying its order to cease and desist dated February 14, 1958,

It is ordered, That the proceeding herein be, and it hereby is, reopened and the Commission's order of February 14, 1958 [54 F.T.C. 1071], be, and it hereby is, modified by substituting the modified language proposed in its order to show cause dated August 9, 1966, for the prohibitory preamble and the paragraphs numbered 1 and 2 of its order to cease and desist dated February 14, 1958.

Commissioner Elman dissented, and has filed a dissenting statement.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

On August 10, 1966, the Commission served upon respondents an order to show cause why the proceeding resulting in its cease and desist order of February 14, 1958, should not be reopened and the order modified to bring its provisions into conformity both with the Commission's Trade Regulation Rule Relating to Deceptive Advertising and Labeling of Previously Used Lubricating Oil, effective September 1, 1965, and with the wording of more recently issued cease and desist orders in similar matters. The purpose of the show cause order as set forth therein was to effect uniform and equal treatment and to require the same standards of performance of all respondents in like situations. The order to show cause was one of several directed to firms engaged in the sale of re-refined lubricating oil subject to Commission orders to cease and desist.

As proposed in the order to show cause, the cease and desist order of February 14, 1958, as modified would read:

It is ordered, That respondents, Mohawk Refining Corporation, a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale, or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container.

(3) Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes, has been manufactured from oil that has not been previously used.

The original order to cease and desist did not include Paragraph (3) above and Paragraph (2) of the original order required disclosure only ". . . on the container" rather than more specifically ". . . on the front panel or front panels on the container."

In their answer dated September 7, 1966, respondents in substance cite three reasons why the proposed modification should not be made.

First, they argue that the modified language is unnecessary because it merely restates the Commission's Trade Regulation Rule Relating to Deceptive Advertising and Labeling of Previously Used Lubricating Oil in substantially the same language; because both respondents and other re-refiners are subject to the Trade Regulation Rule anyway, and because respondents have been and are now voluntarily making the front panel disclosure required by the Rule.

Our answer to this is that a Trade Regulation Rule, however effective in procuring voluntary compliance with the statutes administered by the Commission, does not have the same degree of proscriptive force as an order to cease and desist; and absent a showing that the public interest would be better served by the substitution of a less rigorous restraint in place of a presently effective cease and desist order, the Commission has no warrant in doing so.

Secondly, respondents aver that the proposed modification will not accomplish the intended result of uniformity and equality of treatment ". . . but rather would merely reemphasize the lack of such uniformity of treatment under present orders."

This is merely a conclusionary statement which does not raise any issue of fact. The Commission is obviously not concerned with bringing about uniformity where there are differences among outstanding orders dictated by differing fact situations and differing violations. It is simply addressing itself to the task of achieving uniformity in those areas, notably front panel disclosure, where outstanding orders are susceptible of similarity of treatment.

Thirdly, respondents state that the differing language between the proposed order and the Commission's Trade Regulation Rule will require respondents to make ". . . wholly unnecessary determinations whether and to what extent the language differences might have substantive significance . . . ."

This is wholly groundless. Respondents have conceded in their answer that the Commission's Rule and the proposed language changes in the order are in effect the same and that the new language does not in any way differ in meaning from the language of the Rule. Respondents' primary obligation is to comply with the order. Minor differences between the order and the Rule should cause it no concern.

Neither the order to show cause nor respondents' answer raises any substantial issues of fact warranting assignment of this matter to a hearing examiner. An appropriate order will issue reopening the proceeding and modifying the Commission's order to cease and desist dated February 14, 1958, in accordance with the proposed changes in our order to show cause dated August 9, 1966.

Commissioner Elman dissented, and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

I cannot agree that a desire for symmetry is sufficient reason for modifying the order against respondents. So long as respondents continue to comply voluntarily with the Trade Regulation Rules, there is neither need nor justification for expanding the scope of the order to include the requirements of those Rules.

I also disagree with the refusal to grant respondents a hearing. If they were charged with violating the Rules, respondents would be afforded a hearing; but since they have voluntarily complied with the Rules, their request for a hearing is denied. I fail to see either the logic or the fairness in this action.

IN THE MATTER OF

HARGO WOOLEN MILLS, INC., ET AL.

