

instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:

Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to which the purchaser will thereafter be indebted and against which the purchaser's claims or defenses may not be available.

8. Failing to clearly and fully reveal, disclose and inform customers of all terms and conditions of a sale and of any installment contract or promissory note or other instrument to be signed by any customer.

9. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That after the acceptance of the initial report of compliance, respondents shall submit a report to the Commission once every year during the next three years describing all complaints respecting unauthorized representations, all complaints received from customers respecting representations by salesmen which are claimed to have been deceptive, the facts uncovered by respondents in their investigation thereof and the action taken by respondents with respect to each such complaint.

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

SURREY SLEEP PRODUCTS, INC., ET AL.

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

Docket 8695. Complaint, July 19, 1966—Decision, April 3, 1968

Order requiring a Long Island City, N.Y., manufacturer of mattresses and box springs to cease using deceptive guarantees in the sale of its mattresses and other articles of merchandise.

Complaint

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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 Surrey Sleep Products, Inc., a corporation, and Sol Kitain, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Surrey Sleep Products, 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 42-03 35th Street, Long Island City, New York.

Sol Kitain is an individual and an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

Said individual respondent's 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 manufacturing, advertising, offering for sale, sale and distribution of mattresses, box springs and other sleep products to retailers for resale to members of the purchasing public.

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

PAR. 4. Respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products, have made certain statements and representations, directly or by implication, in catalogs, brochures, labels, and other media with respect to the design, construction, approval, prices and guarantees of said products.

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

Made by the Manufacturers of Prescription Bedding.
Royal Prescription Bedding.

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Prescription Bedding.
Culture Rest an Orthopedic Mattress.
Endorsed by Maryland Chiropractic Association.
Endorsed by Pennsylvania Chiropractic Society.
Custom Craft.
Custom Built Construction.
Rx Royal "400."
Mattress and Foundation \$199.00.
Guaranteed for 15 years.
Guaranteed for 20 years.
It offers you the protection of a full 20 years written unconditional Guarantee.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents have represented and have placed in the hands of retailers and dealers, the means and instrumentalities of representing, directly or by implication:

1. Through the use of the words and terms "Custom Craft," "Custom Built Construction" and "Custom" that certain of respondents' mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses.

2. Through the use of the word and term "Orthopedic" that certain of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction of such product for the prevention, correction or relief of such deformity or deformities.

3. Through the use of the words and terms "Manufacturer of Prescription Bedding," "Prescription Bedding," "Prescription," and "Rx" that certain of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual.

4. Through the use of the statements "Endorsed by Pennsylvania Chiropractic Society" and "Endorsed by Maryland Chiropractic Association" that the design and construction of certain of respondents' mattresses have been approved by said Association and said Society and by reason thereof have preventive or therapeutic properties.

5. That said price amounts are respondents' good faith estimate of the actual retail prices of said mattresses and do not appreciably exceed the highest prices at which substantial sales were made in their trade area.

6. That respondents' merchandise was unconditionally guaranteed for the specified number of years.

PAR. 6. In truth and in fact:

1. Respondents' mattresses have not been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers or users of their mattresses.

2. None of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to body deformity or deformities nor do said mattresses accord with recommendations of orthopedic authorities respecting design and construction for prevention, correction or relief of such deformity or deformities.

3. None of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription of a member or members of the medical profession for the use of a particular individual.

4. No Chiropractic Association or Society has approved the design and construction of any of respondents' mattresses.

5. The represented prices are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area.

6. Respondents' guarantee is not unconditional but contains numerous conditions and limitations. Furthermore, the guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder.

PAR. 7. Respondents, by furnishing retailers and dealers with said advertising material and by placing said labels on its products, have thereby placed in hands of retailers and dealers the means and instrumentalities by and through which they may mislead and deceive the public.

PAR. 8. In the conduct of their business, at all time mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of mattresses, box springs and other bedding products of the same general kind and nature as those sold by respondent.

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

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and

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of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Somers supporting the complaint.

Mr. Harry Friedson, New York, New York, for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

FEBRUARY 24, 1967

PRELIMINARY STATEMENT

This is a proceeding under Section 5 of the Federal Trade Commission Act¹ in which complaint counsel seeks an order which would enjoin respondents, manufacturers and interstate vendors of bedding—box springs and mattresses—from certain alleged receptive acts and practices.

The complaint was issued July 19, 1966. Respondents' answer was filed September 7, 1966. Hearings were held in New York, New York, on November 7 and November 8, 1966. On November 10, 1966, the hearing record was closed. Counsel have filed their proposed findings, conclusions and order pursuant to § 3.19 of the Commission's Rules of Practice for Adjudicative Proceedings. Respondents filed a reply memorandum on January 24, 1967.

The complaint, *inter alia*, alleges:

PAR. 5. [R]espondents have represented and have placed in the hands of retailers and dealers, the means and instrumentalities of representing, directly or by implication:

1. Through the use of the words and terms "Custom Craft," "Custom Built Construction" and "Custom" that certain of respondents' mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses.

2. Through the use of the word and term "Orthopedic" that certain of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction of such product for the prevention, correction or relief of such deformity or deformities.

3. Through the use of the words and terms "Manufacturer of Prescription Bedding," "Prescription Bedding," "Prescription," and "RX" that certain of respondents' mattresses have been specially designed and constructed to meet

¹ 15 U.S.C.A. § 45 "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

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the requirements of a prescription by a member of the medical profession for the use of a particular individual.

4. Through the use of the statements "Endorsed by Pennsylvania Chiropractic Society" and "Endorsed by Maryland Chiropractic Association" that the design and construction of certain of respondents' mattresses have been approved by said Association and said Society and by reason thereof have preventive or therapeutic properties.

5. That said price amounts [preticketed prices] are respondents' good faith estimate of the actual retail prices of said mattresses and do not appreciably exceed the highest prices at which substantial sales were made in their trade area.

6. That respondents' merchandise was unconditionally guaranteed for the specified number of years.

PAR. 6. In truth and in fact:

1. Respondents' mattresses have not been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers or users of their mattresses.

2. None of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to body deformity or deformities nor do said mattresses accord with recommendations of orthopedic authorities respecting design and construction for prevention, correction or relief of such deformity or deformities.

3. None of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription of a member or members of the medical profession for the use of a particular individual.

4. No Chiropractic Association or Society has approved the design and construction of any of respondents' mattresses.

5. The represented prices are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area.

6. Respondents' guarantee is not unconditional but contains numerous conditions and limitations. Furthermore, the guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder.

These charges may be designated as the "labelling deception," "pricing deception," and "guarantee deception." Respondents defend by asserting, *inter alia*:

(1) The amount of respondents' merchandise deceptively labelled and advertised and shipped by respondents in interstate commerce is so small as to be *de minimis*. Therefore, the Federal Trade Commission has no jurisdiction because respondents' allegedly deceptive acts and practices are not in interstate commerce.

(2) Respondents' competitors make representations similar or identical to respondents' allegedly false and deceptive representations, and the Commission should not proceed against respondents unless it proceeds against all of respondents' competitors engaged in similar practices.

(3) The Maryland Chiropractic Association and the Pennsylvania Chiropractic Society in fact have approved respondents' products.

(4) Respondents own a trademark on the words "Prescription Bedding" from the United States Patent Office and are entitled to use the same on their products.

(5) Respondents' guarantee is unconditional for the period of years stated in said guarantee and requires only that the bedding be returned to the factory. This condition is set forth in the guaranty.

At the hearing respondents offered in evidence their trademark on "Prescription Bedding" (RX 8—reserved) and an assignment of the trademark (RX 9—reserved) and agreed to furnish copies for the record. Copies of those exhibits have not been furnished for the record (Tr. 243, 257). The record therefore does not show that respondents in fact do own the trademark "Prescription Bedding." Even though respondents may own the trademark "Prescription Bedding" such ownership will not exculpate, per se, a deceptive use of the trademark in marketing their products.

The Maryland Chiropractic Association and The Pennsylvania Chiropractic Society did approve in writing the "use" of respondents' products (CX 22, CX 23). It was not a false or deceptive act for respondents to represent this fact. The issue, however, is not whether such approval was obtained, but whether it was, and is, being used in a manner violative of Section 5 of the Federal Trade Commission Act.

Respondents' Memorandum of Law (page 9) seeks to exculpate respondents' deceptive labelling misrepresentations on the grounds that such misrepresentations are industrywide. *Universal-Rundle Corporation v. Federal Trade Commission*, 352 F. 2d 831 (C.A. 7, 1965) ² cited in support of this defense is distinguishable from this proceeding. There is no precise and specific evidence in this record as to who are respondents' competitors. There is no evidence in this record, other than Sol Kitain's generalizations, that the representations, which respondents make in selling their bedding or in advertising it, are industrywide or made by any specifically identified competitor or competitors of Surrey. The generalized unsupported testimony of Sol Kitain is not reliable, probative and substantial evidence of industrywide practices. The fact that an unlawful practice is industrywide does not make it any the less unlawful. See *Moog Industries v. Federal Trade Commission*, 238 F. 2d 43, 355 U.S. 411.

² Certiorari has been granted and the case is now pending in the Supreme Court of the United States. *Universal-Rundle Corp.*, No. 101. October, 1966 Term.

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Respondents allege they are not engaged in interstate commerce because their interstate shipments of deceptively labelled merchandise are small. The amount of a respondent's commerce that must be "interstate" in order to confer jurisdiction upon the Federal Trade Commission is not definable in precise dollar amounts or percentages. In their answer, respondents "admit that respondents caused their products to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States * * *."

In *Safeway Stores, Incorporated v. Federal Trade Commission*, 366 F. 2d 795 (C.A. 9, 1966), in rejecting a *de minimis* challenge to the Commission's jurisdiction, in a proceeding under Section 5 of the Federal Trade Commission Act, the court, *inter alia*, said (p. 798):

Petitioners contend, however, that we should ignore the Alaskan sales as a valid basis of jurisdiction by application of the doctrine of *de minimis non curat lex* * * *. We have recently held that only \$3,086.31 in interstate purchases was sufficient to sustain the jurisdiction of the NLRB over a local cemetery association. *NLRB v. Inglewood Park Cemetery Ass'n*, 355 F.2d 448 (9th Cir. 1966). In that case, we quoted the Seventh Circuit's response to an argument of *de minimis*, "The time has not yet arrived when \$2,000 is but a trifle." *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). * * * The provisions of the respective statutes granting jurisdiction to the NLRB and the FTC are not identical. The labor statute probably is intended to be more extensive, but the question as to what is "*de minimis*" should not call for different answers. Assuming that the amounts of the Alaskan sales were "*de minimis*," it would not necessarily follow that the FTC was here without jurisdiction. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59, 60 S.Ct. 811, 845, 84 L.Ed. 1129 (1940), it was written, "the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected." See also, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310, 76 S.Ct. 937, 940, 100 L.Ed. 1209 (1956) (Footnote omitted.), wherein the Court stated,

"It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small*; or whether the effect of the agreement is to raise or to decrease prices." (Emphasis added.)

See also, *Sun Oil Co. v. FTC*, 350 F.2d 624, 631-632 (7th Cir. 1965), *cert. denied*, 382 U.S. 982, 86 S.Ct. 559, 15 L.Ed. 2d 473 (1966).

Moreover, RX 1(a)-(b) and the testimony of Sol Kitain contradict the assertion that respondents' interstate sales are *de minimis*. Even though the dollar value of respondents' bedding shipped in interstate commerce is comparatively small in relation to the dollar value of all their sales, respondents admit that approximately \$30,000 worth was

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shipped in interstate commerce in 1964; \$30,000, in 1965; and \$20,000, from January 1, 1966 through August 30, 1966 (RX 1).

At the outset of the hearings, complaint counsel requested the hearing examiner to take official notice of the Federal Trade Commission's:

Trade Practice Rules for the Bedding Manufacturing and Wholesale Distributing Industry, as Promulgated November 14, 1950, amended January 14, 1955, to include Rule 20 (CX 27).

Guides Against Deceptive Advertising of Guarantees, adopted April 26, 1960 (CX 28).

Guides Against Deceptive Pricing, Effective January 8, 1964 (CX 29).

The hearing examiner requested complaint counsel to point out specifically the manner in which he wishes such official notice to be legally operative in this proceeding (Tr. 4). Complaint counsel has not done this. Upon the authority of the Federal Trade Commission's rulings and decisions in *Devcon Corporation et al.*, Docket C-607, ruling issued October 17, 1966, 70 F.T.C. 1780; *Arnold Constable*, 58 F.T.C. 49, 62 (1961); *Gimbel Brothers, Inc.*, 61 F.T.C. 1051, 1073 (1962), and *Lifetime Cutlery Corp. et al.*, 56 F.T.C. 1648, 1649 (1959), it is found that the Commission's Trade Practice Rules and Guides are "designed to be helpful guides to the various industries for which they have been promulgated, and were not intended to be regarded and recognized as substantive rules of law, or as factual conclusions which might be cited or accepted in an adjudicative proceeding as a substitute for evidence." (Emphasis supplied.) *Lifetime Cutlery Corporation, supra*.

Section 1.55 of the Commission's Rules, effective August 1963, asserts:

Guides are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices. * * *

It is not within a hearing examiner's prerogatives to take official notice or to refuse to take official notice of the Commission's Trade Practice Rules and Guides. In this adjudicatory proceeding the Trade Practice Rules and the Guides must be given the effect which the Commission prescribes for them, not as "a substitute for evidence," but "as administrative interpretations having no force or effect as substantive law." "They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out." *Gimbel Bros., Inc., supra*, p. 1073.

The Guides and Trade Practice Rules "are designed to convey * * * the idea that they have no binding force, with the result that anyone choosing to act counter to the announced Commission interpretation can be held accountable only after formal complaint and hearings conducted pursuant to the requirements of the Administrative Procedure Act." (See Commissioner Reilly's statement issued October 17, 1966, 70 F.T.C. 1786, in *Dercon Corporation et al.*, Docket C-607, p. 1789.) The complaint charges of deceptive advertising or labelling, deceptive pricing, and deceptive guarantees must be proven by reliable, probative and substantial evidence.³ "Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."⁴ That conduct of respondents which is proven by reliable, probative and substantial evidence must be evaluated as to its deception according to criteria set forth in decisions of the Federal Trade Commission and the courts. "[T]he question for adjudication is not whether the advertising departed from criteria announced in the Guides but whether violation of the Act itself was shown." *Arnold Constable Corporation*, 58 F.T.C. 49, 62, *supra*.

The Commission can find deception, without evidence that the public was deceived, on the basis of its visual examination of exhibits. *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F. 2d 268, 270 (10th Cir. 1965), *cert. denied*, 384 U.S. 434, 1966. Surrey's catalogues are in evidence as CX 1, CX 2, CX 3, and CX 4, and specimens of the tags and labels attached to Surrey bedding are in evidence as CX 6, CX 7, CX 8, CX 9, CX 10, CX 11, CX 12, CX 13, CX 14, CX 15, CX 16, CX 17, CX 18, CX 19, CX 20, CX 21, and CX 22. The examiner may, by visual examination of these exhibits, ascertain what representations Surrey is making with reference to its bedding. "[C]apacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act." *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 604 (C.A. 9 1957). "To tell less than the whole truth is a well-known method of deception: and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished," *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4 1950). "A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation. * * * The buying public does not weigh each word in an advertisement or a representation. It

³ § 3.21 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

⁴ *Idem* § 3.14 (a).

is important to ascertain the impression that is likely to be created upon the prospective purchaser. * * * *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656, *cert. denied*, 352 U.S. 1025. "Moreover, advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words," *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 952, 954 (C.A. 2, 1960), *cert. denied*, 364 U.S. 827. "It is clear that in determining the meaning of representations made by respondent the Commission must concern itself not only with the express language of the assertion in question but also with the overall impression which it conveys," *American Home Products Corporation*, Docket 8641, December 16, 1966 (70 F.T.C. 1610). As the court quoted in *P. Lorillard Co., supra*, p. 58, "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions."

Rule 5 of the *Trade Practice Rules for the Bedding Industry* (CX 27, pp. 4, 5) provides, *inter alia*:

In the sale, offering for sale, or distribution of bedding products, it is an unfair trade practice:

(a) To use the term "RX," or any term of similar import, as descriptive of any bedding product which has not been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual:

* * * * *

(c) To use the term "Custom Built," or any term of similar import, as descriptive of any bedding product which has not in fact been made in accordance with specifications furnished prior to manufacture by the individual purchaser and user of such product:

(d) To use the term "Orthopedic," or any term of similar import, as descriptive of any bedding product unless such product has been specially designed and constructed so as to prevent, correct, or afford substantial relief with respect to a specific body deformity or deformities and accords with recommendations of orthopedic authorities respecting design and construction for such deformity or deformities; *provided*, that the term shall in all cases be accompanied by specification of the kind or kinds of body deformities for which the product has been so designed and constructed:

* * * * *

(g) To cause any bedding product to be represented, directly or by implication, as being a product which is used in any hospital or clinic or is recommended by members of the medical profession or by a medical organization when such

is not the fact, or as having been designed or made so as to afford special health, orthopedic, or therapeutic values, when such is not the fact.

