

IN THE MATTER OF

BARBARA E. MARTIN ET AL. DOING BUSINESS AS
HOUSEHOLD SEWING MACHINE COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6148. Complaint, Dec. 3, 1953—Decision, Sept. 16, 1955*

Order requiring retailers of new and rebuilt sewing machines in Washington, D. C., to cease selling sewing machines of which Japanese-made heads were a part without adequate disclosure of foreign origin; to cease, in advertising their machines, using "bait" prices which were not bona fide offers to sell but were made to obtain leads to possible purchasers, using a misleading "20 Year Guarantee" carrying no qualifications, and implying that attachments and sewing lessons were included in the price of the machines; and representing through use of words "Home," "American Home," etc., as brand names, that their Japanese-made machines were products of the well-known firm of that name.

Mr. William L. Taggart, counsel supporting the complaint.

Mr. Leonard B. Sussholz and Mr. Marvin P. Sadur, of Washington, D. C., counsel for respondents.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above named respondents on December 3, 1953, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint, in substance, charges respondents with failing to properly disclose the country of origin on certain Japanese sewing machines sold by them, with improperly using American trade names on such sewing machines, with engaging in what is commonly known as "bait advertising," and with engaging in certain other false and deceptive practices with respect to the prices of the sewing machines advertised by them, the nature of the guarantee covering such machines, and other terms and conditions of sale. Respondents appeared by counsel and filed a joint answer in which they denied having engaged in certain of the illegal practices charged, and alleged that they had

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discontinued others of the practices prior to the issuance of the complaint herein.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, on various dates between March 30, 1954, and January 6, 1955, in Washington, D. C. At such hearings testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the evidence in support of the complaint counsel for respondents moved to dismiss the complaint for insufficiency of evidence and, pursuant to leave granted, memoranda were filed in support of and in opposition to said motion. Said motion was denied, except as to one allegation of the complaint, by order of the undersigned dated September 29, 1954. At the close of all the evidence, counsel for respondents renewed their motion to dismiss the complaint. Said motion is disposed of in accordance with the findings, conclusions and order hereinafter made.

Proposed findings of fact and conclusions of law have been filed by counsel supporting the complaint, and counsel for respondents have also filed proposed findings and conclusions, together with a supporting memorandum and a motion for oral argument upon their proposals. In view of the fact that the issues are fully discussed in the proposed findings and supporting memorandum, and in view of the fact that there are no novel or unusually complex issues involved in this proceeding, the examiner is of the opinion that there is no need for further argument and the motion for oral argument is accordingly denied.

Upon the entire record in the case and from his observation of the witnesses, the undersigned finds that this proceeding is in the public interest and makes the following:

FINDINGS OF FACT

I. The Business of Respondents

On December 3, 1953, when the complaint herein was issued, the respondents Barbara E. Martin, Hershel Martin,¹ and Dennis Martin were, and had been since approximately August 1952, copartners doing business under the name of Household Sewing Machine Com-

¹ The first name of this respondent is incorrectly spelled in the complaint as Herschel.

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pany, having their principal place of business at 1226 H Street, N. E., Washington, D. C. On January 5, 1954, said respondents formed a corporation known as Household Sewing Machine Company, Inc., which was organized and exists under the laws of the State of Delaware. Said corporation is the successor in interest of the co-partnership previously conducted by said respondents.²

The respondents are now, and have been for several years last past, engaged in the retail sale of sewing machines, including sewing machines the heads of which are imported from Japan.³ In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their place of business in the District of Columbia, to purchasers thereof located in the States of Maryland and Virginia and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the District of Columbia and the States of Maryland and Virginia, and in the District of Columbia. Their volume of trade in said commerce has been and is substantial.

II. The Alleged Illegal Practices

A. *The Sale of Inadequately or Deceptively Labeled Japanese Machines*

A substantial portion of the heads on the sewing machines sold by respondents are imported from Japan. Most of these machines are purchased by respondents from Royal Sewing Machine Company of Brooklyn, New York, which imports the heads from Japan. When the machines are received by respondents, they have affixed thereto on the front lower portion of the vertical arm of the machine head a small medallion bearing the legend "Made in Japan." The machines also contain on the front of the horizontal arm, the brand or trade name "American Home DeLuxe." The complaint contains two separate charges concerning the labeling or marking of these machines, (1) that respondents have failed to adequately disclose on the heads of the machines that they are of Japanese origin, and (2) that the

² Respondents have waived service of process upon said corporation and have requested that this proceeding be regarded as one against the corporation. In view of the responsibility of the respondents hereinabove named for the acts and practices hereinafter found, said request is denied to the extent that it seeks a substitution of the corporation in place and in lieu of said respondents.