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

Docket 8665. Complaint, Aug. 13, 1965—Decision, Sept. 23, 1966

Consent order requiring four affiliated New Hampshire and Vermont fabric manufacturers to cease violating the Wool Products Labeling Act by deceptively labeling and falsely invoicing their products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hargo Woolen Mills, Inc., a corporation, Wallisford Mills, Inc., a corporation, and Wallisford Mills of Vermont, Inc., a corporation, and Benjamin H. Erskine and Walter T. Ransburg, individually and as officers of said corporations; and Peterborough Mills, Inc., a corporation, and Charles J. McGowan, individually and as an officer of said corporation (all said corporations and said individuals hereinafter referred to as respondents) have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hargo Woolen Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Keene, New Hampshire.

Respondent Wallisford Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at Keene, New Hampshire.

Respondent Wallisford Mills of Vermont, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Vermont, with its principal office and place of business located at North Montpelier, Vermont.

Individual respondent Benjamin H. Erskine, and individual respondent Walter T. Ransburg are officers of each of the foregoing corporate respondents. Said individual respondents cooperate in the formulation, direction and control of the acts, practices and policies of the corporate respondents. The office and principal place of business of these individual respondents is the same as that of corporate respondent Hargo Woolen Mills, Inc.

Respondent Peterborough Mills, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at Peterborough, New Hampshire. This corporation is owned by the principals of Hargo Woolen Mills, Inc.

Individual respondent Charles J. McGowan is president-treasurer of corporate respondent Peterborough Mills, Inc., and together with the aforesaid individual respondents, formulates, directs and controls its acts, practices and policies. The office and principal place of business of this individual respondent is the same as that of corporate respondent Peterborough Mills, Inc.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1, 1962, respondents have manufactured for introduction into commerce, offered for sale in commerce, sold, transported, distributed, delivered for shipment, and introduced into commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

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

Among such misbranded wool products, but not limited thereto, were wool products, namely, woolen fabrics, which contained substantially different amounts and types of fibers than were set forth on the labels thereto affixed.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act 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 wool products with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of the total fiber weight of (1) woolen fibers; (2) each fiber other than the woolen fibers if said percentage by weight of such fiber is 5 per centum or more; and (3) the aggregate of all other fibers.

PAR. 5. The aforesaid acts and practices of respondents, were, and are, in violation of the Wool Products Labeling Act 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.

PAR. 6. Respondents are now, and for some time last past, have been engaged in the offering for sale, sale and distribution of certain products, namely, woolen fabrics, to manufacturers and jobbers. In the course and conduct of their business, respondents now cause, and for some time last past, have caused, their said products, when sold, to be shipped from their place of business in New Hampshire and Vermont to purchasers located in various other

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

PAR. 7. Respondents in the course and conduct of their business as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products.

Among such misrepresentations, but not limited thereto, were statements representing certain fabrics to be "90% Reprocessed Wool, 10% Nylon," "60% Reprocessed Wool, 25% Manmade Fibers," "40% Wool, 40% Reprocessed Wool, 10% Acrylic, 10% Other Fibers," and "50% Wool, 50% Rayon" whereas, in truth and in fact, the said fabrics contained substantially different amounts of woolen and other fibers than the amounts represented.

PAR. 8. The acts and practices set out in Paragraphs Six and Seven have had, and now have, the tendency and capacity to mislead and deceive purchasers of said fabrics as to the true content thereof, and were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission act.

DECISION AND ORDER

The Commission having issued its complaint on August 13, 1965, charging the respondents named in the caption hereof with violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined that in the circumstances the public interest would be served by waiver here of the provision of Section 2.4(d) of its rule that the consent order procedure shall not be available after issuance of the complaint; and

The respondents, except Charles J. McGowan, having executed an agreement containing a consent order, an admission of all the jurisdictional facts set forth in the complaint, 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 substantially as required by the Commission's rules; and

The Commission having considered said agreement and the affidavit attached thereto which affidavit states, among other things, that respondent Charles J. McGowan terminated his employment with respondent Peterborough Mills, Inc., in 1962 and had no part during his employment in formulating, directing or controlling the acts, practices or policies of such corporate respondent; and

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

1. Respondent Hargo Woolen Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Keene, New Hampshire.

Respondent Wallisford Mills of Vermont, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at Keene, New Hampshire.

Respondent Wallsiford Mills of Vermont, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Vermont with its principal office and place of business located at North Montpelier, Vermont.

Respondents Benjamin H. Erskine and Walter T. Ransburg are officers of each of the foregoing corporate respondents and their address is the same as that of said corporate respondent Hargo Woolen Mills, Inc.

Respondent Peterborough Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at Peterborough, New Hampshire. This corporation is owned by the principals of Hargo Woolen Mills, Inc.