In labelling and advertising their bedding, if respondents use the words "prescription," "custom," "custom built," "orthopedic," "osteopaths," "chiropractors," or terms of similar import, contrary to or in a manner violative of these Rules, complaint counsel need not have proven that the public was actually deceived in order to obtain an order proscribing such language. Moreover, if respondents represent their bedding as having "special health, orthopedic or therapeutic values, when such is not the fact," such representations constitute deceptive acts and practices.

Dorland's Illustrated Medical Dictionary, 24th Ed., 1965, contains, among others, the following definitions:

Chiropractic, page 291

A system of therapeutics based upon the claim that disease is caused by abnormal function of the nerve system. It attempts to restore normal function of the nerve system by manipulation and treatment of the structures of the human body, especially those of the spinal column.

Chiropractor

One who practices chiropractic.

Orthopedic, page 1062

Pertaining to the correction of deformities; pertaining to orthopedics.

Orthopedics, page 1062

That branch of surgery which is specially concerned with the preservation and restoration of the function of the skeletal system, its articulations and associated structures.

Osteopathy, page 1070

1. Any disease of a bone. 2. A system of therapy founded by Andrew Taylor Still (1828-1917) and based on the theory that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal body mechanics and manipulative methods of detecting and correcting faulty structure.

Therapeutic

1. Pertaining to therapeutics, or to the art of healing. 2. Curative.

Therapeutics, page 1570

1. The science and art of healing. 2. A scientific account of the treatment of disease.

After this hearing record was closed, respondents moved on December 22, 1966, to amend their answer in order to reflect a sale, on Decem-

ber 20, 1966, of a one-half interest in the voting stock of the corporation to third parties. This motion was denied on December 29, 1966.

The hearing record consists of the exhibits; the testimony of respondent Sol Kitain, chief executive officer of Surrey Sleep Products, Inc.; five retail vendors of respondents' products, pricing witnesses; and the secretary-treasurer of the chiropractic association and society that approved "the use" of respondents' bedding.

The hearing examiner has carefully considered the entire record, including the proposed findings; conclusions; and legal memoranda; and replies thereto. Findings not hereinafter made in the form proposed, or in substantially that form, are hereby rejected. Motions heretofore made and not previously ruled upon are hereby denied. Based upon his examination and consideration of the entire record, the examiner makes the following:

FINDINGS OF FACT

1. Corporate respondent, Surrey Sleep Products, Inc., (Surrey) a New York corporation since 1946, with its principal office and place of business at 42-03 35th Street, Long Island City, New York (Tr. 8), manufactures and sells in interstate commerce—box springs, mattresses, sleep chairs and sofa beds. Respondent Sol Kitain and his wife were the officers and directors of the corporation during the relevant periods—and at the time of the hearing (Tr. 8). Mrs. Kitain did not participate actively in the business (Tr. 15). As the principal stockholder and principal officer, Sol Kitain "has complete charge" of Surrey Sleep Products, Inc. (Tr. 58). He formulates policy (Tr. 59).

2. Surrey buys raw materials, innerspring units, hair pads, cotton felt, ticking and other necessary components, box springs and cartons and processes them into finished products (Tr. 9). The company manufactures two separate lines of products: bedding—box springs and mattresses—and upholstered goods—sofa beds and sleep chairs. This proceeding involves only the bedding (Tr. 200).

3. Surrey has had a show room in Chicago, Illinois, for 15 years, where its merchandise was on display year round, and a show room at 196 Lexington Avenue, New York, New York.

4. Surrey does not use newspapers, television or radio to advertise its products (Tr. 189). It uses only catalogues such as are in evidence as CX 1, CX 2, CX 3 and CX 4.

5. At the time of the hearing the company employed 26 people, including its sales personnel (Tr. 10).

6. Most of Surrey's business is transacted with retail furniture stores (Tr. 10). A "healthy" percentage of its business is obtained

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through decorators and people in the trade coming into the company's show rooms in Chicago and New York. The company's factory is located at 42-03 35th Street, Long Island City, New York.

7. During 1964, 1965, and up to September 1, 1966, Surrey's sales and interstate shipments were:

Year	Total shipments	Shipments of upholstered goods	Shipments of bedding	Interstate shipments
1964.....	\$769, 332. 60	\$461, 000	¹ \$308, 000	\$30, 000
1965.....	770, 959. 04	¹ 462, 000	¹ 308, 000	30, 000
1966.....	538. 752. 00	¹ 269, 376	¹ 269, 000	20, 000

(RX 1(a)-(b).)

¹ The breakdowns given for upholstered goods and bedding are approximations. When added they do not total the figure given for total shipments. However, the figures were supplied by respondents, and the discrepancy is not material.

Surrey bedding is not a mass produced item. Surrey does not sell any one customer a large amount of bedding. Surrey bedding is sold to small and medium sized customers, to decorators, to decorator type stores (Tr. 205). A big account for Surrey would be total annual sales to one customer between \$25,000 and \$30,000 (Tr. 206).

8. Respondent Sol Kitain, as an officer, director and one of the principal stockholders of the corporate respondent, formulates, directs and controls the acts and practices of the corporate respondent.

9. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States. During the relevant period respondents have maintained a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

11. During all the relevant period, in the conduct of their business respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of box springs, mattresses, sleep chairs, sofa beds, and other products of the same general kind and nature as those sold by Surrey Sleep Products, Inc.

12. The larger bedding manufacturers, such as the Simmons Company, Englander, Stearns and Foster, do not purchase component

parts for their products from outside sources—as Surrey does—but make the total product themselves. Mr. Kitain estimated that nationally, there must be “thousands” of bedding factories that run the gamut from a small firm with two or three employees to firms employing hundreds of persons, and a “few companies who employ thousands” (Tr. 16–17). He testified that Sealy and Serta are franchise arrangements under which many individually owned factories pay a royalty for the use of the names and get the benefits of national advertising (Tr. 17–18). “Basically, the industry is in the hands of a lot of small people” (Tr. 18).

13. Surrey’s bedding cannot, as a practical matter, be sold to dealers that are too far away from the Surrey factory because the shipping costs for such a large bulky item as a mattress would be so disproportionate as to make Surrey’s bedding noncompetitive, pricewise, with locally manufactured bedding. On the other hand, Surrey’s upholstered goods can be shipped great distances because its sofa beds and sleep chairs compete more on a style basis. Surrey’s upholstered line is styled in Italian Provincial, Spanish, Moorish, French Provincial, Modern, and Traditional decor (Tr. 20). Surrey sells only its higher priced bedding outside the trade area immediately surrounding its factory (Tr. 20–21).

14. Surrey sells, and during the relevant period has sold, its bedding under the following brand names, among others:

“Prescription Bedding” (CX 12, CX 20, CX 21, CX 22); “Sano Pedic” (CX 11); “Custom Craft” (CX 8); “Sano Craft,” “Sano Tex” (Tr. 21); “Allergo Pedic,” “Rx Royal ‘400,’” “Culture Rest” (CX 9); “Rest-O-Pedic” (CX 18); “Rest Form” (CX 1, page 41, CX 10); “Ortho-Flange—Orthopedic innerspring construction” (CX 7); “Rest O Lux” (CX 13); “Royal Prescription Bedding” (CX 15, CX 16, CX 17).

15. Surrey spends between \$1000 and \$1500 annually for advertising (Tr. 189). It does not use radio, television or newspaper advertising (Finding 4, *supra*), but depends chiefly upon its catalogue, and supplements which are in evidence as CX 1, CX 2, CX 3 and CX 4. Mr. Kitain’s testimony (Tr. 32–39) about the number of each of these catalogues and supplements that had been used, and the precise time when each was used, is a bit vague. A substantial number of each of these exhibits (CX 1, CX 2, CX 3 and CX 4) were sent by Surrey through the United States mails in interstate commerce, during the relevant period, for the purpose of advertising Surrey’s products and promoting sales for them.

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16. A copy of one of the pages of CX 2 is as follows:

Surrey Sleep Products, Inc.

[Picture of mattress]

Prescription Bedding has the endorsement of the Pennsylvania & Maryland Chiropractic Society and hundreds of other Osteopaths and Chiropractors throughout the country.

- It is the most luxurious bedding in the world.
- It offers you the greatest selection of size and firmness.
- It is the most beautifully styled and carefully detailed bedding available.
- It offers you the protection of a full 20 year written Unconditional Guarantee.

PRESCRIPTION BEDDING made for your weight, made for your height, made for your sleep requirements, made in twenty-seven sizes. An exclusive patented mattress and box spring combination custom made for you. *WE SPECIALIZE IN ODD SIZE AND CUSTOM BEDDING.* (Italic supplied.)

Prescription Bedding and Sano-Pedic Prescription Bedding

PRODUCT GUARANTEE

We guarantee to the purchaser of a set of prescription bedding, that the construction is free from defects in materials and workmanship.

We further agree to replace without charge for 20 years from date of purchase, any prescription mattress returned to our factory and found to be defective.

This guarantee does not extend to cover fire or water damage, soiling, accident or misapplication.

Surrey Sleep Products, Inc., N.Y.C.

Page 8 of CX 4 is as follows:

Prescription Bedding has the endorsement of the Pennsylvania Chiropractic Society and hundreds of other Osteopaths and Chiropractors throughout the country.

- It is the most luxurious bedding in the world.
- It offers you the greatest selection of size and firmness.
- It is the most beautifully styled and carefully detailed bedding available.
- It offers you the protection of a full 20 year written Unconditional Guarantee.

PRESCRIPTION BEDDING

SANO-PEDIC PRESCRIPTION ROYAL "400"
ROYAL PRESCRIPTION THE "EMPRESS" CUSTOM CRAFT

PRODUCT GUARANTEE

WE GUARANTEE to the purchaser of a set of PRESCRIPTION BEDDING, that the construction is free from defects in materials and workmanship.

WE FURTHER AGREE to replace without charge for 20 years from date of purchase, any PRESCRIPTION mattress returned to our factory and found to be defective.

THIS GUARANTEE does not extend to cover fire or water damage, soiling, accident or misapplication.

SURREY SLEEP PRODUCTS, INC., N.Y.C.

Surrey Sleep Products, Inc., factory, Office & Showroom, 53 East 25th Street, New York 10, N.Y.; Chicago Showroom: 325 North Wells Street, Chicago, Ill. (Italic supplied.)

17. Surrey's catalogues, CX 1, CX 2, CX 3 and CX 4, emphasize, among other things, the "custom" or "customized" aspect of Surrey's manufacturing process. In addition, these catalogues are designed to, and do, convey to a prospective customer the impression that Surrey bedding has unique medical—orthopedic, osteopathic and chiropractic—virtues and that a Surrey mattress is a "prescription" mattress having special therapeutic qualities. Insofar as the evidence in this record shows, all such representations by Surrey are false, misleading and deceptive. Surrey bedding may, or may not, have special medical—orthopedic, osteopathic and chiropractic virtues. It may have special therapeutic qualities. There is no reliable, probative and substantial evidence in the record relating to such facts. The hearing Examiner finds, in the absence of evidence to the contrary, that Surrey's representations in these respects are false, misleading and deceptive within the purview of Section 5 of the Federal Trade Commission Act.

18. The *quality* of Surrey bedding is not in issue in this proceeding. Mr. Kitain testified (Tr. 209-221) that no one in the industry makes a better quality bedding than does Surrey; and that Surrey can make one of the "hardest" or "firmest" mattresses in the industry. Mr. Kitain and the two chiropractors, G. Harry Lewis (Tr. 156, *et seq.*) and Harold F. Carbaugh (Tr. 138, *et seq.*) testified that "hard" or "firm" mattresses are beneficial for *some* people. The advantages, if any, of a "hard" vis-a-vis a "soft" mattress are not delineated in this record.

19. On the basis of the chiropractors' testimony, the hearing examiner can find only that sometimes hard mattresses are desirable, and sometimes they are not desirable, in chiropractic.

Dr. Carbaugh testified: (Tr. 151-152)

HEARING EXAMINER GROSS: Well, what would cause the approval of the Surrey mattress?

THE WITNESS: I cannot answer that; I don't know.

HEARING EXAMINER GROSS: Well, what would be the interest of a professional man described as a chiropractor in a mattress? Specifically, what would be his professional interest in a mattress?

THE WITNESS: Definitely, for posture, for rest. *So many mattresses are soft. Some of them are too hard.* (Italic supplied.)

Dr. G. Harry Lewis, the other chiropractic witness, testified: (Tr. 160)

For certain cases, yes, you would want a hard mattress. (Italic supplied.)

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If firm or extra firm mattresses possess unique medical—orthopedic, osteopathic and/or chiropractic—virtues, the record contains no substantial evidence of this fact. In the absence of evidence, neither a positive nor a negative finding as to the virtues of a firm or extra firm mattress is justified.

20. On or about January 7, 1961, the Pennsylvania Chiropractic Society wrote a letter to Surrey Sleep Products, Inc., reading:

PENNSYLVANIA CHIROPRACTIC SOCIETY,
Harrisburg, Pa., January 7, 1961.

SURREY SLEEP PRODUCTS, INC.,
New York 10, N.Y.,

GENTLEMEN: The Pennsylvania Chiropractic Society, by its Board of Directors, having examined the Prescription Bedding of Surrey Sleep Products, Inc., of 53 East 25th Street, New York, New York, hereby approves the use of the aforesaid product.

Very truly yours,

PENNSYLVANIA CHIROPRACTIC SOCIETY.

During the year 1966, respondents received a letter from the Pennsylvania Chiropractic Association asking respondents to cease using its endorsement. Upon communicating with the Association, Mr. Kitain was informed that the Association did not wish to endorse Surrey bedding or any other set of bedding. Prior to the hearing in November 1966, Surrey had stopped representing that the Pennsylvania Chiropractic Association had endorsed its bedding (Tr. 55).

21. On or about September 23, 1962, The Maryland Chiropractic Association sent a letter to Surrey as follows:

MARYLAND CHIROPRACTIC ASSOCIATION INC.,
Hagerstown, Md., September 23, 1962.

SURREY SLEEP PRODUCTS, INC.,
New York, N.Y.

GENTLEMEN: The Maryland Chiropractic Association Inc., by its Board of Directors, having examined the Prescription Bedding of Surrey Sleep Products, Inc., of New York, New York, hereby approves the use of the aforesaid product.

Very truly yours,

MARYLAND CHIROPRACTIC ASSOCIATION INC.

22. There is considerable testimony in this record concerning the circumstances under which the above endorsements by the chiropractic societies were given (Sol Kitain, Tr. 194, *et seq.*; Dr. Harold F. Carbaugh, Tr. 141, *et seq.*; Dr. G. Harry Lewis, Tr. 154, *et seq.*). Most of this testimony is irrelevant to the issues presented here for adjudica-

tion. The endorsements were obtained—and were extensively advertised by Surrey (CX 2, CX 4, CX 6, CX 19). However, “words and sentences may be literally and technically true, and yet be framed in such a setting as to mislead or deceive,” *Rothschild v. Federal Trade Commission*, 200 F.2d 39, 40 (C.A. 7 1952) *cert. den.* 345 U.S. 941. Surrey’s representations that its bedding was approved by the Maryland Chiropractic Association and the Pennsylvania Chiropractic Society were literally true—but were used by Surrey in a misleading and deceptive manner.

There is no evidence in this record that Surrey bedding was endorsed by “hundreds of osteopaths and chiropractors throughout the country” (See CX 2, CX 4—Finding 16, *supra*). Such statement would appear to be completely false.

23. In addition to the representations that Surrey makes in its catalogues, as herein found (CX 1, CX 2, CX 3 and CX 4), Surrey affixes to its bedding labels, streamers, ribbons, and/or tags of which specimens are in evidence as CX 6—CX 22 inclusive. By means of these labels Surrey represents, *inter alia*:

Endorsed by Maryland *Chiropractic* Association with a seal of the association (CX 6).

Endorsed by Pennsylvania *Chiropractic* Society with a seal of the society (CX 19).

Ortho Flange, *Orthopedic* Innerspring Construction (CX 7).

Custom Craft scientifically constructed for natural *healthful* sleep and maximum comfort. factory guarantee against structural defects for 20 years (CX 8).

Culture Rest, an *orthopedic* mattress scientifically constructed for normal *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years (CX 9).

* * * * *

Rest-form, *custom built* construction for sleep comfort, engineered for proper sleep (CX 10).

Sano Pedic, scientifically constructed for normal *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years (CX 11).

Prescription Bedding, scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee for 20 years in writing against structural defects (CX 12).