³ In their proposed findings counsel for respondents state that the respondent Dennis Martin sold and conveyed his interest in the business on March 6, 1954. There is no evidence in the record to sustain this statement. Moreover, in view of the association of said respondent, with the business during the period when the acts and practices hereinafter discussed occurred, his departure from the business after the issuance of the complaint herein would not relieve him from responsibility.

use of the trade or brand name "American Home" has tended to lead the public to believe that the machines are manufactured by American companies using a similar name. These charges are separately discussed below.

1. Sufficiency of markings of Japanese origin

The complaint alleges that the markings of Japanese origin on respondents' sewing machines are deficient in three respects: (a) That when the machines are received by respondents they contain the inscription "Made in Japan" on the back of the vertical arm of the machine head, but that the inscription becomes obscured from view when respondents attach a motor to the head; (b) that the medallion containing the inscription "Made in Japan" which is affixed to the front of the vertical arm can easily be removed; and (c) that the inscription on the medallion does not constitute adequate notice to the public that the heads are imported because it is too small and indistinct. In their answer respondents have denied the foregoing allegations and allege affirmatively (a) that they do not perform any assembling operations which would cause any inscription to become obscured; (b) that the medallion appearing on the front of the machine cannot easily be removed, and when removed leaves unsightly holes; and (c) that the medallion affixed to the front of the vertical arm is conspicuous and distinct and has been approved by the United States Customs Bureau. The issues thus raised with respect to the sufficiency of the markings of Japanese origin on respondents' machines are each hereinafter discussed.

a. *The obscuring of country of origin*

There is no evidence in the record, whatsoever, with respect to a label or other inscription of foreign origin on the back of the vertical arm of respondents' machines. Moreover, the record fails to establish that respondents perform any assembling operations in the course of which any such inscription is obscured by a motor. Assembling operations consisting of the attachment of a motor, light and rheostat are performed by Royal Sewing Machine Company prior to the receipt of the machines by respondents. The only further operation performed by respondents is the placing of the sewing machine heads in a portable case or console cabinet. There is no evidence that this causes any inscription of Japanese origin to become obscured.

b. *Removability of the medallion*

It is undisputed that a small medallion showing country of origin appears on the front lower portion of the vertical arm of the machine

head. The only evidence offered by counsel supporting the complaint tending to establish the charge that this medallion can easily be removed is that of the manager of a competitor of respondents who expressed the opinion that all metal medallions can be removed without marring the machine. It does not appear from the record that this witness has had any actual experience in removing a medallion of the type used by respondents. Another witness, who had purchased one of respondents' machines, testified that he removed the medallion in order to have it available in connection with his testimony and to obviate the necessity of bringing the sewing machine to the hearing room. However, he gave no indication of whether it was difficult or easy to remove the medallion or whether it could be done without marring the machine.

In support of their contention that the medallion is not easily removable and cannot be removed without marring the machine, counsel for respondents rely largely on the testimony of the respondent Hershel Martin, who stated that he had removed one of the medallions with a screw driver and that although he had proceeded with due care, the machine was scratched and the medallion bent. He further stated that after the medallion had been removed, there appeared underneath on the head of the machine, the inscription "Made in Japan." The manager of Royal Sewing Machine Company, who also testified on behalf of respondents, stated that the medallions on the machines sold to respondents were difficult to remove because they were riveted to the machine from the inside.