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 Hargo Woolen Mills, Inc., a corporation, and its officers, Wallisford Mills, Inc., a corporation, and its officers, and Wallisford Mills of Vermont, Inc., a corporation, and its officers, and Benjamin H. Erskine and Walter T.

Ransburg, individually and as officers of said corporations; and respondent Peterborough Mills, Inc., a corporation, and its officers; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce of fabrics or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

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

It is further ordered, That respondents Hargo Woolen Mills, Inc., a corporation, and its officers, Wallisford Mills, Inc., a corporation, and its officers, and Wallisford Mills of Vermont, Inc., a corporation, and its officers, and Benjamin H. Erskine and Walter T. Ransburg, individually and as officers of said corporations; and respondent Peterborough Mills, Inc., a corporation, and its officers; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of woolen fabrics or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character and amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That the complaint insofar as it relates to respondent Charles J. McGowan be, and the same hereby is, dismissed.

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

IN THE MATTER OF

PAGEANT PRESS, INC., ET AL.

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

Docket C-1115. Complaint, Sept. 23, 1966—Decision, Sept. 23, 1966

Consent order requiring a New York City subsidy publisher to cease misrepresenting in its advertising the profits which authors may make, the sales promotion it gives its books, and making other false claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Pageant Press, Inc., a corporation, and Simon A. Halpern, individually and as officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pageant Press, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Simon A. Halpern is an individual and an officer of the said corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including the acts and practices hereinafter set forth.

Said respondents have their offices and principal place of business at 101 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondents are now, and for more than four years last past have been, engaged in the advertising and soliciting of contracts for the publication of books for authors and prospective authors, and in the printing, promotion, sale and distribution of the contracting authors' books.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their services and products, the respondents have made numerous statements and representations respecting costs and sharing of costs of publications, the advertising, reviewing and distributing of the publications and the profits and benefits derived by the publishing authors in their promotions, in advertisements, in newspapers, magazines and other periodicals, generally purchased by authors and in circulars, letters, and in a brochure entitled "How To Get Your Book Published Promoted Distributed" which is sent to persons responding to the advertisements.

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

Q. Who pays for the advertising and promotion of my book?

A. We do. We pay for the national advertising and direct mail circulation on your book to the book trade, libraries and the reading public.

We provide and specify national advertising for all our books, at no extra cost to the author.

Why Authors Have Confidence in Pageant Press

. . . Pageant's contracts specify national advertising, publicity and sales promotion for each book.

Payments to our authors total tens of thousands of dollars each year. These returns are based on orders from bookstores, department stores, wholesalers, libraries, colleges and universities all over the country and in foreign countries.

And now. . . . See how Pageant Publicizes, Advertises, Distributes Your Book.

. . . A book needs the widest possible discussion in the reviewing media of the country—whether magazines, newspapers, radio, television or public platform.

—Norman Cousins
Saturday Review

. . . This financial return is calculated to enable our authors to regain their entire cost plus a profit when the trial edition is sold. . .

The publishers agree to publish a first edition not exceeding. . . . Copies of said work within. . . . working days . . . .

However, if you are tired of waiting for recognition—if you believe that your book has good sales possibilities and that some enterprising publisher could make a lot of money with it, then subsidy publishing should appeal to you.

Our authors receive a 40% return ($1.20) on a $3.00 book). Having your book published by Pageant Press is a business venture. Under our plan the author of a good steady seller can realize a sizeable profit.

Our full page group advertisements in the 'Bible of the book business', The Book Buyer's Guide, have resulted in orders from independent and chain shops across the nation and from foreign countries. . . Our ads are designed to attract the bookseller's eye and his order . . .Our complete general catalog is printed in Publishers' Trade List Annual, which is distributed through over 10,000 bookstores, schools, libraries, government purchasing offices, and practically every other outlet in the book world.

* * * * * * *

Q. What Is The Attitude Of Reviewers And Booksellers Toward Subsidized Books?

A. Pageant books have been reviewed in the most important newspapers of the country from coast to coast. . . The New York Times has devoted a total of almost two full columns to four of our books. Our reviews have also appeared in syndicated news services, the column of noted commentators and national magazines in specialized fields. As for booksellers, we regularly fill orders from wholesalers, chain book shops and independent dealers across the nation and in foreign countries. (See back cover of brochure for a partial list.)

* * * * * * *

Special—If we think your manuscript has unusual possibilities we will offer you a straight royalty or partial subsidy contract.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent, and have represented, directly or by implication:

1. That in most instances under their plan of publication the contracting author will recover all or substantially all of his or her entire investment.

2. That bookstores, department stores, wholesalers, libraries, colleges and universities throughout the United States regularly purchase books in large numbers from the respondents.