Rest-O-Lux; Reinforced Prebuilt Border; Heavy Insulation; Custom Type Construction; Built For Comfort; Made by the Manufacturers of *Prescription* Bedding (CX 13).

Sano Pedic

Scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years. \$179.00 (CX 14).

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Royal Prescription Bedding

Scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee for 20 years in writing against structural defects. \$199.00 (CX 15, CX 16, CX 17, CX 21).

Rest-O-Pedic

Scientifically constructed

for

Natural *healthful* sleep

and

Maximum comfort

Factory Guarantee against

structural defects for 15 years (CX 18).

(Italics in the above excerpts is supplied.)

24. The labels, streamers, ribbons and/or tags are used by Surrey to convey to the mind of a prospective customer and do convey the impressions, *inter alia*:

That Surrey mattresses have unique chiropractic virtues (CX 6, CX 19), unique orthopedic virtues (CX 8, CX 9) or therapeutic virtues—"healthful sleep" (CX 8, CX 9, CX 11, CX 12, CX 14, CX 15, CX 16, CX 17, CX 18, CX 20, CX 21).

Such representations are, within the framework of this record, false, misleading, and deceptive within the intent and meaning of Section 5 of the Federal Trade Commission Act.

25. The labels, streamers, ribbons and/or tags also are designed to and do convey the impression, contrary to the fact, that Surrey bedding is "custom built" or "customized" (CX 10) "custom built construction"; (CX 13) "custom type construction" and this also constitutes a false, misleading and deceptive representation within the intent and meaning of the Act.

26. One of Surrey's defenses is that the representations that it makes, as herein found, are identical or similar to representations made by a large number of bedding manufacturers. Respondents' proposed finding⁵ to that effect is rejected because there is no substantial probative evidence in this record to support it.

Moreover, even though the evidence should support such a finding (which it fails to do), such finding would not exculpate Surrey's

⁵ Respondents' Memorandum of Law, pp. 9, 10: "all firms in the bedding industry use the terms 'pedic,' 'ortho,' 'Rx,' 'posture' or their equivalents. The practice is open, flagrant, and notorious. There has been no enforcement of the provisions of the bedding code since its adoption in 1955."

wrongdoing. *Universal-Rundle* (page 529, *supra*) does not, in this examiner's opinion, hold that one wrongdoer may successfully defend his deceptive acts and practices by demonstrating that his competitors engage in identical or similar practices. See *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411.

27. In its brief in the Supreme Court, in *Universal-Rundle*, the Federal Trade Commission, *inter alia*, asserts: (p. 25)

It is the Commission's practice, prior to issuing any complaint, to consider whether the practice involved would more suitably be dealt with through some form of industry-wide proceeding. Pursuant to this practice, it has instituted or refused to institute such proceedings, depending on the particular circumstances. Even after the Commission determines that enforcement on a case-by-case basis is most appropriate, it carefully considers whether it should stay orders against particular respondents in the light of supervening decisions or evidence that competitors in an industry are engaging in similar practices. In some cases, it has granted such stays (see, e.g., *Atlantic Products, Inc.*, F.T.C. Docket No. 8513, Nov. 19, 1962; Rowe, *Price Discrimination Under the Robinson-Patman Act* 518-519 (1962 ed.), 159 (Supp. 1964)); in others it has denied them. (Footnotes omitted.)

28. Complaint counsel has proven by reliable, probative and substantial evidence in this record that respondents, in the interstate sale of their products, have represented and do represent, contrary to the fact:

That Surrey bedding possesses unique medical—orthopedic, osteopathic and/or chiropractic—virtues;

That certain of their mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses;

That certain of respondents' mattresses have been specially designed and constructed so as to afford orthopedic, osteopathic, chiropractic and/or other therapeutic relief to the users of said mattresses, or will prevent or correct undesirable orthopedic, osteopathic and chiropractic conditions in the users;

That Surrey mattresses are therapeutic for orthopedic, osteopathic and chiropractic pathology; and

That Surrey mattresses have been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual.

Such representations by respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

The Pricing Deception

29. Complaint counsel called five retail vendors of Surrey bedding for the purpose of proving that the prices which Surrey pretickets on its bedding "are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area" (Complaint Par. Six (5)). These witnesses were: Arthur Getter, William Grady, Albert Berger, Anthony Englishis, and Bernard Schnee.

30. The testimony of the pricing witnesses fails to prove that the prices which Surrey pretickets on its bedding are not respondents' good faith estimate of the prices at which respondents' bedding is sold at retail in respondents' trade areas:

Arthur Getter (Tr. 105-125), a member of the National Association of Interior Designers, president of M. Feigelman, Inc., 119 W. 24th Street, New York City, had been with that company for 18 years (Tr. 108), and testified that his company is in the business of "furniture retailing." The last purchase his company made of Surrey products was "more than a year ago" (Tr. 104). He was not certain which brand of Surrey bedding his company sold. He had been an interior decorator for 16 years (Tr. 122). The witness was unable to recall the price which Surrey had preticketed on the Surrey products he had sold (Tr. 106). M. Feigelman sells "maybe twenty or thirty" brands of bedding (Tr. 111). The witness testified that his company usually sold the bedding as part of a bedroom suite. The witness was unable to recall specifically the price at which his firm sold Surrey bedding. Mr. Getter's testimony will not support any finding as to the prices at which his firm sold Surrey bedding. The witness testified that one of his "primary functions" was that of a decorator (Tr. 120). "The largest part of my time is involved in doing decorating for our customers" (Tr. 120). The witness had been interviewed concerning his testimony more than a year prior to his appearance at the hearing. He had not, since that time, endeavored to refresh his recollection about the sale prices of Surrey bedding, nor had he been requested to do so. His testimony was so vague and uncertain that it must be disregarded as proof of the pricing charge in the complaint.

Albert Berger (Tr. 134-138), interior decorator and furniture salesman, conducts his own business, Advance Decorators, at 2166 White Plains Road, The Bronx, New York. He has been in business for 18 years and has been selling Surrey bedding for 8 or 10 years. He sells Surrey's Sano-Tex, Sano Craft, Prescription and Royal Prescription labels. "We sold our bedding for \$150.00 per set" (Tr. 137). Mr. Ber-

ger was unable to recall whether the Surrey bedding which he sold was preticketed (Tr. 138).

"In either case, the customer never saw it [any preticketed price]. The beds were always covered. Half the time we never bothered to show the customer the bedding.

"Let me point out that our operation is different from a regular furniture store. It is a small decorator showroom. Whenever we sold a bedroom set, we usually sold the bedding. We never had people walking in off the street, coming in to buy a set of bedding. We sold our bedding basically to our own customers who bought a bedroom set" (Tr. 138). ". . . to my recollection, I don't think we have ever had anyone walk in off the street and just buy a set of bedding" (Tr. 138A). Mr. Berger's testimony fails to prove that Surrey's preticketed prices on its bedding do not constitute a bona fide estimate of the prices at which the bedding is generally sold at retail in Surrey's trade area.

William Grady (Tr. 167, *et seq.*), the furniture manager for 30 years of Howell Brothers, a retail firm in Hoboken and West New York, New Jersey, testified that Howell sells Surrey's Prescription Bedding in the Hoboken store. The witness testified that he sold Surrey's Prescription Bedding for \$199.50 (Tr. 170); and that Howell Brothers has been quite successful in selling Surrey's bedding at the preticketed price. Mr. Grady's testimony not only fails to prove the pricing charges in the complaint, but actually proves the opposite of such charges.

Anthony Englis (Tr. 171-176), an interior decorator in the retail furniture business under the name Tal-Enge, Ltd., at 2 Park Avenue, New York, New York, sells Surrey's "Royal Prescription" and "Carriage Trade" labels. Mr. Englis sells the Royal Prescription bedding for \$199.50 or \$199 (Tr. 174). If there is another decorator involved "we get \$199 and give back the commission" (Tr. 174). If a customer walks in off the street, "they will have to pay \$199.50." The testimony of Mr. Englis not only fails to prove the pricing charges in the complaint, but proves just the opposite.

Bernard Schnee (Tr. 176-179), president of Zaretsky and Schnee Furniture Corporation, 476-480 Rockaway Avenue, Brooklyn, New York, testified that his company sells Surrey's Prescription Bedding for \$199, the preticketed price. Mr. Schnee's testimony proves that the price which is preticketed upon Royal Prescription bedding (CX 15, CX 16, CX 17) is the price at which Mr. Schnee's company sells it.

31. Commission Exhibit 5, an advertisement by the Sage-Allen Department Store of Hartford, Connecticut, in the Hartford Times of September 10, 1963, for Surrey Prescription Bedding at a "Special! Introductory Price \$159.00—Mattress, Box Spring Set," is not reliable,

probative and substantial evidence of Surrey's alleged pricing deception, when considered with the other evidence on this issue.

32. Complaint counsel has failed to prove by reliable, probative and substantial evidence in this record that the prices which Surrey pre-ticketed upon its bedding "are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area." This charge in the complaint should be, and it hereby is, dismissed.

The Guarantee Deception

33. As previously found, Surrey spends between \$1000 and \$1500 per year for advertising (Tr. 189, Finding 15, *supra*). It does not advertise by newspaper or by radio, or television (Finding 4, *supra*). Surrey's guarantee is mentioned in its catalogue (CX 1), the supplements to the catalogue (CX 2, CX 3 and CX 4), and on some of the tags or labels attached to its bedding (CX 6-CX 22, inclusive). Surrey's guarantee certificates (CX 25-CX 26) are enclosed in the cartons in which its bedding is packaged and are reproduced *in facsimile* in its supplements, CX 2 and CX 4 (Finding 16, *supra*). There is no discrepancy between Surrey guarantee certificates and the guarantee as advertised, such as was found by the Federal Trade Commission in *Montgomery Ward & Co.* (Docket 8617, opinion issued July 26, 1966. [70 F.T.C. 52, 61]).⁶

34. Surrey's catalogue (CX 1) and the supplements to its catalogue (CX 2, CX 3 and CX 4) are sent to Surrey dealers. The guarantee as set forth in these exhibits (CX 1, CX 2, CX 3 and CX 4) is not made directly to the ultimate beneficiary⁷ of the guarantee, the retail customer-user. Such ultimate beneficiary receives the guarantee certificates (CX 25, CX 26) which, as above stated, is enclosed in the carton in which Surrey bedding is delivered to the user. Surrey's guarantee certificates read:

We guarantee to the purchaser of a set of the above listed bedding that the construction is free from defects in materials and workmanship.

We further agree to replace without charge for [15] 20 years from date of purchase any above listed mattress returned to our factory and found to be defective. (Emphasis supplied.)

This guarantee does not extend to cover fire or water damage, soiling, accident or misapplication. Surrey Sleep Products, Inc., N.Y.C. (CX 25, CX 26.)

⁶ This was a 3-2 decision, with Commissioners Elman and Reilly dissenting, and is now on appeal to the Court of Appeals for the Seventh Circuit.

⁷ A Surrey dealer is, of course, also beneficiary of the guarantee to the extent that he is able to use it to sell Surrey bedding.

Complaint Counsel's position is that the guarantee is deceptive because the Surrey bedding must be returned to the factory (see Tr. 224-226). On page 14 of his proposed findings complaint counsel states:

The worst feature of the respondents' guarantee, which is not disclosed, is that the purchaser must return the mattress to respondents' factory for a determination by them as to whether or not the product is defective.

Surrey's guarantee does disclose that its bedding must be returned to its factory. What would complaint counsel have Surrey state in its guarantee that is not stated? Bedding is the type of product which must be examined at the factory or by a Surrey dealer in order to ascertain whether it has any *structural* defects.

35. Unlike *Montgomery Ward*⁸ Surrey does not sell directly to the user. Mr. Kitain's uncontradicted testimony is that Surrey's dealers relieve their customers, the retail purchasers, of the necessity of returning Surrey bedding to the factory, and, in the few instances where there have been complaints, the dealer has assumed the burden of returning the bedding to the factory.

36. Under Surrey's guarantee, if anything goes wrong with the workmanship of Surrey bedding the company replaces the bedding without charge (Tr. 222). Surrey makes good on damage to its bedding which is inflicted in the process of delivering such bedding to the user (Tr. 222-223). Construction complaints are rare except in those instances where a user finds a mattress is firmer or softer than he likes, or thought it would be. This is *not* a construction defect—cannot be—and is not covered by Surrey's guarantee against "structural defects."

37. Mr. Kitain testified, and there is no evidence to the contrary, that Surrey performs on its guarantee unconditionally (Tr. 228). "We always upheld our guarantee a hundred percent, with every dealer" (Tr. 256).

38. Surrey's guarantee states "returned to our factory" as a condition to replacement under the guarantee. Mr. Kitain's testimony is uncontradicted in this record, and the examiner finds, that when a claim under the guarantee is presented, Surrey's local dealer replaces the bedding at the user's home—and later returns the bedding to the Surrey factory, at the dealer's or Surrey's expense.

⁸ The instant case is also distinguishable from *Sibco Products Co., Docket 8628*, Commission's opinion dated November 22, 1965, affirmed 367 F. 2d 364 (C.A. 2 1966) in which the Commission found that respondents' advertisements for a water filtration unit did not adequately disclose the conditions of the guaranty.

Mr. Kitain testified: (Tr. 224)

Q. Other than those situations of delivery [any damage during delivery] and taking time to become accustomed to the mattress, [because it is harder or softer than the user is accustomed to] have you ever had complaints, or have you ever been sued?

A. No, Sir.

Q. Have you ever had any complaints?

A. Over the years, once in—occasionally there might be a complaint, but if there is such, there is no problem or argument. We do whatever has to be done. Not only do we have to keep the consumer happy, but the customer from whom the consumer bought the mattress, too (Tr. 224).

39. The Commission's Guides Against Deceptive Advertising of Guarantees adopted April 26, 1960 (CX 28), *inter alia*, provide:

In general, any guarantee in advertising shall *clearly and conspicuously disclose*—

(a) *The nature and extent of the guarantee.* This includes disclosure of—

(1) What product or part of the product is guaranteed,

(2) What characteristics or properties of the designated product or part thereof are covered by, or excluded from, the guarantee,

(3) What is the duration of the guarantee,

(4) What, if anything, any one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; and

(b) *The manner in which the guarantor will perform.* This consists primarily of a statement of exactly what the guarantor undertakes to do under the guarantee. Examples of this would be repair, replacement, refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee this should be set out; and

(c) *The identity of the guarantor.* The identity of the guarantor should be clearly revealed in all advertising, as well as in any documents evidencing the guarantee. Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor.

These guides are not a "substitute for evidence." (See p. 531, *supra*.) There is no evidence in this record that Surrey has ever failed or refused to perform under the terms of its guarantee, as advertised; nor is there any evidence of any deceptive discrepancy between Surrey's advertised guarantee and Surrey's performance thereunder.

40. Surrey's guarantee does disclose:

(a) *The nature and extent of the guarantee*

* * * * *

(b) *The manner in which the guarantor will perform*

* * * * *

(c) *The identity of the guarantor.*

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41. Complaint counsel has failed to prove by reliable probative and substantial evidence, as charged in the complaint, that:

Respondents' guarantee is not unconditional but contains numerous conditions and limitations. Furthermore, the guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder. (Italic supplied.)

This charge in the complaint should be, and it hereby is, dismissed.

CONCLUSIONS

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

2. Respondent, Surrey Sleep Products, Inc., a New York corporation, since 1946, manufactures and sells bedding—box springs and mattresses—sleep sofas and chair beds, in commerce, as “commerce” is defined in the Federal Trade Commission Act.

3. Respondent, Sol Katain, during the relevant period involved in this proceeding was an officer, director and principal stockholder of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent as herein found.

4. In the conduct of their business during all of the relevant period respondents were in substantial competition, in commerce, with other corporations, firms, and individuals who made and/or sold products of the same general kind and nature as the products sold by respondents.

5. Complaint counsel has proven by reliable, probative and substantial evidence the charges in Paragraphs Five (1), (2), (3) and (4), and Six (1), (2), (3) and (4) of the complaint. Respondents have failed to establish any defenses in law or in fact to these charges as proven.

6. Complaint counsel has failed to prove by reliable, probative and substantial evidence the charges in Paragraphs Five (5) and (6), and Six (5) and (6) of the complaint, and these charges should be dismissed.

7. In the conduct of their business during the relevant period respondents engaged in false, misleading and deceptive acts and practices as herein found.

8. Respondents' false, misleading and deceptive acts and practices herein found were and are to the prejudice and injury of the public and of respondents' competitors, and 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.

9. Respondents' unfair and deceptive acts and practices herein found to violate the Federal Trade Commission Act should be enjoined.