Considering the evidence as a whole, the examiner is of the opinion and finds, that counsel supporting the complaint has failed to sustain the burden of proof with respect to the charge concerning the removability of respondents' medallions.

c. Legibility of the medallion

Most of the evidence offered by counsel supporting the complaint regarding the charge of insufficiency of notice of country of origin is based on the allegation that the inscription, "Made in Japan," appearing on the medallion which is affixed to the lower front portion of the vertical arm of the machine, is too small and indistinct to give adequate notice to the public. The evidence relates mainly to a gilt-colored medallion with raised letters of the same color, which was used by respondents until approximately November 1953, when respondent's source of supply began shipping machines with a gun-metal colored medallion. Typical of the gilt medallions is one which is approximately $1\frac{5}{8}$ by $1\frac{3}{8}$ inches in size and bears the following inscription: On top, the legend "1952 Series" in numbers and letters

$\frac{1}{8}$ inch in height; in the center, the words "DeLuxe Model" in letters $\frac{1}{4}$ to $\frac{1}{6}$ of an inch in height; and on the bottom, the words "Made in Japan" in letters $\frac{1}{12}$ of an inch in height.

The Commission in its recent decision in the *Standard Sewing Equipment Corporation* case,⁴ in which it reviewed most of the cases dealing with the sale of Japanese sewing machines, held that a gilt medallion containing the inscription "Made in Japan" in gilt letters $\frac{1}{8}$ inch in length, does not give adequate notice to purchasers and the public of the country of origin of the machine. Since the inscription "Made in Japan" on the gilt medallion used by respondents in this case is only $\frac{1}{12}$ of an inch in height, there would appear to be no question, under the precedent cited, that the medallion does not give adequate notice of country of origin.

Aside from this precedent, however, and based solely on the record in this case, the examiner is satisfied and finds that the gilt medallion used by respondents does not give adequate notice of country of origin. Most of the witnesses who purchased respondents' machines containing the gilt-colored medallion, did not notice the medallion at the time the machine was demonstrated to them and, in a number of instances, were not aware that the machine was of Japanese origin until sometime after it was delivered to their homes. This was true not only of witnesses called in support of the complaint but also of a number of purchasers whom respondents called as witnesses.

Counsel for respondents sought to show that the inscription "Made in Japan" could be read by witnesses in the hearing room when standing a distance of one or $1\frac{1}{2}$ feet from the machine. In most instances, however, it was necessary for the witness to bend his or her head to the level of the machine in order to read the inscription. Aside from this, the fact that a witness can read an inscription in the hearing room when his attention is specifically directed to it, is hardly a fair test of the adequacy of notice of the medallion under normal conditions of purchase. The most eloquent testimonial to the inadequacy of the notice given by the medallion is that most of the witnesses who testified, including a number called by respondents, had not seen the medallion until the machine had been in their homes for some time. Some of respondents' witnesses who had purchased the machine did not know even at the time of the hearing what inscription the medallion contained.

Counsel for respondents also sought to show that respondents' salesmen were instructed to advise prospective purchasers of the foreign origin of the machines. The record shows that many pur-

⁴ Docket No. 5888, May 2, 1955.

chasers were not informed by the salesmen that the sewing machine heads had been imported from Japan.⁵ Aside from this, however, it is the opinion of the hearing examiner that the giving of adequate notice to the public cannot be made to depend on the whim of individual salesmen who are paid on a commission basis, but requires that the machine itself should be adequately marked.

In the answer filed on their behalf, respondents take the position that the medallion used by them gives adequate notice to the public. Counsel for respondents appeared to take a similar position during most of the course of the hearings held herein. However, counsel sought to show through the testimony of respondents Barbara and Hershel Martin that respondents have been using a gun-metal medallion instead of the gilt medallion since approximately November 1953, and that they do not propose to resume the use of the latter. Counsel for respondents contend that the gun-metal medallion which respondents are now using has been accepted by the Commission as complying with the Act in a proceeding against respondents' source of supply, Royal Sewing Machine Company, in which an order, based on the use of a gilt medallion, was issued May 5, 1953 (49 F.T.C. 1351). Counsel accordingly argue that since respondents abandoned use of the gilt medallion prior to the issuance of the complaint herein and have been using a gun-metal medallion of the type which has been approved by the Commission in the *Royal Sewing Machine Company* case, there is no longer any public interest in this aspect of the proceeding. With this argument the examiner cannot agree.