3. That they assure and provide contracting authors national advertising for their books.

4. That their advertising, publicity, and sales promotion campaigns assure the success of the sale and distribution of books published by them.

5. That they print and bind all the copies listed in the contract of the first edition of an author's book.

6. That books published by the respondents are reviewed by noted columnists, critics and other reviewing media which include magazines, newspapers, radio, TV and etc.

7. That they offer and enter into contracts or agreements with authors of manuscripts, determined to have unusual possibilities of success, whereby respondents agree to assume all or a portion of the publication, promotion and distribution costs and to compensate the author on the basis of the number of books sold.

PAR. 6. In truth and in fact:

1. In most instances, authors who have their books published by the respondents do not recover all or substantially all of their entire investment.

2. The books published by the respondents are not regularly purchased in large numbers of bookstores, department stores, wholesalers, libraries, colleges and universities throughout the United States.

3. Respondents do not nationally advertise any of their contracting authors' books. Such advertising, if any, consists of an insignificant one-inch column in the New York Times or New York Herald Tribune.

4. Respondents' advertising, publicity and sales promotion compaigns do not assure the success of the sales and distribution of the books published by them. Such sales success, if any, is generally accounted for by the efforts of the individual authors.

5. Respondents do not print or bind all the copies called for in the first edition as listed in the contract with the author.

6. Books published by respondents have not been reviewed by noted critics, columnists or other reviewing media including magazines, newspapers, radio, TV and etc. except in isolated instances.

7. Respondents seldom, and then only in virtually unique situations, offer and enter into contracts or agreements with authors of manuscripts whether determined by them to have unusual possibilities of success or for any other reason, whereby respondents agree to assume all or a portion of the publication, promotion and distribution costs and to compensate the author on the basis of the number of books sold.

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

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

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the tendency and capacity 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' services and products by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

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

1. Respondent Pageant Press, Inc., is a corporation 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 101 Fifth Avenue, in the city of New York, State of New York.

Respondent Simon A. Halpern is an officer of said corporation and his address is the same as that of the said corporation.

2. The Federal Trade Commission has jurisdicition 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 Pageant Press, Inc., a corporation, and its officers, and Simon A. Halpern, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the solicitation of contracts for the publication of books or other printed matter for authors and prospective authors and in the promotion, sale, or distribution of books of authors who have engaged respondents' services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That under their plan of publication the contracting authors will recover all or substantially all of their entire investment in the publication of their books: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for the respondents to establish that any represented number or proportion of authors have recovered the represented portion or amount of their investment.

2. Misrepresenting, in any manner, the amount of return on investment, profits or gains derived or which may be derived by persons who have engaged respondents' services.

3. That books or other printed matter published by respondents are purchased in large numbers or quantities in the regular course of business by bookstores, department stores, wholesalers, libraries, colleges and universities; or misrepresenting, in any manner, the kind or number of purchasers of said books or the number of such books purchased by such organizations or others.

4. That the contracting author's book will be nationally advertised; or misrepresenting in any manner, the kind, manner or extent of the advertising, publicizing or promoting accorded said books or other printed matter.

5. That their advertising, publicity, or sales promotion campaign assures success of the sale or distribution of books or other printed matter published by them.

6. That they print or bind all or a portion of the copies listed in the contract of the first edition of an author's book: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said books are printed or bound as represented.

7. That books published by respondents are reviewed by critics or columnists, or in newspapers, magazines, radio, TV or other reviewing media: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder to establish that the said books have been reviewed as represented.

8. That respondents offer and enter into contracts or agreements with authors of manuscripts, whether or not determined by them to have unusual possibilities of success or for any other reason, whereby respondents agree to assume all or a portion of the publication, promotion or distribution costs or to compensate the author on the basis of the number of books sold: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that they make such offers and enter into contracts or agreements as represented and that a bona fide effort is made to make such offers and enter into such contracts with each of the authors responding to such advertising representations.

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

IN THE MATTER OF

COMMUNITY BLOOD BANK OF THE KANSAS CITY AREA, INC., ET AL.

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

*Docket 8519. Complaint, July 5, 1962—Decision, Sept. 28, 1966**

Order requiring a community blood bank, an area hospital association, its hospital members, and hospital pathologists, all in the Kansas City area,

*The Court of Appeals, Eighth Circuit, 405 F. 2d 1011 (1969) (8 S.&D. 865), held that evidence established respondents, a hospital association and a blood bank association, were nonprofit corporations and exempt from provisions of the Federal Trade Commission Act.