ORDER

It is ordered, That respondents Surrey Sleep Products, Inc., a corporation, and its officers, and Sol Kitain, 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 advertising, offering for sale, sale or distribution of mattresses, box springs or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words or phrases "Custom Craft," "Custom Built Construction," or any other words or phrases of similar import or meaning as descriptive of stock merchandise; or representing, directly or by implication, that their products have been specially designed and constructed in accordance with specifications furnished prior to manufacture by purchasers or users;

2. Using the word or term "Orthopedic" or any other terms, words or phrases of similar import or meaning as descriptive of mattresses or any other bedding product not specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities, and not in accord with recommendations of an orthopedic authority or authorities respecting the design or construction of such product for the prevention, correction or relief of a body deformity or deformities;

3. Using the words, terms, phrases or symbols, "Manufacturers of Prescription Bedding," "Prescription" or "RX," or any other words, terms, phrases or symbols of similar import or meaning as descriptive of stock mattresses or bedding products; or representing in any manner that stock mattresses have been specially designed and constructed to meet the requirements of a prescription by a member or members of the medical profession for the use of a particular individual;

4. Representing, directly or by implication, that the design and construction of their products have been approved by a practitioner or practitioners of medicine, osteopathy, orthopedics or chiropractic: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for the respondents to establish the fact of such representation;

5. Representing in any manner, directly or by implication that respondents' bedding has unique medical, orthopedic, osteopathic, or chiropractic virtues: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish the facts in such representation or representations;

6. Furnishing or otherwise placing in the hands of dealers in or retailers of respondents' products the means and instrumentalities by and through which such dealers or retailers may mislead or deceive the public in the manner or as to the things herein expressly prohibited; and

It is further ordered, That the charges in subparagraphs 5 and 6 of Paragraph Five and subparagraphs 5 and 6 of Paragraph Six of the complaint be, and hereby are, dismissed.

OPINION OF THE COMMISSION

APRIL 3, 1968

BY ELMAN, *Commissioner*:

This case comes before the Commission on cross appeals by respondents and complaint counsel from the examiner's initial decision sustaining some of the allegations of the complaint and dismissing others. The parties having waived oral argument, the case was submitted to the Commission on the record and briefs.

Respondents are a New York corporation, Surrey Sleep Products, Inc., and one of its officers, Sol Kitain. Surrey manufactures mattresses, sofa beds, and sleep chairs which it sells to retail furniture stores and decorators. Surrey maintains a showroom in Chicago, and solicits orders through salesmen and through catalogues which describe its various products. The complaint, which relates only to mattresses, charged respondents with engaging in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act.

The charges in the complaint may be summarized as follows:

(1) That respondents falsely preticketed their mattresses with prices that exceeded those normally charged for them.

The examiner dismissed this charge, and complaint counsel has not appealed.

(2) That respondents falsely advertised that their mattresses were unconditionally guaranteed, when in fact the guarantees contained numerous conditions and limitations.

The examiner dismissed this charge, and complaint counsel has appealed.

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(3) That "for the purpose of inducing the purchase" of their mattresses, respondents made false and misleading representations in their "catalogs, brochures, labels, and other media with respect to the design, construction [and] approval" of their mattresses. As illustrative of respondents' deceptive representations, the complaint set out the following:

Made by the Manufacturers of Prescription Bedding.
Royal Prescription Bedding.
Prescription Bedding.
Culture Rest an Orthopedic Mattress.
Endorsed by Maryland Chiropractic Society.
Endorsed by Pennsylvania Chiropractic Society.
Custom Craft.
Custom Built Construction.
RX Royal "400." (Complaint, Par. Four.)

The examiner sustained these charges, and respondents have appealed from his findings and proposed order.

I

Respondents' main argument, urged repeatedly throughout the proceeding, is that the Commission lacks jurisdiction.

The complaint alleged, and the examiner found, that deceptive representations were made in regard to several brands of Surrey mattresses, among them Prescription Bedding, Custom Craft, Sano Pedic, and Rest-O-Pedic. Respondents argue that the record shows that only one brand of Surrey mattresses—Prescription Bedding¹—was sold in interstate commerce, and that the Commission lacks jurisdiction over representations regarding Surrey's other brands of mattresses that were not sold in interstate commerce. And as to Prescription Bedding, respondents argue that the Commission lacks jurisdiction because the volume of sales in interstate commerce was only about \$5,000 annually (RX 1A-B), an amount which they characterize as *de minimis*.

The record shows the following: Complaint counsel introduced no evidence of any sales in commerce, and instead relied on respondents' admission that Surrey's catalogues were disseminated in interstate commerce. The catalogues contain advertising for all of Surrey's mattresses and include reproductions of the labels used on the various brands (CX 1). Respondent Sol Kitain testified that although various types of mattresses were advertised in Surrey's catalogues (as well

¹ Surrey markets a mattress labeled Royal Prescription Bedding, which is the same as Prescription Bedding, but with blue instead of brown ticking (Tr. 54). According to the record, Royal Prescription Bedding was also sold in interstate commerce (Tr. 166-68). We shall use the term Prescription Bedding to refer to both brands, since the charges relating to them are the same.

as sofa beds and sleep chairs, which are not involved in this proceeding), the only mattresses sold outside the State of New York were those labeled Prescription Bedding. He emphatically denied that any other Surrey mattresses were sold in commerce² (Tr. 187-88; RX 1A-B). Only one out-of-State customer was called as a witness and his testimony corroborated Mr. Kitain's (Tr. 166-68).

Respondents' contention as to Prescription Bedding that \$5,000 of interstate sales is *de minimis* is clearly without merit, and requires no further discussion.³ Their further contention that proof of sales in interstate commerce is a jurisdictional prerequisite is also erroneous, and misconceives the nature of both the Commission's jurisdiction and the charges in the complaint.

The relevant fact overlooked by respondents is that the complaint relates not only to the sale of Surrey mattresses but also to Surrey's advertising. As noted above, the complaint charged respondents with making misrepresentations "in catalogs, brochures, labels, and other media" (Complaint, Par. Four). Since the catalogues and brochures (CX 1-4) containing the alleged misrepresentations were admittedly sent to dealers in various States (Tr. 32-40, testimony of Mr. Kitain), it is irrelevant whether respondents did or did not succeed in selling their mattresses to out-of-State customers. Since the challenged representations appear in Surrey's interstate advertising, such acts and practices are clearly subject to the Commission's jurisdiction.

This is not a new question. It was fully considered by the Commission in *S. Klein Dept. Stores, Inc.*, Docket No. 7891. The complaint in that matter related solely to advertisements disseminated in interstate commerce. It contained no specific allegations that any sales were made to out-of-State customers or that the purpose of the advertisements was to induce interstate sales. In an interlocutory ruling dealing expressly with the jurisdictional question, the Commission held that:

* * * interstate disseminations of advertisements * * * constitute "methods of competition in commerce" and "acts or practices in commerce" within the pur-

² According to Mr. Kitain's testimony, the high cost of shipping mattresses generally limits their sale to an area near the place of manufacture. Surrey's Prescription Bedding, which is assertedly of high quality, is an exception to this rule (Tr. 19-21).

³ *Safeway Stores, Inc. v. F.T.C.*, 366 F. 2d 795, 798 (9th Cir. 1966): "We have recently held that only \$3,086.31 in interstate purchases was sufficient to sustain the jurisdiction of the NLRB over a local cemetery association. *NLRB v. Inglewood Park Cemetery Ass'n*, 355 F. 2d 448 (9th Cir. 1966). In that case we quoted the Seventh Circuit's response to an argument of *de minimis*, 'The time has not yet arrived when \$2,000 is but a trifle.' *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). * * * The provisions of the respective statutes granting jurisdiction to the NLRB and the FTC are not identical. The labor statute probably is intended to be more extensive, but the question as to what is '*de minimis*' should not call for different answers."

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view or coverage of Section 5(a)(1) of the Federal Trade Commission Act. The jurisdiction alleged thus rests solely on the interstate disseminations alleged.

Conclusions that the statute's coverage so extends have sound basis in law and public policy. The Act's specified targets are unfair or deceptive activities which are in commerce. It is well established that commerce among the states is not confined to transportation, but comprehends all commercial intercourse between different states and all component parts of such intercourse.⁴

Thus, under the established precedent of the *S. Klein* case, there is no question that the Commission has jurisdiction over unfair or deceptive advertising in interstate commerce, and it is not necessary to allege or prove that the advertisements resulted in interstate sales.⁵ While *S. Klein* settles the legal question of jurisdiction, it leaves open other and perhaps more difficult questions in particular cases as to whether the Commission should exercise jurisdiction and whether it is in the public interest to initiate a proceeding.

II

We need not dwell long on the substantive charges relating to the design, construction, and approval of respondents' mattresses. Upon consideration of the record, the Commission has concluded that the allegations of the complaint in such regard should be dismissed. In view of this determination, it would serve no useful purpose to review here the evidence in the record bearing on these charges.

III

We turn now to complaint counsel's appeal from the examiner's dismissal of the charge that respondents deceptively advertised their

⁴ 57 F.T.C. 1544. Part of the Commission's opinion in that appeal is incorrectly printed in the Federal Trade Commission Decisions. Correctly, the carry-over paragraph on pp. 1543-44 of volume 57 should read:

"Section 5(a)(1) of the Federal Trade Commission Act declares unlawful unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and Section 5(a)(6) empowers and directs the Commission to prevent their use. Section 4 of the Act defines commerce as meaning 'commerce among the several States * * *'. Counsel for respondent and counsel supporting the complaint join in contending that the hearing examiner erred in concluding that paragraph three implicitly included a charge that the challenged advertising was disseminated to induce interstate sales. We agree with counsel. The correct construction of that charge is that interstate disseminations of advertisements for inducing purchases of merchandise constitute 'methods of competition in commerce' and 'acts or practices in commerce' within the purview or coverage of Section 5(a)(1) of the Federal Trade Commission Act. The jurisdiction alleged thus rests solely on the interstate disseminations alleged." [Footnote omitted.]

The complaint was later dismissed by the Commission, without opinion (60 F.T.C. 388); but such dismissal did not, and was not intended to, overrule the prior ruling on jurisdiction.

⁵ See also *Bankers Securities Corp.*, 57 F.T.C. 1219, 1225, *aff'd* 297 F. 2d 403 (3d Cir. 1961), citing *S. Klein* as an alternative ground for jurisdiction.

guarantees. The facts concerning the guarantees are undisputed. Surrey's guarantee certificates are all identical except for the number of years, which differs among Surrey's brands. The guarantee certificate for Prescription Bedding reads:

We Guarantee to the purchaser of a set of Prescription Bedding, that the construction is free from defects in materials and workmanship.

We Further Agree to replace without charge for 20 years from date of purchase, any Prescription mattress returned to our factory and found to be defective.

This Guarantee does not extend to cover fire or water damage, soiling, accident or misapplication. (CX 26.)

The guarantee certificate is enclosed in the carton in which the mattress is wrapped, so a customer does not see it until after he has purchased and unwrapped the mattress. Prior to purchase, the customer's only knowledge of the terms of the guarantee comes from Surrey's description in its catalogues and on the mattress cartons. In Surrey's catalogue, the guarantee is described as follows:

It offers you the protection of a full 20 year written Unconditional Guarantee. (CX 2.)^o

And the label on the carton of Prescription Bedding states:

Factory guarantee for 20 years in writing against structural defects. (CX 12, 15, 16, 17, 21.)

Complaint counsel alleges that these descriptions of Surrey's guarantee are deceptive because they fail to disclose two material limitations that are stated in the guarantee certificate: (1) that a claimant under the guarantee must return the mattress to Surrey's factory at his own expense and (2) that the mattress is not guaranteed against wear or use, but only against defects in materials and workmanship.

The sole evidence of Surrey's performance of its guarantee was the testimony of respondent Kitain who stated that despite the limitations in the guarantee certificate, Surrey, in fact, honored its guarantees as if they were unconditional. He stated unequivocally that Surrey would replace any mattress, regardless of the nature of the customer's complaint, and that Surrey did not require the customer to return the mattress to its factory, but would replace a mattress at its expense whenever a customer lodged a complaint with the dealer from whom he had bought it (Tr. 228-29).

^o In addition to the quoted description of the guarantee, Surrey's catalogues include a facsimile of the guarantee certificate. However, this print is too small to be easily read.

On the basis of the testimony that Surrey did not enforce the limitations stated in the guarantee certificate, the examiner concluded that the description of the guarantees was not deceptive and he dismissed that charge in the complaint.

We disagree. The issue here is essentially the same as that involved in *Montgomery Ward & Co. v. F.T.C.*, 379 F. 2d 666 (7th Cir. 1967), where the court of appeals held that a respondent charged with deceptive advertising of a guarantee cannot defend on the ground that it honors the advertised guarantee and does not enforce the more restrictive terms of the guarantee certificate. The examiner distinguished the two cases on the ground that Montgomery Ward sells its merchandise directly to the ultimate consumer, while Surrey sells its products through dealers. (Finding 35.) The Commission does not agree that this distinction calls for a different holding. Although Surrey's mattresses are sold through dealers, the dealers play no part in the guarantee aspect of the transaction. It is Surrey, not the dealer, that makes the guarantee, supplies the certificate and the cartons bearing the description of its terms, and it is Surrey on whom the purchaser must rely for its performance. The reasoning in *Montgomery Ward* is equally applicable to this case. As stated by the court:

Assuming Wards has a policy of honoring guarantees as advertised, the issue is yet not one of performance, but one of advertising, of what a prospective purchaser is likely to think on the basis of advertising alone. The delivery of limiting guarantee certificates with the product purchased might mislead customers notwithstanding Wards' policy. Given such a certificate, customers are not likely to ignore its limitations when seeking satisfaction under its guarantee, particularly in view of the certificate language, "the obligations assumed under this warranty are in lieu of all warranties express or implied." (At 670-71.)

Accordingly, the Commission holds that the examiner erred in dismissing this charge, and we shall enter an order prohibiting respondents from making representations concerning Surrey's guarantees that do not disclose all of the conditions and limitations contained in the guarantee certificate.

IV

Respondents also request that the complaint be dismissed as to respondent, Sol Kitain, in his individual capacity, but cite no persuasive reasons therefor. The record shows that Mr. Kitain "has complete charge" of Surrey Sleep Products, Inc." and that "he formulates policy" (Finding 1). Accordingly, the request is denied.

In sum, we are granting both complaint counsel's appeal and respondents' appeal except as it relates to dismissing the complaint against the individual respondent. Accordingly, we are dismissing all charges in the complaint, except those relating to respondents' guarantees. The findings and conclusions of the hearing examiner, to the extent that they conflict with this opinion, are rejected, and the hearing examiner's order is set aside. An appropriate order will be entered.

FINAL ORDER

This matter has been considered by the Commission on the cross-appeals of complaint counsel and respondents from the hearing examiner's initial decision. The Commission has rendered its decision granting respondents' appeal except as it relates to dismissing the complaint against the individual respondent, granting complaint counsel's appeal, and adopting the findings of the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be set aside, and the following order should be issued in its place. Accordingly,

It is ordered, That respondents Surrey Sleep Products, Inc., a corporation, and its officers, and Sol Kitain, 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 advertising, offering for sale, sale or distribution of mattresses, box springs or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that their products are guaranteed unless all of the terms and conditions of the guarantee, including its nature and extent, the name and address of the guarantor, and the manner in which the guarantor will perform thereunder, are clearly and conspicuously disclosed in immediate conjunction therewith.

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 of their compliance with this order.

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IN THE MATTER OF

TOBIAS, FISCHER & CO., 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-1317. Complaint, April 3, 1968—Decision, April 3, 1968

Consent order requiring a New York City corporation which auctions merchandise to cease falsely advertising, deceptively invoicing, and misbranding 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 Tobias, Fischer & Co., Inc., a corporation, and Charles H. Tobias, individually and as an officer of said corporation, and Jack C. Stein, individually and as fur adviser to Tobias, Fischer & Co., Inc., a corporation, and Charles H. Tobias, 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 Tobias, Fischer & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Charles H. Tobias is the sole officer of the corporation, and respondent Jack C. Stein is fur adviser to the corporation and Charles H. Tobias.

Respondent Tobias, Fischer & Co., Inc., is an auctioneer of all types of merchandise including fur products. Charles H. Tobias controls, formulates and directs the acts, practices and policies of the corporation and acts under the advice of Jack C. Stein in marketing fur products. The office and principal place of business of the respondents is 6 East 46th Street, New York, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and

received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled to show the country of origin of furs used in such fur products as U.S.A. when the country of origin of such furs was, in fact, Finland.

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 show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured any such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

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

- (b) The term "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 the said Rules and Regulations.

(e) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 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 any such fur product.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as Sweden when the country of origin of such furs was, in fact, Finland.

PAR. 8. 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 inasmuch as the term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 9. 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 New York Times, a newspaper published in the city of New York, State of New York and having a wide circulation in New York, and other States of the United States.