While the case of counsel supporting the complaint was based mainly on the testimony of witnesses who had purchased sewing machines containing the gilt medallion, one of the witnesses called by him had purchased a sewing machine with the gun-metal medallion from respondents in November, 1953. This witness' testimony was substantially similar to that of purchasers who had bought machines with the gilt medallion, *viz*, that she did not notice the medallion at the time the machine was demonstrated to her and was not aware that the machine was of Japanese origin until someone called her attention to the medallion after the machine had been in her home for some time. From the testimony of this witness, it would appear that the gun-metal medallion now in use is not significantly clearer

⁵The testimony of most of the witnesses called in support of the complaint, who purchased a Japanese sewing machine from respondents, indicates that they were not informed by the salesmen at the time of purchase that the head was of Japanese origin. While some of the purchasers called as witnesses by respondents recalled being told that the machine was made in Japan, or that the "parts" were imported, or that the machine was "imported," several of them testified that they had not been informed that the machine was of Japanese origin. (See, e. g., R. 768, 838.)

than the gilt one previously used. It may also be noted that the gun-metal medallion accepted as compliance in the *Royal Sewing Machine Corporation* case, is referred to in the Commission's decision in the *Standard Sewing Equipment Corporation* case, *supra*, as having letters $\frac{1}{8}$ of an inch in height, while the letters in the legend "Made in Japan" in the instant case are $\frac{1}{12}$ of an inch in size. Moreover, it is not merely a question of the size of the letters on the medallion or the color of the medallion but also where the medallion is placed on the sewing machine head. In the instant case, the medallion is affixed to the lower portion of the vertical arm where it is considerably less conspicuous than it would be were it placed near the top of the vertical arm, adjacent to the brand name "American Home DeLuxe."

However, it is not necessary to determine at this time whether the gun-metal medallion gives any more adequate notice to the purchasing public than did the gilt one which preceded it, since the examiner is not convinced that respondents intend irrevocably to abandon selling machines with the gilt medallion. Although counsel for respondents argue that respondents have agreed not to use the gilt medallion, the testimony of respondent Barbara E. Martin indicates that she still regards the gilt medallion as giving adequate notice to the public and that her basic reason for stating that she did not intend to use this medallion was "because the machines are not coming through [from Royal Sewing Machine Company] that way" (R. 1085), rather than because of any true conviction as to the inadequacy of the medallion. Moreover, irrespective of what respondents have stated concerning their intention to abandon the use of the gilt medallion, the record shows that respondents are still selling machines with the gilt medallion and may reasonably be expected to do so for some time in the future. The intention expressed by respondents Barbara and Hershel Martin, not to sell machines with the gilt medallions, specifically excepts therefrom machines which have been repossessed from customers. Such machines constitute approximately 5 to 10 percent of the machines sold monthly by respondents, an amount which cannot be regarded as de minimus.⁶ Furthermore, while respondents Barbara and Hershel Martin testified that their firm had not been selling the machines with the gilt medallion since approximately November, 1953 (except for repossessions), the testimony of their store manager indicates that respondents have been selling machines with the gilt medallion during the past twelve months (R. 1010).

⁶ The fact that such machines are sold at a lower price than the new machines does not, as argued by counsel for respondents, dispense with the necessity for giving adequate notice of country of origin to the public. The requirement for adequate notice does not depend on whether a machine is new or repossessed or is sold at a greater or lesser price.

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Despite the contention of counsel for respondents that respondents have abandoned the use of the gilt-colored medallions, in the memorandum submitted in connection with their proposed findings counsel have questioned the authority of the Commission to require respondents to change the origin marking on their machines in view of the fact that the Bureau of Customs of the Treasury Department has approved such markings under the Tariff Act. This contention has been specifically overruled by the Commission in the *Standard Sewing Equipment Corporation* case, *supra*, and it is unnecessary for the examiner to discuss it at this point. However, the fact that respondents continue to question the legal right of the Commission to require them to properly mark the country of origin on their sewing machines is an additional indication of the need for corrective action.⁷

d. *The preference for American products*

The question of whether respondents' sewing machines are adequately marked as to country of origin presupposes that there is some obligation to the public, on the part of a vender, to make such disclosure. In this connection, the complaint alleges that, (a) when sewing machines are not clearly marked, the purchasing public assumes the machines are of American origin, and (b) there is a preference among members of the public for American-made products over those of other countries. Respondents have admitted in their answer, and it is so found, that in the absence of proper notice, the public assumes a product is domestically manufactured. However, respondents contend that most purchasers are primarily concerned with price, quality and availability of replacement parts rather than with country of origin.