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

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

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

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

PAR. 10. 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 that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a) (5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto were fur products advertised as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb," when in truth and in fact, the furs contained therein were not entitled to such designation.

PAR. 11. 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 with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 5(a) (5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised to show the country of origin of furs contained in such fur products as U.S.A. when the country of origin of such furs was, in fact, Finland.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as 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. 13. 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 methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

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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 respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Tobias, Fischer & Co., 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 6 East 46th Street, New York, New York.

Respondent Charles H. Tobias is the sole officer of the corporation and respondent Jack C. Stein is fur adviser to the corporation and Charles H. Tobias. 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 Tobias, Fischer & Co., Inc., a corporation, and its officers, and Charles H. Tobias, individually and as

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

A. Misbranding any fur product by:

1. Failing to affix a label to such fur product 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. Falsely or deceptively labeling or otherwise identifying any such fur product as to the country of origin of furs contained in such fur product.
3. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form on a label affixed to such fur product.
4. Failing to set forth the term "natural" as part of the information required to be disclosed on a label under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe such fur product which is 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 a label affixed to such fur product.
6. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on a label in the sequence required by Rule 30 of the aforesaid Rules and Regulations.
7. Failing to set forth separately on a label attached to such fur product composed of two or more sections containing different animal fur the information required under Sec-

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tion 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, 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. Misrepresenting in any manner, on an invoice directly or by implication, the country of origin of the fur contained in such fur product.

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

C. Falsely or deceptively advertising any fur product 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 such 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. Falsely or deceptively identifies any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

3. Falsely or deceptively identifies any fur product as to the country of origin of fur contained in such fur product.

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 such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

Complaint

IN THE MATTER OF

GUILFORD INDUSTRIES, INC.

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

Docket C-1318. Complaint, April 3, 1968—Decision, April 3, 1968

Consent order requiring a Guilford, Maine, fabric mill to cease misrepresenting
the fiber content of its wool products and furnishing false guaranties.

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 Guilford Industries, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Guilford Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business at Guilford, Maine.

Respondent Guilford Industries, Inc., is a mill engaged primarily in the manufacture of woolen and woolen blend fabrics which are sold principally to manufacturers of women's wear.

PAR. 2. Respondent, now and for some time last past, has 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 Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondent 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, namely fabrics, labeled as "100% wool," when in truth and in fact, said products contained substantially different fibers and amounts of fibers other than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondent 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 woolen fabrics 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 five per centum of the total fiber weight, of (1) wool fibers; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was five per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The respondent furnished false guaranties that certain of its said wool products were not misbranded when respondent in furnishing such guaranties had reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

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

PAR. 7. Respondent is now, and for some time last past, has been engaged in the offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of its business as aforesaid, respondent now causes and for some time last past has caused its said products, when sold, to be shipped from its place of business in the State of Maine, to purchasers located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Respondent in the course and conduct of its business has made statements on invoices to its customers, misrepresenting the fiber content of certain of its products.

Among such misrepresentations, but not limited, were statements setting forth the fiber content thereof as "100% wool," thereby representing the products to be composed entirely of wool, whereas, in truth and in fact, the product was not 100% wool but contained substantially different fibers than represented.

PAR. 9. The acts and practices as set forth in Paragraph Eight have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 10. The acts and practices of the respondent set forth in Paragraph Eight were, and are, all to the prejudice and injury of the public and respondent's 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.

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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 Wool Products Labeling Act of 1939; 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 respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby

issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Guilford Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business at Guilford, Maine.

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 Guilford Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction into commerce, the 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 products" 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 respondent Guilford Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing false guaranties that certain of their wool products are not misbranded when respondent in furnishing such guaranties has reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

It is further ordered. That respondent Guilford Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of fabrics or other products, in commerce, as "commerce" is defined in the Federal Trade Commis-

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sion Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That the 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

BEN RAY SPORTSWEAR, INC., 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-1319. Complaint, Apr. 8, 1968—Decision, Apr. 8, 1968

Consent order requiring a New York City manufacturer of sportswear to cease misbranding 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 Ben Ray Sportswear, Inc., a corporation, and Benjamin Metrano and Ray Robbins, 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 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 Ben Ray Sportswear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Benjamin Metrano and Ray Robbins are officers of said corporation. They formulate, direct and control the acts, practices and policies of the corporate respondent including the acts and practices hereinafter referred to.

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Respondents are manufacturers of large size skirts and sportswear, both wool and textile, with their office and principal place of business located at 224 West 35th Street, New York, New York.

PAR. 2. Respondents, now and for some time last past, 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 Wool Products Labeling Act of 1939, 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, was a skirt stamped, tagged, labeled, or otherwise identified as containing 100 percent wool whereas in truth and in fact, such skirt contained substantially different fibers and amounts of fibers than represented.

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

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

PAR. 5. 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 methods of competition and unfair and deceptive acts and practices 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 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 in the importation into the United States, of textile fiber products, and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 7. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, was a textile fiber product with a label which failed:

1. To disclose the true generic name of the fibers present; and
2. To disclose the percentages of such fibers by weight.

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

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respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ben Ray Sportswear, 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 224 West 35th Street, New York, New York.

Respondents Benjamin Metrano and Ray Robbins 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 Ben Ray Sportswear, Inc., a corporation, and its officers, and Benjamin Metrano and Ray Robbins, 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 manufacture for introduction into commerce, introduction into commerce, or 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.

It is further ordered, That respondents Ben Ray Sportswear, Inc., a corporation, and its officers, and Benjamin Metrano and Ray Robbins, 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, 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 misbranding textile fiber products by failing to affix a stamp, tag, label, or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

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

IN THE MATTER OF

QUALITY THRIFT FURS, INC., TRADING AS HOPPER FURS
ET AL.

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

Docket C-1320. Complaint, April 8, 1968—Decision, April 8, 1968

Consent order requiring a St. Louis, Mo., retail furrier to cease misbranding and falsely invoicing 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

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vested in it by said Acts, the Federal Trade Commission, having reason to believe that Quality Thrift Furs, Inc., a corporation, trading under its own name and as Hopper Furs, and Edward Hopper, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH. 1. Respondent Quality Thrift Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri. The corporation trades under its own name and as Hopper Furs.

Respondent Edward Hopper is an officer of the said corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent.

Respondents are retailers of fur products with their office and principal place of business located at 425 North Seventh Street, St. Louis, Missouri.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were 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 disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
2. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured any such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in ac-

cordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Mouton Lamb" was not set forth on labels in the manner required by law, in violation of Rule 9 of said Rules and Regulations.

(b) The term "assembled" was used on labels to describe fur products composed of pieces in lieu of the required terms, in violation of Rule 20(d) 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 not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

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

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the 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 that the fur products contained or were composed of used fur, when such was the fact.

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

4. To show the country of origin of imported 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) The disclosure "Second-hand," where required, was not set forth on invoices, in violation of Rule 23 of said Rules and Regulations.

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

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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 methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

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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 respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Quality Thrift Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 425 North Seventh Street, St. Louis, Missouri.

Respondent Edward Hopper is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Quality Thrift Furs, Inc., a corporation, trading under its own name or any other name or names, and Edward Hopper, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the 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 any fur product by:

1. Failing to affix a label to such product 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 "Dyed Mouton Lamb" on a label in the manner required where an election is made to use that term instead of the term "Dyed Lamb."

3. Setting forth the term "assembled" or any term of like import as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe such fur product composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

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

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

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, 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.

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

3. Failing to disclose that such fur product is "Second-hand" when such fur product has been used or worn by an ultimate consumer and is subsequently marketed in its original, reconditioned, or rebuilt form with or without the addition of any furs or used furs.

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

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

LENOX, INCORPORATED

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

Docket 8718. Complaint, Oct. 13, 1966—Decision, Apr. 9, 1968

Order requiring a Trenton, N.J., manufacturer of fine china dinnerware and giftware to cease unlawfully fixing and maintaining the resale prices at which its products are sold at retail.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lenox, Incorporated, a corporation, and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, Lenox, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its main office and place of business at Prince and Meade Streets, Trenton, New Jersey. Respondent is now and has been for many years engaged in the manufacture, sale, and distribution of household fine china dinnerware, giftware, and artware. Respondent produces dinnerware made of porcelain and bone china. In its giftware line, respondent produces fine china vases, ashtrays, bowls, mugs, and similar items. Respondent sells its fine china dinnerware, giftware, and artware products to approximately 2,000 franchised dealers located in various States of the United States. The total gross sales of all its products are substantial, and exceed \$14,000,000 per year.

PAR. 2. In the course and conduct of respondent's business, there has been at all times mentioned herein, and is now, a continuous movement of said fine china dinnerware, giftware, and artware in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act. Respondent manufactures fine china dinnerware, giftware, and artware products in various States throughout the United States and causes the manufactured merchandise to be shipped from the State of manufacture to other States for resale through its franchised distributors.

PAR. 3. Except to the extent that competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged, respondent, Lenox, Incorporated, now, and at all times mentioned herein, has been and is in competition with other individuals, partnerships, corporations or firms engaged in the manufacture, distribution, and sale of fine china dinnerware, giftware, and artware.

PAR. 4. It is now, and has been for some time, the practice and policy of respondent to adopt and employ in the various States of the United States and the District of Columbia, a system of establishing resale prices for its products by various means and methods, including the requirement that its dealers maintain or adhere to the prices established and promulgated by respondent.

PAR. 5. By various means and methods, respondent has entered into and effectuated the aforesaid practice and policy by which it can and does control, establish, manipulate, fix, and maintain the resale prices at which its products are sold by its dealers. In order to carry out the said plan or policy, respondent adopted and employed and still employs the following means among others, by which it has undertaken to pre-

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vent and has prevented dealers from selling said products at prices other than the said resale prices established by respondent :

(a) It issues resale price lists and advertising material to the trade in which the various resale prices for said products are set forth and explained ;

(b) It makes it generally known to the trade, by direct or indirect means, that it expects and requires all dealers handling Lenox fine china products to maintain and enforce said resale prices or such dealerships will be terminated ;

(c) It enters into formal and informal agreements, understandings, and arrangements with its dealers as a condition precedent to the opening of new accounts that such dealers will maintain resale prices ;

(d) It solicits, invites and obtains from dealers handling Lenox fine china products cooperation and assistance in ascertaining information pertaining to any dealers or others who resell such products and fail to maintain resale prices established by respondent ;

(e) It employs a system of policing the maintenance of resale prices by dealers which includes, among other things, "rigged" orders and examinations of these orders by an electrical process ;

(f) It subscribes to and actively employs a "clipping" service to ascertain which dealers are advertising said products at resale prices below those established by respondent ;

(g) It directs Lenox salesmen and other employes to secure information identifying any dealer who fails to observe the established resale prices ;

(h) It threatens to terminate and does terminate the franchises of Lenox dealers who fail to observe and maintain the established retail prices ;

(i) It threatens to terminate and does terminate the franchises of Lenox dealers who advertise Lenox fine china products at other than the established resale prices without Lenox's permission ;

(j) It has in effect a program by which it makes known to dealers handling Lenox products that failure to maintain the established resale prices will result in termination of their franchise.

The above are among the various means and methods which have been used and are now being used by respondent in the enforcement of its system of maintaining established prices: all with the result that said prices have been and are generally observed and maintained by dealers handling Lenox products.

PAR. 6. The above acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers handling Lenox products, by

requiring them to resell the same at prices fixed by respondent as aforesaid; such practices prevent dealers from selling these products at the prices they deem to be warranted; such practices have the capacity, tendency and effect to hinder and suppress all price competition in the resale of such products in the various States of the United States and the District of Columbia, thus tending to obstruct their free and natural flow of commerce in such products and the freedom of competition in this channel of interstate commerce.

PAR. 7. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public, constitute unfair methods of competition in commerce or unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Joseph Rutberg and Mr. Howard R. Lurie supporting the complaint.

Debevoise, Plimpton, Lyons & Gates by Mr. Andrew C. Hartzell, Jr., Mr. Robert M. Buchanan, and Mr. William D. Rudolph for the respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MAY 29, 1967

The Federal Trade Commission on October 13, 1966, issued its complaint in this matter alleging that respondent employed a system of establishing resale prices for its products by various means and methods, including the requirement that its dealers maintain or adhere to the prices established and promulgated by respondent. The complaint further alleged that respondent employed various practices to prevent dealers from selling its products at prices other than the resale prices established by respondent, and that these practices injured, hindered, suppressed, lessened, or eliminated actual and potential competition and constituted unfair methods of competition in commerce or unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Answer was filed and hearings were held in New York, New York, and Philadelphia, Pennsylvania. Thereafter, proposed findings of fact, conclusions of law, and order were filed. These proposals, including replies, supporting briefs, and oral argument, have been considered, and those proposed findings not herein adopted, either in form or in substance, are rejected as not being supported by the record

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or as not being necessary; and the hearing examiner, having considered the entire record, makes the following findings of fact, conclusions drawn therefrom, and order:

FINDINGS OF FACT

Respondent, Lenox, Incorporated, is a New Jersey corporation with its main office in Trenton, New Jersey, and its manufacturing plant in Pomona, New Jersey. Respondent has three lines—Lenox fine china, Lenox giftware, and Oxford bone china. Its giftware line includes china vases, ashtrays, bowls, mugs, and similar items (Answer). Respondent sells cream-colored fine china under its Lenox trademark and white bone fine china under its Oxford trademark (Tr. 26).

Respondent sells directly to about 2,100 franchised retail dealers, who operate 3,000 outlets, but does not sell to wholesalers (Tr. 107, 111). Retail dealers handling respondent's products fall into three broad categories—department stores, jewelry stores, and specialty and gift stores (Tr. 108). Respondent operates stores selling to the public at its Trenton and Pomona facilities (Tr. 31).

Respondent ships its products from its Pomona plant to its dealers located throughout the United States. In the course and conduct of respondent's business, and at all times mentioned in the complaint, there has been a continuous movement of respondent's fine china dinnerware and giftware in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act. Respondent manufactures its fine china dinnerware and giftware in Pomona, New Jersey, and causes these products to be shipped from the State of manufacture to other States and the District of Columbia for resale through its franchised dealers (Answer).

For many years respondent has been and is now in competition with other individuals, partnerships, corporations, and firms engaged in the manufacture, distribution, and sale of fine china products (Answer).

Respondent is the leading domestic producer of fine china in terms of dollar sales (Tr. 29). Its total annual gross sales exceed \$14 million (Answer).

Respondent operates through a franchise method of distribution and considers the "franchise" it bestows upon dealers to be the right to buy and sell respondent's products (Tr. 39).

Respondent's officials believe that if respondent sold to every dealer who wanted to handle its products, the prestige outlets would lose interest in selling Lenox products and would push the products of its competitors (Tr. 180-83).

Respondent's products are known for their high quality and are advertised in national magazines. Although most of this advertising does not contain prices, its giftware advertisements, which represent a small percentage of respondent's total advertising, usually contain prices (Tr. 78; Com. Exs. 269-70).

Respondent has 22 field salesmen, also called district managers. All but one of these are full-time employees, each compensated by a salary plus commissions. Each salesman has an assigned territory, which usually covers several States, and is responsible for 100 to 150 dealer accounts, many of which he visits only once or twice a year (Tr. 112-13,167). Salesmen show new patterns to dealers, help train dealer personnel to exhibit and sell Lenox products, assist in taking a dealer's inventory, and perform similar duties (Tr. 32-34, 113).

Respondent does not lower its established resale prices generally, but it does have an annual promotion of hostess bowls and platters that dealers do not normally carry (Tr. 73-74; Com. Exs. 384-85). Prices to dealers and "suggested" resale prices of these items are lowered during this promotional period. These two items, however, account for less than one-tenth of 1 percent of Lenox's sales volume (Tr. 74). Respondent currently markets 60 or 70 different patterns of chinaware and divides its dinnerware into two categories called Group I and Group II. Group I is composed of patterns that are the most popular, and Group II is composed of less popular patterns that are not manufactured on a regular basis. Respondent permits, and at times encourages, the sale of Group II patterns at less than the prices that it had previously established (Com. Ex. 117A; Tr. 27-28).

Mr. Petty, respondent's vice president of marketing, testified that he was familiar with the *Colgate* and *Parke, Davis* decisions;¹ that since his arrival at Lenox in May 1960, company policy had been to act within the boundaries of those decisions; and that he had advised the Lenox employees, including salesmen, of this policy (Tr. 155, 186).

A few months prior to Mr. Petty's arrival at Lenox, the Supreme Court had decided *Parke, Davis*, and on March 18, 1960, Lenox had issued a memorandum to its salesmen describing what they should and should not do to comply with that decision (Tr. 187; Res. Ex. 3).