The position of respondents in this respect overlooks the essential principle which controls in determining whether a practice has the tendency to mislead or deceive. It is not a question of whether all or even a majority of the public has a preference for American-made products. It is sufficient, to require the giving of adequate notice, if a substantial segment of the public has such a preference. It is not necessary, moreover, that this preference be the primary factor controlling the purchase of a product. It is sufficient if it is a significant factor which the public takes into consideration in making its purchases.

There is no question from the record in this proceeding, and it is so found, that a substantial part of the purchasing public has a

⁷ See *C. Howard Hunt Pen Co. v. FTC*, 197 F. 2d 273, 282 (C. A. 3, 1952).

preference for American-made products, including sewing machines. This preference has been found to exist in a number of cases, both by the Commission and the courts.⁸ While some of the witnesses called in support of the complaint conceded on cross-examination that price and quality are important factors in making a purchase, this does not gainsay the fact, as counsel for respondents apparently assume, that the origin of the product is also a significant factor and that there exists a preference for American-made products, all other things being equal.⁹

2. The use of the brand name "American Home"

Across the front of the horizontal arm of respondent's machines there appears in large, conspicuous letters, the brand name "American Home DeLuxe." The complaint charges that the word "Home" is part of the name of well-known American companies and that some of these companies use the word "Home" as part of the brand name of their product, including sewing machines. It is alleged that by using the word "Home" as part of the brand name of their machines, respondents have represented that such machines are made by one of the American companies with which such name has been associated. Respondents contend that the word "Home" is a free word which is not the dominant part of respondents' brand name, and that their machines are different in appearance from those using the word "Home" as part of their name.

The evidence shows that there has been a sewing machine on the American market using the name "New Home" since the 1860's, and that millions of dollars have been spent in advertising this machine in various national magazines and other publications. The machine is presently manufactured by the Free Sewing Machine Company, which also manufactures the Free Westinghouse machine. Advertising literature and circulars used in connection with the sale of the New Home sewing machine refer to the manufacturer as the "New Home Sewing Machine Company." It is not clear from the record whether the New Home Sewing Machine Company is a separate entity or is a division of the Free Sewing Machine Company. However, this fact has no material significance since it is clear that the name "New

⁸ See *Standard Sewing Equipment Corporation, supra*, and *L. Heller & Son, Inc. v. FTC*, 191 F. 2d 954 (C. A. 7, 1951).

⁹ In the *Heller* case, the Court of Appeals specifically recognized that the preference for American-made products presupposed that "other considerations such as style and quality are equal." The relativity of the preference was also recognized by one of respondents' witnesses who testified that, "everything else being equal," he preferred American-made products and wished to be advised whether a product was of foreign origin (R. 899, 903).

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Home" is widely associated in the public mind with a sewing machine of domestic origin.¹⁰

Counsel supporting the complaint produced a number of witnesses who had purchased respondents' American Home machine and who testified that they had confused the name with that of the New Home machine or thought it was made by the same company. Some of the witnesses testified that they actually thought they were getting a New Home machine and did not learn until some time later that the American Home and New Home were not one and the same machine, or were not made by one and the same company. Counsel for respondents, on the other hand, produced a number of witnesses who had purchased the American Home machine and who, with one exception, testified that they had not confused the name American Home with the name New Home.

Counsel for respondents suggest in the memorandum submitted by them that there is a necessary conflict between the testimony of the two groups of witnesses, and argue that the testimony of their witnesses should be accepted while the testimony of the witnesses called in support of the complaint should be rejected as not worthy of belief. Counsel cite numerous examples from the testimony of the witnesses in support of the complaint purporting to show that they were either confused or lying or were prejudiced against respondents. However, substantially all the examples cited are of such a minor and inconsequential nature that they do not, in the opinion of the examiner, materially affect the credit or weight to be given to the testimony of these witnesses.¹¹

¹⁰ Counsel for respondents argue that under the complaint, counsel supporting the complaint must not only establish that the word "Home" is part of the name of a well-known American machine, but must also show that it is part of the corporate name of the American Company manufacturing such machine. The examiner cannot agree with this highly technical construction of the complaint. The confusion in the public mind, if it does exist, results from the public's identifying the name "Home" with an American-made sewing machine, irrespective of whether that word is technically a part of the name of an American company. It may also be noted, in connection with the question of whether there is a New Home Sewing Machine Company, that respondents' manager testified that it was his understanding that the New Home machine was made by the New Home Sewing Machine Company (R. 1006).

¹¹ Examples of the alleged confusion, contradiction or prejudice cited by counsel for respondents are: (a) The fact that some of the witnesses who testified that they had confused the two names had failed to mention this fact in a letter of complaint which they wrote to the Better Business Bureau; (b) the fact that some witnesses referred to the "New Home" machine as a product of the "New Home Sewing Machine Company," whereas, according to counsel, there is no such company; (c) the fact that some of the witnesses were uncertain as to the color or appearance of the New Home machine or when they had seen it; (d) the fact that some witnesses thought that the machine demonstrated to them was the "New Home"; and (e) the fact that many witnesses have received and read copies of the complaint in this proceeding. Most of the examples cited hardly require comment. However, it may be noted in passing that the fact some witnesses thought the machine they saw bore the name "New Home," so far from indicating a lack of credit-worthiness in their testimony, actually tends to establish the very confusion in names charged in the

Counsel apparently expect a degree of precision in recollection and testimony that is beyond the capacity of most lay witnesses of the type here involved, including not only those who testified in support of the complaint, but also those called on behalf of respondents. Similar instances of confusion and minor contradiction could be cited from the testimony of respondents' witnesses most of whom, like those called in support of the complaint, had evidently had little or no courtroom experience and were at times nervous and confused.¹² In the opinion of the hearing examiner, both groups of witnesses gave a substantially accurate account of their experiences in dealing with respondents. There is no necessary conflict, as counsel for respondents seeks to suggest, in the fact that one group of witnesses experienced a confusion in names while another, by and large, did not. It is quite possible that some members of the public may find two names confusing because of their apparent similarity, while others may not.

The hearing examiner is convinced, however, that the experience of the witnesses who testified in support of the complaint is not at all unusual or atypical, but is such that it can reasonably be expected to be shared by many other members of the purchasing public. The reasonableness of their confusion is attested to by the fact that one of respondents' own witnesses testified that she too had confused the names American Home and New Home briefly, but that the confusion was cleared up when the salesman told her the American Home machine was foreign made. Since a number of other witnesses called by respondents also claimed to have been told by the salesman of the machine's foreign origin, this may account for the lack of confusion on their part.

In any event, the record establishes the existence of confusion and the likelihood of confusion from the use of the name "American Home" of sufficient proportions as to establish a need for corrective action in the public interest. As has already been suggested above, it is not necessary that all or that even a majority of the members of the public be misled. The Federal Trade Commission Act was intend-

complaint. The fact that, admittedly, many of the witnesses received copies of the complaint is a fact of very minor significance in the opinion of the examiner, and there is no evidence that any of the witnesses were prejudiced against respondents because of this fact. Furthermore, it appears that some, at least, of respondents' witnesses had talked to a representative of respondents prior to testifying in this proceeding and apparently were informed as to respondents' version of the facts.

¹² Counsel for respondents cite the case of a witness called in support of the complaint whose excessive loquacity and lack of responsiveness to questions caused the examiner to admonish her several times. However, a similar example may be cited of a witness called on behalf of respondents, and there were a number of other instances of volunteering of information and lack of responsiveness among respondents' witnesses.

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ed to protect not merely the cognitive and the sophisticated, but the "ignorant, the unthinking, and the credulous."¹³ The fact that any significant segment of the public may be deceived is sufficient to support a finding that the Act has been violated.¹⁴ Based on the credible testimony in the record, the examiner is convinced and finds that the name "American Home DeLuxe" used by respondents on their sewing machines can be readily confused with the name "New Home," a name used on a well-known machine of American origin, and that the use of said name by respondents has tended to, and does, mislead and deceive a significant portion of the purchasing public.¹⁵