Lenox also distributed to its dealers a report, dated September 19, 1960, prepared by the Research Institute of America, Inc., that gave detailed advice regarding compliance with *Parke, Davis* (Res. Ex. 4). Mr. Petty used this report when he discussed the subject with Lenox salesmen at an annual sales meeting in December 1960. He has repeated

¹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

similar instructions at all subsequent regional and national sales conferences (Tr. 186-90). Lenox holds one national sales conference and several regional meetings each year (Tr. 203). Apparently Mr. Petty attempted to stay within the limits that he thought were set by the *Parke, Davis* decision, but the majority of the respondent's dealers had been Lenox dealers for some years and their relationship with the respondent had already been established when he came with the company. It also appeared to be his policy to carry on the established relationships with dealers with as little disruption as possible. Although there were no agreements between respondent and its dealers to continue the dealerships for any specific period of time, there was a clear understanding between them that for such time as the agreements continued in effect the dealers would maintain prices. Respondent's plan of operation was devised to insure that its dealers would cooperate in carrying out all of its policies, including its policy to maintain resale prices, and that its dealers would adhere to such prices. The dealers knew what was expected of them and they, in turn, expected to adhere to those prices. And, with few exceptions, they did adhere to them. One example of an understanding that arose between a dealer and the respondent after 1960 was the understanding that existed regarding the reinstatement of Thalhimers, a dealer in Richmond, Virginia. In that situation it is clear that Thalhimers' vice president expected to cooperate with respondent in maintaining all of its policies (Com.Exs. 81-98).

Respondent always has applicants who wish to become Lenox dealers because they believe that they can profitably sell respondent's products (Tr. 32, 111-12).

When respondent receives a request from a potential dealer for a franchise, it notifies the appropriate district manager to call upon the prospective dealer, and it usually notifies the prospective dealer that he will be visited by a representative of respondent (Tr. 32). The district manager then visits the prospective dealer, looks over the store, reviews the franchise requirements, and when assured that the dealer understands the requirements and will do business in accordance with them, fills out a franchise application, takes an initial order and submits the franchise application and initial order to the Distribution Committee in Trenton for approval (Tr. 37-46; Com.Ex. 197).

Respondent's "Sales Manual" (Com.Ex. 391) includes the following instructions to its salesmen in connection with its distribution policy:

In selecting accounts to be franchised, it is expected that every dealer stock and display a representative assortment of the line. It is equally important that

you review with dealer prospects the franchise requirements to assure that they are understood and that the dealer is in agreement with them.

Lenox Dinnerware

The Lenox dinnerware franchise requirements are as follows:

- 1—Account will conform to the suggested minimum retail prices.
- 2—Will not resell any Lenox products to non-dealer stores or distributors.

* * * * *

In the Lenox Franchise Application (Com.Ex. 197), which is filled out by the salesman during and after consultation with a prospective dealer, there is the statement:

- (17) Have you reviewed franchise provisions with attention to following:
 - (a) Price maintenance.

* * * * *

In the "Dinnerware and Giftwear Franchise Provisions" (Com.Ex. 264), which is the franchise prepared for and forwarded to its Lenox brand dealers whose applications have been approved, there is the following statement:

The following points are brought to your attention so that we will have a mutual understanding of the conditions under which we are doing business. You may wish to pass this information along to the members of your organization handling these details so they, too, will be informed.

LINES AND DISCOUNTS

Lenox makes the following products and lines which are available to its dealers.

- Dinnerware—45% discount
- Gift items—50% discount

* * * * *

PRICES

The Lenox dinnerware and giftware price books illustrate all lines and list suggested retail prices.

Lenox distributes its products, under its trademark or name at a minimum suggested retail price. We expect the Dealer, in consideration of the franchise privilege, to conform to these prices. Lenox may from time to time change the suggested minimum retail prices by giving notice in writing to the Dealer.

In the "Oxford Bone China Dinnerware Franchise Provisions" (Com.Ex. 265), which is the franchise prepared for and sent by respondent to its Oxford brand dealers, there is this provision:

It is important the following points be reviewed so there is a mutual, clear understanding regarding the franchising of your store for Oxford Bone China.

* * * * *

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SUGGESTED RETAIL PRICES

The Oxford Bone China price book lists the suggested retail prices for all pieces in the line.

Oxford Bone China is distributed under its trademark at minimum suggested retail prices. The dealer is expected, in consideration of the franchise privilege, to conform to these prices.

From time to time the suggested retail prices may be changed by giving written notice.

Although the respondent refers to its retail prices as "suggested," respondent makes it clear to a new dealer that a mutual understanding exists regarding the "suggested" prices and that respondent considers the new dealer to have agreed to conform to those prices. There are similar references to mutual understanding in Commission Exhibit 8, which is a letter to a new dealer in 1950, and in Commission Exhibit 3, which is a letter from Mr. Petty to a new dealer in 1962. When respondent sends the franchise to the new dealer, after the Distribution Committee has approved his application, one of these letters, which are sometimes called "Welcome Aboard" letters, accompanies the franchise and calls the new dealer's attention to the franchise provisions (Tr. 44-45, 47-48).

After sending the franchise and the "Welcome Aboard" letter, respondent then sends to the new dealer various advertising and promotional material (Tr. 49-50). At later times similar material, including pattern folders, some of which contains retail prices, is sent to respondent's dealers (Tr. 124).

At the time prospective dealers were interviewed, respondent's salesmen made it clear to them that they were expected to maintain the "suggested" retail prices set by respondent and that if they sold at lower prices, they would be cut off as customers and would not be permitted to buy from respondent in the future. Respondent, nevertheless, occasionally had to remind its dealers of its price maintenance policy (Tr. 185-86, 231, 279-80, 316; Res.Ex. 2).

During the seven years since May 1960, when Mr. Petty came to Lenox, the company has terminated the franchises of less than ten dealers for price cutting (Tr. 202-3). In the four and one-half years since August 1962, when W. E. Koch became vice president of sales for Lenox, the company has terminated the franchises of approximately five or six dealers for price cutting (Tr. 133).

Lenox policy of ceasing to sell to dealers who sell its products to unauthorized dealers is an integral part of its policy of selective distribution (*i.e.*, to sell only to selected dealers but not to all dealers who would be willing to sell respondent's products). In refusing to sell to

a dealer who transships to an unauthorized dealer, Lenox does not consider whether the latter is selling at, above, or below respondent's "suggested" prices (Tr. 200-1). More than half of the unauthorized dealers who have received respondent's products by transshipment have sold these products at respondent's "suggested" prices (Tr. 200-1, 205-6). The unauthorized dealer has presumably paid more for respondent's products than the authorized dealer (Tr. 98). At least one of respondent's officials testified that he assumed the authorized dealer who sells to an unauthorized dealer would be selling respondent's products below the "suggested" retail price, but such fact has not been proved.

When respondent learns that an unauthorized dealer is selling its products, it sometimes places an order with him in such form that it is able to identify the order (Tr. 96, 98-99). Although no distinguishing mark appears on the china, respondent watches for the order when it comes to its factory and, because of the makeup of the order, is able to follow it from the authorized dealer to the unauthorized dealer to whom it is transshipped (Tr. 98-99). Respondent has never compensated anyone for shopping an unauthorized dealer (Tr. 92). On one occasion in 1961, the evidence shows that respondent had a dealer place such an order with a catalog house (Tr. 223, 430; Com.Exs. 22-26).

Respondent has obtained cooperation and assistance from its dealers in determining whether other dealers have resold respondent's products at less than the established resale prices. It does not appear that respondent solicited or invited this kind of cooperation from its dealers in recent years, but it has continued to accept such cooperation (Tr. 249-50, 342-50, 485-88; Com. Exs. 191, 258, 260). In fact, it seems that it would be virtually impossible for respondent to refuse to accept such cooperation and continue to maintain a policy of resale price maintenance.

Respondent subscribed to an advertising checking or clipping service which enabled it to ascertain which dealers were advertising respondent's products at prices below those advertised by respondent. On at least one occasion, this clipping service was utilized to obtain information relating to the price cutting of a dealer (Com. Ex. 51). In 1964 the arrangement with the clipping service was changed so that the information now obtained from it does not supply the prices at which the products are advertised but only the amount of advertising done by various dealers (Tr. 196-98; Res. Exs. 5, 6).

There were occasions in the past when respondent threatened to terminate the franchises of dealers who failed to maintain respondent's

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established prices, but in recent years respondent has made a determined effort to cause its salesmen to refrain from making threats—it has merely cut off dealers without warning (Tr. 241-42, 253; Com. Exs. 168, 309, 350, 351). The district managers were instructed in 1960 not to make agreements with dealers (Res. Ex. 3) and such understandings as there were thereafter with new dealers were presumably not designated by the company as agreements.

Respondent contends that such price maintenance activities as it engaged in were by unilateral action and were legally permissible under the Federal Trade Commission Act. Respondent, however, also contends that even if the evidence is construed as proving a price-fixing agreement with any dealer, such an agreement was legal under the so-called fair trade law of the state involved and was thus outside the proscriptions of the Federal Trade Commission Act, as amended (Tr. 508-9).

Respondent submitted evidence to establish that Lenox products met the "fair trade" prerequisites of bearing the trademark, brand, or name of the producer and were in free and open competition with commodities of the same general class produced by others. The Lenox trademark is well-known and is fired into each individual piece of Lenox china as part of the manufacturing process. The name Oxford similarly appears on items in the Oxford bone china line. The boxes or cartons in which Lenox china is shipped prominently display these trademarks. Retail outlets that carry Lenox products also prominently display these trademarks in association with Lenox products (Tr. 106-7).

Other manufacturers of china sold their products in the same general price ranges as Lenox products and displayed them side by side with Lenox. They include: Royal Doulton, Wedgwood, Rosenthal, Royal Worcester, Franciscan, Syracuse, Haviland, Picard, Ginori, Limoge, Royal Crown Darby, Spode, Flintridge, Minton, Castleton, Coalport, Hutschenreuther, and Royal Jackson (Tr. 30, 109-10, 474).

Almost every store carrying Lenox china carries a variety of china products, and every community in which Lenox china is sold offers through one or more outlets competing products (Tr. 110-11). Petty testified that at least 99 percent of all Lenox dealers carry competing lines (Tr. 436-37). A Commission witness, Robert Siegfried of P. A. Freeman, Inc., Allentown, Pennsylvania, testified that his store carried, in addition to Lenox, Wedgwood, Minton, Royal Doulton, Ginori, Ceralene, Royal Worcester, and possibly one or two others (Tr. 352).

Edwin Smoyer, another Commission witness, whose store was about one block away from Robert Siegfried's store, testified that in addition to Lenox and Oxford his store carried Syracuse (Tr. 372-73).

Jack Cheslock, a Commission witness from Baltimore, Maryland, testified that he sold Haviland, Royal Doulton, and Worcester and that he had sold Rosenthal, Flintridge, and Coalport. He added that other lines that he did not carry were available in his trading area (Tr. 328).

The evidence shows that several competing brands of china were generally sold by respondent's dealers and by others competing with its dealers (Tr. 473, 499-501, 281, 219).

Lenox does not sell to any mail-order houses, and stores carrying its products generally trade in the geographical trading area in which they are located (Tr. 108). Lenox and many other producers use the Hearst map of consumer trading areas in the United States to identify consumer trading areas (Tr. 412; Com. Ex. 99).

The only direct sales to consumers that Lenox makes are at its stores located in the home office in Trenton, New Jersey, and in the factory in Pomona, New Jersey. These stores sell in their respective local trading areas (Tr. 112).

DISCUSSION

In the Federal Trade Commission's opinion *In the Matter of Sandura Company*, 61 F.T.C. at 819, after quoting from *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310, the Commission discussed the same issues that are presented in this case and stated:

The Court has also observed that "resale price maintenance is a privilege restrictive of a free economy," 351 U.S., at 316, otherwise governed by Congressional limitations on price fixing that must be strictly construed. It is in this context that respondent's defense must be appraised.

The Court's remarks underscore what was already apparent from a reading of the statute, namely, that the McGuire Act creates a limited exception to the otherwise pervasive sweep of the prohibitions against price fixing. It is a "general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45. And see, e.g., *Javierre v. Central Atagracia, Inc.*, 217 U.S. 502, 507-508; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U.S. 1, 10. The gravity of the offense charged and the specificity of the exemption claimed convince us that this rule is applicable here. Respondent had the burden of proving that its resale-price-maintenance agreements were sanctioned by the statute. Beyond question, it failed to tender such proof.

In the first place, respondent's statement of the scope of the evidence begs the question. It may be that dealer testimony was elicited only from witnesses doing

business in fair-trade states, but the totality of both dealer and distributor testimony demonstrates an enveloping nationwide pattern of price maintenance. Respondent's network of dealer franchises and distributor territories was intended to be, and, so far as possible, was, extended uniformly across the country. Its resale-price-maintenance activity was an integral part of this national program of distribution. It was therefore incumbent upon respondent to show that its resale-price agreements with distributors and dealers were everywhere sanctioned by fair-trade laws. [Footnote omitted.] No such showing was made or even attempted. Nor, we suspect, could it be, since there are no fair-trade acts in five states and the District of Columbia; in two other states they have been declared unconstitutional; and in seventeen others the non-signer provisions of the acts have been held unconstitutional. See CCH Trade Reg. Rep. Pars. 6017, 6019, 6021.

There seems to be no doubt that respondent has violated the Federal Trade Commission Act if it is concluded as is concluded herein that respondent had a price maintenance agreement with its dealers and that it failed to show that such agreements were lawful in all the States of the United States.

Counsel supporting the complaint offered numerous documents that were taken from respondent's files. Some of these documents were identified by witnesses, but most were not. With regard to most of them, the only foundation laid was the agreement that the documents came from respondent's files. These documents were received in evidence on the theory that they were admissible as being records kept in the ordinary course of business. Respondent has contended that they were not properly authenticated and not properly admitted. At the time these documents were admitted, their use was limited in that only those documents that originated with respondent, its officers, or employees were admitted to prove the truth of the matters contained in them. It is the hearing examiner's view that the documents he has relied on and has cited in this decision as supporting findings of fact constitute reliable and probative evidence.

THE PROPOSED ORDERS

Counsel supporting the complaint contend that since respondent did not purport to comply and did not, in fact, comply with the so-called fair trade laws of those States that have such laws, it cannot now contend that its contracts were lawful in such States; and, in addition to proposing a prohibition against price agreements generally, counsel supporting the complaint proposed a provision in the order that would prohibit respondent from entering into resale price maintenance contracts in the "fair trade" States for a period of three years. In view of the conclusion reached herein that the agreements were probably lawful in the "fair trade" States, and the fact that re-

spondent now expressly enters into resale price maintenance agreements in States where these agreements are lawful, such prohibition is not included in the cease and desist order.

Counsel supporting the the complaint also proposed a provision that would require the reinstatement of all the dealers terminated since January 1960 for failing to maintain respondent's resale prices. It appears that a provision in the order that would bring about the reinstatement of terminated dealers should be limited to those States that do not have valid "fair trade" statutes. There has been no showing that there are dealers who were terminated for failing to maintain respondent's resale prices in such States, and it does not appear that such a limited provision would affect any former dealers. But if there are any such dealers, their reinstatement appears to be proper.

Among the other provisions proposed by counsel supporting the complaint is one that would prohibit respondent from publishing, disseminating, or circulating to any dealer any price list, price book, or other document indicating any resale or retail prices and another provision that would prohibit respondent from advertising any resale or retail prices. Respondent objects strenuously to these provisions, contending that the dealers need price lists as essential merchandising tools, that they get such from respondent's competitors, and that respondent would be at a disadvantage if it was not able to supply price lists to its dealers. The hearing examiner does not believe that these price lists are essential marketing tools; and since the circulation of such price lists would make a continuation of unlawful price agreements simple to effectuate, it would seem that the dealers should prepare their own retail prices for such length of time as would insure that they were not still following their old agreement.

CONCLUSIONS

In view of the circumstances under which prospective dealers are advised by respondent's salesmen of respondent's price maintenance policy, and the general discussions that occur during the preparation of the dealer's application for a franchise, as well as the subsequent conduct of most of the dealers in maintaining prices set by respondent, it is deduced, concluded, and held that there was an understanding and implied agreement between respondent and its dealers that the dealers would maintain the retail prices set by respondent. The dealers further fully understood that they could terminate this agreement at any time and could sell at any price but by failing to adhere to the prices set by respondent they would be cut off from respondent as a source of supply. Thus, it is found, as alleged, that it is now and has

been for some time the practice and policy of the respondent to adopt and employ in the various States of the United States and the District of Columbia, a system of establishing resale prices for its products.

It is further concluded and found that during most periods of time for many years past such dealers have adhered to the retail prices fixed by respondent, and the acts and practices found above have had and now have the tendency and effect of suppressing and eliminating price competition between respondent's dealers and are in violation of Section 5 of the Federal Trade Commission Act. The majority of the States of the United States have enacted valid statutes which provide that certain resale price maintenance contracts are lawful, and the McGuire Act amendment to Section 5 of the Federal Trade Commission Act provides that contracts in such States are not unlawful.

The hearing examiner is persuaded that even though respondent did not purport to enter into resale price maintenance agreements and, in fact, denies that it did so, nevertheless such agreements were made and were probably permissible in certain jurisdictions by virtue of valid statutes in those jurisdictions.

It is not essential that there be a definite holding that respondent's agreements were permissible in "fair trade" States because respondent failed to show that they were permissible throughout the country. Respondent has the right to enter into price maintenance agreements in the "fair trade" States which it now does openly and expressly. If it were necessary to decide this issue, the hearing examiner would hold that respondent's price maintenance agreements with its dealers were lawful in the "fair trade" States, although it seems clear that Congress did not intend that a manufacturer could accidentally or incidentally be afforded the protection of the McGuire Act.

ORDER

It is ordered, That respondent Lenox, Incorporated, a corporation, and its officers, agents, representatives, employees, successors, and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of fine china dinnerware, giftware, and artware, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from hindering, suppressing, or eliminating competition or from attempting to hinder, suppress, or eliminate competition between or among dealers handling respondent's products by:

1. Requiring dealers, through a franchise agreement or other means, to agree that they will resell at prices specified by respondent or that they will resell below or above specified prices;

2. Requiring prospective dealers to agree, through direct or indirect means, that they will maintain respondent's specified resale prices as a condition of buying respondent's products;

3. Requesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent, or acting on the reports so obtained by refusing or threatening to refuse sales to the dealers reported;

4. Harassing, intimidating, coercing, threatening, or otherwise exerting pressure on dealers, either directly or indirectly, to observe, maintain, or advertise established resale prices;

5. Selling to dealers at a markdown or discount from a resale or retail price for a period of two years;

6. Publishing, disseminating or circulating to any dealer, any price list, price book or other document indicating any resale or retail prices for a period of two years;

7. Utilizing any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent;

8. *Provided, however*, That nothing hereinabove contained shall be construed to limit or otherwise affect any resale price maintenance contracts that respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (66 Stat. 632 (1952); 15 U.S.C. 45 (a));

9. Advertising any resale or retail prices in national or regional advertising or advertising any resale or retail prices in any State or territory except those in which contracts or agreements prescribing minimum or stipulated prices are lawful;

10. Failing to sell or refraining from selling to any dealer who was terminated after January 1, 1960, for failing to maintain respondent's "suggested" resale prices, who desires to purchase from respondent, and who is located in any State or territory of the United States in which resale price maintenance contracts or agreements are unlawful or in the District of Columbia.

OPINION OF THE COMMISSION

APRIL 9, 1968

By MacIntyre, *Commissioner*:

The complaint herein charges the Lenox company (Lenox) with violations of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in connection with its household porcelain china, bone china, and giftware business. The complaint charges that Lenox employs a system of establishing resale prices for its products by var-

ious methods, including the requirement that its dealers maintain the prices established by Lenox; that Lenox employs various practices to prevent its dealers from selling its products at prices other than the resale prices established by Lenox; that these practices injure actual and potential competition; and that these practices constitute unfair methods of competition in commerce or unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. In essence, the complaint charges Lenox with maintaining an unlawful resale price maintenance system in connection with the distribution of its products, which system has the effect of suppressing price competition in the resale of these products.

Hearings were held in this matter before an examiner, who filed his initial decision on May 29, 1967. The examiner concluded that the charges were sustained by the evidence. In brief, the examiner found that respondent adheres to a resale price maintenance system by various acts and practices which "have the tendency and effect of suppressing and eliminating price competition between respondent's dealers and are in violation of Section 5 of the Federal Trade Commission Act." (Initial decision, p. 591.) The examiner issued an order prohibiting respondent from engaging in resale price maintenance except in fair trade States, selling to dealers at a discount from suggested retail price for two years, circulating retail price lists for two years, and national or regional advertising of retail prices except in fair trade States. The examiner further ordered reinstatement of dealers in non-fair trade States terminated after January 1, 1960, for failure to adhere to respondent's suggested retail prices who desire reinstatement.

The matter is before the Commission on appeal by both parties. Complaint counsel appeal on the ground that the examiner's order to cease and desist is unduly narrow and insufficient to terminate respondent's conduct and restore free market conditions. Respondent appeals on the ground that the evidence does not support the charges in the complaint and urges its dismissal. The grounds for the respective appeals will be considered in detail below.

Respondent is considered the leading domestic manufacturer of fine china and related products—in terms of both annual sales and quality of the products. Respondent does not deal with wholesalers but sells exclusively to retailers. From a retailer's point of view respondent's line is highly desirable, due to its quality and customer acceptance.

Respondent requires prospective dealers to agree to its franchise provisions. The dealer application form which is completed by the

Lenox representative interviewing the prospective dealer, the sales manual,¹ and the franchise each contain at least one reference to the fact that, as a condition to obtaining a franchise, the prospective dealer must be in agreement with the requirement that Lenox products will only be sold at prices established by respondent. Thus, respondent's sales manual instructs the representative that "[i]t is equally important that you review with dealer prospect the franchise requirements to assure that they are understood and that the dealer is *in agreement* with them." (Emphasis supplied.)

Up until recently, respondent also used an advertising clipping service, permitting it to determine the prices at which its dealers advertised Lenox products. At various occasions dealers have informed respondent of another dealer's sales of Lenox china at a discount and respondent has acted on such information by terminating the discounting dealer. On at least one occasion respondent requested and received a dealer's cooperation in obtaining documentary evidence of another dealer's sales at prices below those set by respondent. The record also shows that at times respondent had threatened to terminate a discounting dealer's franchise. However, respondent alleges that since the Supreme Court's decision in *Parke, Davis*,² it instructed its representatives to refrain from making such threats.

In addition, and as a method to insure that its products would not be discounted, respondent threatens its dealers with termination for transshipping Lenox products to unauthorized dealers. This prohibition against transshipping is included in the franchise. When respondent learns that an unauthorized dealer is selling its products, a readily identifiable order is placed with the unauthorized dealer, either by respondent itself or by one of its dealers at the behest of respondent. Processing this order will inform respondent which one of its dealers is transshipping. Based on these findings the examiner concluded "that there was an understanding and implied agreement between respondent and its dealers that the dealers would maintain the retail prices set by respondent." (Initial decision, p. 591.)

Accordingly, the examiner found that respondent, by these various acts and practices, had violated Section 5 of the Federal Trade Commission Act and issued his order to cease and desist.

Respondent contends, however, that the examiner erred in finding the existence of an agreement between Lenox and its dealers. Accord-

¹ Respondent argues that the sales manual and franchise are no longer in use. They were not withdrawn from use, however, until the summer of 1966, at a time respondent was well aware of the nature of the Commission's investigation and shortly before the issuance of complaint on October 13, 1966.

² *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

ing to respondent, it not only did not enter into any agreements with its dealers but "took affirmative steps to avoid such agreements and relied on the dealer's self-interest as the inducement to follow [respondent's] suggested retail prices."³ Respondent argues at great length that the facts do not support the finding of an agreement. The thrust of its argument appears to be directed, however, to the absence of a finding that respondent has entered into formal contracts or express agreements with its dealers. With reference to its franchise, respondent states that "[i]t was not signed by respondent or the dealer"⁴ and "[w]e do not have here express vertical price-fixing agreements like those found unlawful in *Dr. Miles Medical Company* * * * [n]or is there in respondent's chain of distribution the web of manufacturer-wholesaler-retailer relationships which gave rise to combinations held to be unlawful."⁵ (Citations omitted.)⁵ Rather, respondent contends its "simple, direct method of distribution" falls within the type of conduct specifically sanctioned by *Colgate*.⁶ According to that decision,

In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.⁷

The question whether or not an agreement exists between respondent and its dealers must be answered within the context of respondent's overall business behavior. The answer does not solely hinge upon the existence of a formal contract or express agreement. As the Supreme Court stated in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. (Citations omitted.)⁸

It has long been established that a formal contract or express agreement to substantiate a finding of agreement within the meaning of the antitrust laws need not exist.

³ Brief of respondent to the Commission, p. 9.

⁴ *Id.* at 6.

⁵ *Ibid.*

⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁷ *Id.* at 307.

⁸ *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). See also *United States v. General Motors*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

Upon a review of the record in this matter and due consideration of respondent's business conduct, we find that the examiner concluded correctly that implied agreements to maintain suggested retail prices exist between respondent and its dealers. Respondent's sales manual, dealer application form and franchise brochure speak for themselves. Each contains a specific reference to resale price maintenance and requires a prospective dealer's agreement to respondent's resale price maintenance policy. This policy required dealers to sell Lenox products at prices established by respondent. While respondent did not execute formal contracts with its dealers, under the present circumstances no other conclusion is possible than that agreements as to resale prices between respondent and its dealers do in fact exist. Certainly a prospective dealer must at the very least be tacitly in accord with the franchise provisions to become a Lenox dealer and there can be little doubt that a prospective dealer voicing disapproval of respondent's resale price maintenance policy would not become a Lenox dealer.

Accordingly, respondent must be found to have entered into illegal price maintenance agreements with its dealers.

The record contains other evidence that respondent's conduct goes beyond the simple refusal to deal sanctioned by *Colgate*. The limits of *Colgate* are clearly transgressed by a policy that over the years has ranged from and included policing of dealers to threatening termination. The record also contains a fully documented instance in which respondent has requested and received a dealer's cooperation to obtain evidence of another dealer's price-cutting. These facts alone justify a finding of illegality in and of themselves without an attendant finding of other concerted action or agreements. As the Supreme Court stated in *Parke, Davis*:

... an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declaration to sell to a customer who will not observe his announced policy. (Court's emphasis.) (362 U.S. 43.)

Respondent cannot be said to have relied on a policy whereby "each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices." (362 U.S. 44.)

Respondent's contention that since 1960 it took specific and affirmative steps to comply with *Parke, Davis* must be rejected. Respondent claims, without admitting, of course, that its conduct prior to 1960 was unlawful, that since the *Parke, Davis* decision it instructed its salesmen, by memorandum and at sales meetings, of the boundaries of per-

missible conduct under that decision. Since the record contains sufficient evidence to justify a conclusion that respondent's pre-1960 conduct went beyond the simple refusal to deal sanctioned by *Colgate*, this contention will be examined in the context of respondent's business behavior since 1960.

The examiner found, in effect, a "continuation of conspiracy." We concur in this finding. The only evidence in the record concerning any steps taken by respondent after 1960 is the above-referred-to memorandum to salesmen. No evidence was introduced that respondent's sales manual was altered to reflect respondent's alleged policy to stay within "the boundaries of permissible conduct under *Parke, Davis*."⁹ In fact, the sales manual was not withdrawn until shortly before the Commission issued its complaint. Respondent's application form for prospective dealers was not amended nor were the franchise provisions changed to reflect a distribution policy allegedly revised subsequent to *Parke, Davis*. Nor did respondent communicate what it considered permissible under *Parke, Davis* to its dealers, most of whom, according to the examiner, had been Lenox dealers for some years. In our opinion, respondent has not sustained the burden of proof required to show discontinuance of an illegal agreement. Not sufficient is respondent's claim that the illegal activities have been abandoned.¹⁰ As the Court observed in *United States v. Consolidated Laundries Corp.*, "it is clear that a confederate, once shown to have been such, has the burden of satisfying the trier of fact that he had withdrawn from the enterprise." (Citations omitted.)¹¹ The same rationale applies in the instant matter. Thus, respondent must introduce more convincing evidence that it has discontinued its illegal conduct.¹² This respondent has not done and a conclusion that the illegal conduct has not been discontinued after 1960 is therefore justified. In addition, the evidence in the record contradicts respondent's contention. Assuming, *arguendo*, that the evidence in this case is capable of being separated into ante- and post-1960 categories, we need only determine whether there exists a relation between respondent's past conduct and the conduct under examination. "If such a relation or connection is found it may properly be condemned as a continuance of an unlawful conspiracy."¹³ Respondent has not convinced us that it has significantly altered its

⁹ Brief of respondent to the Commission, p. 11.

¹⁰ *United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (D.C.N.Y. 1960).

¹¹ 291 F. 2d 563, 573, *rehearing denied*, 291 F. 2d 576 (2d Cir. 1961).

¹² *Local 167 v. United States*, 291 U.S. 293 (1934); *Hyde v. United States*, 225 U.S. 347 (1912).

¹³ *American Chain & Cable, Inc. v. Federal Trade Commission*, 139 F. 2d 622, 624 (4th Cir. 1944).

method of doing business since 1960, nor do we believe that the available evidence should be thusly limited or separated. Rather, we base our finding of illegality upon the totality of the available evidence with respect to respondent's overall business behavior over a number of years.

Respondent also attacks the examiner's finding that the majority of its dealers have been Lenox dealers for some years and that, even considering a management change in 1960, respondent's policy was to continue established relationships with its dealers "with as little disruption as possible." (Initial decision, p. 584.) Lenox was established in 1889 and has almost 3000 dealers. Surely respondent is not contending that the majority of its dealers became dealers since 1960. Respondent's entire *modus operandi*—the manner in which it selects its dealers, the interview of and the detailed application form for prospective dealers—indicates that respondent very definitely is interested in the establishment of lasting business relationships with its dealers. In addition, the evidence in the record indicates that the majority of respondent's dealers have been Lenox dealers for some years. Conversely, respondent has not introduced any evidence to the effect that the majority of its dealers have not been Lenox dealers for some years. We conclude that the examiner correctly found that the majority of respondent's dealers had established relationships with respondent for some years prior to 1960.

Respondent further contends that the evidence of agreements is limited to dealers located in fair trade States and that "[a]ssuming, *arguendo*, that such agreements were made with certain dealers, there was no evidence that this was done except in fair trade States where such agreements were legal."¹⁴

The examiner concluded that respondent's distribution policy was nationwide and if a difference exists between its policy applicable to dealers located in fair trade States and dealers located in non-fair trade States, respondent failed to show it.¹⁵ We concur in this conclusion. The record does not contain any evidence that respondent does not adhere to a uniform nationwide distribution policy and, more significantly, respondent does not claim to employ a different policy in fair trade States as distinguished from non-fair trade States. Respondent merely contends that no evidence of its dealings in non-fair trade States was introduced. Such repetitive and redundant evidence, however, is not necessary,¹⁶ and the burden of showing that a different

¹⁴ Brief of respondent to the Commission, p. 26.

¹⁵ Initial decision, pp. 590-591.

¹⁶ *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953).

policy does exist rests on respondent. In the absence of any evidence to the contrary, no other conclusion is possible.

Respondent further argues that if agreements were found to have been made they were made in fair trade States and therefore legal. The examiner was of the opinion that even though respondent specifically denies having entered into resale price maintenance agreements with its dealers, that such agreements were made and "probably permissible" in fair trade jurisdictions. (Initial decision, p. 592.)

If it were necessary to decide this issue, the hearing examiner would hold that respondent's price maintenance agreements with its dealers were lawful in the "fair trade" states, although it seems clear that Congress did not intend that a manufacturer could accidentally or incidentally be afforded the protection of the McGuire Act. (Initial decision, p. 592.)

Respondent does not contend that it in fact did enter into fair trade agreements before the issuance of the complaint, and there is no question that it did not. As a matter of fact, since the issuance of the complaint respondent has entered into formal fair trade contracts.¹⁷ In addition, respondent's alleged policy, as discussed above, was not to enter into fair trade contracts but to stay within the boundaries of permissible conduct under *Parke, Davis*. What respondent endeavored to show during the course of this proceeding was that since it could have entered into fair trade contracts had it desired to do so, and that since the type of product it sold and since its distribution method qualified respondent for fair trading, its conduct was legal in fair trade States.

In effect, respondent seeks to equate price-fixing agreements with fair trade contracts, or antitrust illegality with fair trade validity, by arguing that if a price maintenance agreement is found to exist it cannot be illegal in fair trade States because fair trade statutes exempt such agreements from illegality. With respect to respondent's dealings in interstate commerce, this contention must be examined in the context of the Miller-Tydings Act¹⁸ and the McGuire Act,¹⁹ which confer immunity to otherwise illegal price maintenance agreements provided these agreements are made pursuant to and in conformity with valid fair trade statutes. Thus, the Supreme Court stated that:

A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which the persons to whom its purchasers may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act.²⁰

¹⁷ Answer brief of respondent to the Commission, p. 21; initial decision, p. 592.

¹⁸ 50 Stat. 693 (1937), 15 U.S.C. § 1.

¹⁹ 60 Stat. 631 (1952), 15 U.S.C. § 45.

²⁰ *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944).

This language was subsequently quoted by the Supreme Court in *United States v. McKessen & Robbins, Inc.*²¹ There the Court continued and stated that the

question before us is whether the price fixing agreements challenged herein move along that route. If they do not, they are illegal *per se*. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine.²²

The Court went on to say that "since resale price maintenance is a privilege restrictive of a free economy" Congressional intent on the limitations thereto must be strictly construed.²³ This indicates to us that a manufacturer cannot "accidentally or incidentally" be afforded the protection of the McGuire Act and without having introduced some evidence that he in fact should be afforded this protection. As to this, the Commission observed in *Sandura*:

The Court's remarks underscore what was already apparent from a reading of the statute, namely, that the McGuire Act creates a limited exception to the otherwise pervasive sweep of the prohibitions against price fixing.²⁴

In that case, respondent advanced a similar argument that its price agreements between its dealers or distributors in fair trade States were prima facie legal. The Commission stated that "[r]espondent had the burden of proving that its resale-price-maintenance agreements were sanctioned by the statutes."²⁵

Respondent places great reliance on *United States v. Socony Mobil Oil Co.*²⁶ in an effort to show that it has met this burden of proof, namely, that its resale price maintenance agreements are valid in fair trade states. In that case Chief Judge Sweeney stated that "I can find nothing in the McGuire Act which limits its exemptions to fair trade agreements."²⁷ This argument has previously been considered and rejected by this Commission in the *Roberts Co.* case, in which we said, with specific reference to Chief Judge Sweeney's statement, that "[e]ven if this construction, for which no precedent is cited, be accepted as correct, it must still be established that the applicable state

²¹ 351 U.S. 305 (1956).

²² *Id.* at 310-311.

²³ *Id.* at 316.

²⁴ *Sandura Co.*, Docket No. 7042, 61 F.T.C. 756, S19 (1962), modified in other respects, *Sandura Co. v. F.T.C.*, 339 F.2d S47 (6th Cir. 1964).

²⁵ *Id.* at S19.

²⁶ "[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

²⁷ 150 F. Supp. 202 (D. Mass. 1957), certified, 252 F.2d 420 (1st Cir. 1958), dismissed, 356 U.S. 925 (1958).

²⁸ *Id.* at 204.

laws sanction the agreement actually employed.”²⁸ We note that Massachusetts public policy and common law permits the type of agreement with which we are concerned here, even without the existence of its Fair Trade Act; its Fair Trade Act is thus not necessary to give them validity.²⁹ In other jurisdictions, however, this type of agreement—but for the existence of fair trade statutes—would be illegal, either by virtue of common law doctrine or legislative enactment. And it is our understanding that fair trade statutes in such jurisdictions are considered in derogation of the common law and accordingly must be strictly construed.³⁰ In the instant proceeding we hold that respondent has failed in its burden of proof that its conduct was permissible under the various state fair trade statutes.

Respondent itself appears to have been in doubt that its policy, without more, was protected by fair trade legislation since subsequent to the initiation of this proceeding it has entered into formal fair trade contracts in those States having valid fair trade statutes. In view of our holding that respondent failed to show that its conduct was legal in fair trade States, it is unnecessary to review other evidence, primarily circumstantial, tending to show that respondent’s policy was not, in a number of instances, in conformity with fair trade policies and precepts. It is enough to hold that public policy, as well as applicable precedents, demands that the McGuire Act exemption to the anti-trust laws be strictly construed and those seeking its protection be held to the highest accountability.

Respondent also urges dismissal of the complaint on the ground that most of the documents introduced in evidence were improperly admitted. A request for admission of genuineness was denied by respondent and respondent objected to the admission of the documents for lack of proof of genuineness or authenticity. Respondent contends, absent an admission of genuineness or waiver of objection to admission, complaint counsel has the burden of proving genuineness before the documents can be admitted and used against respondent. According to respondent, the hearing examiner’s admission of and reliance upon these documents constitute substantial error warranting dismissal of the complaint for failure of proof. We find this contention without merit.

The documents—to the admission of which respondent objects—can be briefly summarized. Most of these were submitted by counsel for respondent upon request of complaint counsel. The remaining documents

²⁸ *The Roberts Co.*, Docket No. 6943, 56 F.T.C. 1569, 1599 (1960).

²⁹ 150 F. Supp. 204.

³⁰ See, e.g., *Venable v. Engel, J., & Co., Inc.*, 1948-49 CCH Trade Cas. ¶ 62523, Md. Ct. of App. (1949).

were submitted by an official of respondent to the investigating attorney. It is not disputed that they come from respondent's files.³¹ The documents themselves consist of lists of officers and employees of respondent, franchise brochures, advertising and promotional material, price lists, interoffice memoranda and other internal records, dealer correspondence, invoices and purchase orders.

The examiner—over the objections of respondent, who did not introduce any evidence which would place the authenticity of the documents in doubt—admitted the documents, on the theory that they were records kept in the regular course of business.

In support of its position that the documents in question were improperly admitted for failure of proof of authenticity or genuineness, respondent cites and relies in part on our opinion in *Frito-Lay, Inc.*³² It appears that respondent interprets this opinion as holding that upon objection to the admission of documents for lack of proof of authenticity complaint counsel must prove their authenticity. This, however, is not the correct interpretation of that opinion.

We do not interpret this statement to mean, as respondent seems to contend, that upon the mere denial of a request for admission or waiver of objection to authenticity complaint counsel must prove authenticity. Nor do we believe that upon an objection, without more, to admission for failure to prove authenticity would complaint counsel be required to prove authenticity. Respondent is in the best position to determine the authenticity of the documents which come from its own files and the burden of proof would be on respondent to introduce some evidence tending to show that they are not authentic. Accordingly, these documents were not improperly admitted by the hearing examiner. It is not clear whether respondent also objects to the admission of these documents for failure to prove that they were kept in the regular course of business; if respondent does raise this objection, the reasoning applicable to the issue of authenticity is equally applicable to the issue whether or not the documents were kept in the regular course of business. In both instances respondent is in the best position to determine the character of the documents, and in balanc-

³¹ Tr. 11, 375-376.

³² Docket No. 8606, 66 F.T.C. 1521, 1524 (1964). The pertinent paragraph reads as follows:

"Somewhat different considerations are applicable to complaint counsel's requests for the admission of authenticity of the documents. Regardless of whether a document appears on its face to be respondent's own or that of some third person, complaint counsel would be obliged, in the absence of an admission or waiver of objection to genuineness, to stand ready to prove that the document is authentic. . . . While the number of documents is very large, there is little reason to anticipate that respondent would be unable to determine readily whether each of them is in fact what it purports to be. The authenticity of most of them ought to be immediately apparent on their face."

ing the convenience of the parties we hold that it is respondent's burden to introduce some evidence tending to refute the conclusion that documents coming from its own files are authentic and kept in the regular course of business.

Moreover, it should be noted that the Commission's rules (former § 3.14(b) renumbered now as § 3.43(b)) call for the admissibility of "relevant material and reliable evidence." Clearly documents coming from a respondent's files can be regarded as reasonably reliable absent some countervailing evidence demonstrating their unreliability. It is the burden of the party challenging the reliability of a document to come forward with the evidence supporting the challenge.

Respondent also contends that the testimony of one Cheslock, a terminated dealer, should have been stricken because before he testified complaint counsel allegedly improperly influenced him.²³ The examiner denied a motion to strike Cheslock's testimony on the ground that while respondent may have succeeded in showing that Cheslock was an interested witness, Cheslock's testimony would not be affected though his credibility would be. A review of the record indicates that the examiner relied on Cheslock's testimony in support of the proposition that respondent's dealers sold several competing brands of china and thus its products were in free and open competition with similar products. Respondent itself repeatedly claimed this to be a fact and such a finding would be vital to substantiate a claim that respondent is entitled to fair trade its products, a claim respondent has repeatedly made. The examiner also cites Cheslock's testimony in support of his finding that dealers were expected to maintain suggested retail prices set by respondent and if they sold at lower prices, they would be terminated. Again, this finding is not in dispute. Accordingly, we see no reason to exclude Cheslock's testimony from the record and concur in the examiner's ruling thereon. The Commission, absent a clear abuse of discretion or unusual circumstances, will not interfere with the examiner's ruling on the issue of credibility. The examiner's proximity to the proceedings, his presiding thereover, and his ability to observe the witnesses' demeanor clearly place him in the most favored position with respect to any rulings on the credibility of a witness. Nor do we find such unusual circumstances or clear abuse of discretion in this case to warrant our interference.

Complaint counsel have appealed from the initial decision of the examiner on the ground that the order contained therein is inadequate

²³ Before Cheslock was subpoenaed to testify complaint counsel provided him with a copy of the complaint and proposed order. The proposed order contained a provision requiring Lenox to reinstate dealers terminated for price-cutting.

in that it will not effectively terminate respondent's unlawful conduct and restore free market conditions. Complaint counsel, among other arguments, contend that in order to be effective the order should contain a prohibition against respondent's limitations on dealer resales and an unlimited prohibition of suggested prices. Complaint counsel further contend that the provision requiring respondent to reinstate any dealers terminated after 1960 for price-cutting should not be limited to non-fair trade states and that respondent should be prohibited from engaging in fair trade for a period of three years.

With respect to respondent's policy of prohibiting dealers from reselling its products to unauthorized dealers, the examiner found that it constitutes an integral part of respondent's selective distribution system. He did not find, however, as urged by complaint counsel, that the transshipping prohibition was related to respondent's resale price maintenance policy.

It is not disputed that respondent strictly enforces its prohibition against transshipping, that a violation of this prohibition results in termination of the offending dealer and that respondent has, in fact, terminated transshipping dealers. In considering the totality of respondent's conduct we conclude that the prohibition of transshipping is indeed an integral part of respondent's resale price maintenance policy. Whatever reasons respondent may assign to the existence of this prohibition, it is primarily a method of insuring that Lenox products would not be resold to dealers who might sell them at prices below those established by respondent. Once the finding is made that the transshipping prohibition is a "part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act."³⁴ Accordingly, the order to cease and desist, if it is to be effective, must include a provision prohibiting respondent from restricting its dealers to sell Lenox products to whomever they wish, including other dealers. We also reject respondent's contention that transshipping was not an issue in this proceeding and hence the order to cease and desist should not include a prohibition against the transshipping restriction. The issue in this proceeding is respondent's resale price maintenance system and the various acts and practices which are part of this system and implement it. On the basis of our conclusion that the transshipping restriction is an integral part of respondent's resale price maintenance policy, a prohibition against this restriction is not only appropriate but necessary for an effective order.

³⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967). See also *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

We also agree with complaint counsel's contention that respondent should be prohibited from engaging in fair trade for a period of three years. With reference to such a prohibition, the Supreme Court stated that it is necessary "in order that the ground may be cleansed effectually from the vice of the former illegality."³⁵ However, should respondent desire to do so, after two years from the effective date of the order and after demonstrating that competition in the resale of its products has been restored, it can apply to the Commission for repeal of this provision. Similarly, the provision requiring the reinstatement of dealers terminated for price-cutting should not be limited to non-fair trade states. Nor should it be limited to dealers terminated for price-cutting but must include dealers terminated for transshipping.

Respondent's contention that the Commission is without authority to require affirmative acts but must confine itself to requiring cessation of the conduct found unlawful is without merit. The courts have long upheld Commission orders requiring affirmative acts.³⁶ The Commission is also accorded wide discretion in determining the type of order necessary.³⁷

Respondent further contends that the prohibition against the distribution of suggested retail price lists is unnecessary and would be detrimental to respondent's business. The examiner's order prohibits respondent from using suggested retail price lists for a period of two years. Complaint counsel appealed this provision and urge that respondent be prohibited from distributing suggested retail price lists in perpetuity.

In this context, respondent, subsequent to the close of hearings in this proceeding, has moved to add to the record documentary exhibits consisting of suggested price lists issued by its competitors. This motion was denied by the Commission without prejudice.³⁸ In its present appeal respondent repeats this motion and urges the Commission to add this material to the record of this proceeding.

We have carefully considered respondent's request and have concluded that this material should not be admitted to the documentary record. It is respondent which is charged with a violation of Section 5 of the Federal Trade Commission Act and not its competitors. The price lists of respondent's competitors bear no relevance to the instant proceeding and hence should not be admitted into the record after the close of hearings.

³⁵ *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 724 (1944).

³⁶ *Ward Laboratories, Inc. v. F.T.C.*, 276 F. 2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827.

³⁷ *F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957).

³⁸ *Lenox, Incorporated*, Docket No. 8718. Order Denying Respondent's Request to Add Documentary Exhibits to Record, July 19, 1967.

We further conclude that respondent should be enjoined from the use of suggested retail price lists for a period of three years, provided that respondent may, after two years from the effective date of the order and upon a showing that competition in the resale of its products has been restored, petition the Commission for a repeal of this provision. Respondent's argument that there is nothing inherently unlawful in the use of suggested retail price lists must be examined within the framework of the use respondent has made of such lists in the past. To the extent that suggested retail price lists were used by respondent as a tool in furtherance of unlawful activities, their future use should be prohibited, at least until such time as the effect of the unlawful conduct can be expected to have disappeared. We conclude that respondent in fact used suggested retail price lists in furtherance of the unlawful conduct found herein. The Commission is accorded considerable discretion in the fashioning of orders to cease and desist, and it has the duty to fashion such an order as is necessary to effectively dissipate the effects of the unlawful conduct and prevent its recurrence. An order which would not at least temporarily prohibit the use of suggested retail price lists would not accomplish this goal.

Finally, respondent contends that the prohibition on requesting dealers to report other dealers who do not observe established resale prices and the prohibition of threatening or exerting pressure on dealers to observe established resale prices is unjustified. This form of conduct, however, is traditional as a means of securing dealer adherence to suggested resale prices and the examiner correctly included in his order a prohibition as to each of these practices. While the evidence as to these practices in the record is somewhat dated, we believe that a prohibition with respect thereto should nevertheless be included in the order. So long as these practices bear a reasonable relation to the conduct found unlawful, the Commission is not only entitled but, in accordance with its mandate from the Congress, has the duty to include a prohibition of these practices in its order to cease and desist. Repeatedly the courts have upheld the Commission's authority to prohibit practices of a similar nature as those committed in the past.

In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its road block to the narrow law the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [Footnote omitted.]³⁹

³⁹ *F.T.C. v. Ruberoid*, 343 U.S. 470, 372 (1952).

Final Order

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In the instant matter, the order, to be effective, must include a prohibition of these practices which, over the years, have become to be considered the classic tools for the establishment and perpetuation of resale price maintenance systems.

In accordance with the above, the initial decision of the examiner is adopted by the Commission, as modified by this opinion, and the appeal of complaint counsel and respondent is granted to the extent indicated and otherwise denied. An appropriate order will be entered.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his taking the oath of office.

FINAL ORDER

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the examiner, filed May 29, 1967. The Commission has rendered its decision denying respondent's appeal in part, granting complaint counsel's appeal in part, and adopting the initial decision of the examiner, as modified by the opinion accompanying this order. For the reasons stated herein, the Commission has determined that the order entered by the examiner should be modified and, as modified, adopted and issued by the Commission as its final order.

ORDER

It is ordered, That respondent, Lenox, Incorporated, a corporation, and its officers, agents, representatives, employees, successors, and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of fine china dinnerware, giftware, and artware, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from hindering, suppressing, or eliminating competition or from attempting to hinder, suppress, or eliminate competition between or among dealers handling respondent's products by:

1. Requiring dealers, through a franchise agreement or other means, to agree that they will resell at prices specified by respondent or that they will not resell below or above specified prices;
2. Requiring prospective dealers to agree, through direct or indirect means, that they will maintain respondent's specified resale prices as a condition of buying respondent's products;
3. Requesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent, or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported;

4. Harassing, intimidating, coercing, threatening or otherwise exerting pressure on dealers, either directly or indirectly, to observe, maintain, or advertise established resale prices;

5. Selling to dealers at a mark down or discount from a resale or retail price;

6. Publishing, disseminating or circulating to any dealer, any price list, price book or other document indicating any resale or retail prices for a period of three years following the effective date of this order: *Provided, however,* That respondent may, two years following the effective date of this order, upon a showing that competition in the resale of its products has been restored, petition the Commission to repeal this provision;

7. Utilizing any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent;

8. Requiring or inducing, by any means, dealers or prospective dealers to refrain, or to agree to refrain, from reselling respondent's products to any dealers or distributors;

9. Entering into any contract or agreement prescribing minimum or stipulated prices, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, for a period of three years following the effective date of this order: *Provided, however,* That respondent may, two years following the effective date of this order, upon a showing that competition in the resale of its products has been restored, petition the Commission to repeal this provision;

10. Failing to sell or refraining from selling to any dealer who was terminated after January 1, 1960, for

(a) failing to maintain respondent's "suggested" resale prices, or

(b) selling to another dealer for resale, and who desires to purchase from respondent.

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.

Commissioner Nicholson not participating for the reason that oral argument was heard prior to his taking the oath of office.