B. The "Bait Advertising" Charge

The complaint charges respondents with having engaged in what is known in common parlance as "bait advertising." It is alleged, in this respect, that respondents advertised Free-Westinghouse machines, purporting to sell for as much as \$119.50, for prices as low as \$38.88; that respondents' offers to sell such machines were not genuine and bona fide but were made for the purpose of obtaining leads as to persons interested in buying sewing machines; and that when persons responded to respondents' advertisements, respondents or their salesmen refused to sell, made no effort to sell, or ignored or disparaged the advertised machine, and tried to sell a higher-priced machine, usually one of Japanese origin. Respondents, while admitting in their answer that one of the purposes in advertising was to obtain leads and information as to persons interested in purchasing sewing machines and also that they have apprised prospective purchasers of other machines carried, have denied the remainder of the bait advertising charge.

The record discloses that respondents regularly advertised the Free-Westinghouse machine, on the average of three and four times a week, in most of the newspapers in Washington, D. C. The advertisements, which were substantially similar to content, carried the familiar slogan "You Can Be Sure If It's Free-Westinghouse," underneath which was a picture of the machine; contained reference to a relatively high price as the "Value" of the machine but offered to sell it at a substantially lower price, payable \$1 down and \$1 a week; listed a number of desirable performance "features" of the machine; referred to a "20 Year-Guarantee"; and invited interested persons to call for

¹³ *Positive Products Co. v. FTC*, 132 F. 2d 165 (C. A. 7, 1942).

¹⁴ *Prima Products Inc. v. FTC*, 209 F. 2d 405, 409 (C. A. 2, 1954).

¹⁵ In making the above finding the examiner finds it unnecessary, in view of the more direct evidence in the record, to rely on the testimony of the manager of the firm which manufactures the New Home machine that his company has received complaints from persons who confused the name American Home with New Home.

a home demonstration and to reserve a machine. In most instances when a person called in response to the advertisement an appointment was made for a salesman to call at his or her home to demonstrate the machine. The salesman in almost every instance brought with him a more expensive machine, usually one of the Japanese "American Home" machines.

Counsel supporting the complaint called fourteen witnesses who testified as to their experiences in attempting to purchase a Free-Westinghouse machine in response to one of respondents' advertisements. In most instances, the machine was demonstrated in the home of the witness but a few came directly to respondents' store. The testimony of most of these witnesses reflects a tactic on the part of respondents and their salesmen of seeking to discourage the purchase of the Free-Westinghouse by advising customers not to purchase it, by disparaging its performance, by stating that it would not perform certain operations although they were among the advertised "features" of the machine, and by displaying a general attitude of reluctance to sell the machine or of indifference toward it, and finally of seeking to induce customers to purchase a more expensive type machine, usually one of the Japanese machines.

The attitude of respondents' salesmen was characterized by some of the witnesses as: "[V]ery reluctant" to answer questions concerning the machine (R. 25); "[h]e talked it down in a lot of different ways" (R. 254); [h]e kept telling me how bad the machine was * * * and trying to discourage me" (R. 296); "[h]e more or less began to run down the machine, much to my amazement" and "immediately began trying to sell me a different machine" (R. 340); he "sort of shrugged it off" (R. 575). Most of the witnesses referred to the unusually noisy performance of the machine and mentioned, in some instances, that this had received comment from the salesman as indicative of the undesirability of the machine. Other adverse comments by the salesmen which were referred to by witnesses supporting the complaint were, that the machine would not sew backward and forward (although the advertisements stated that is "Sews forward and reverse"), that it skipped stitches or that the stitch could not be regulated (although the advertisement stated that the machine had a "Precision stitch regulator"), that it would not sew over pins (although the advertisement stated "Sews over pins and heaviest seams"), that you couldn't get parts for the machine (although the advertisement stated that there was a "20-Year parts guarantee"), that it was a "toy," and that it had a long bobbin which was less desirable than the round bobbin on the Japanese machines.

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After the customers had been sufficiently discouraged by the disparaging remarks of the salesman and noisy performance of the machine,¹⁶ the salesman then tried to sell a more expensive machine, usually one of the "American Home" Japanese machines, some of which sold for several times the price of the Free-Westinghouse. Seven of the witnesses called in support of the complaint eventually succumbed to the tactics of the salesman and bought a more expensive machine, but six of them stuck to their guns and despite all efforts to discourage them, insisted on buying the Free-Westinghouse machine.

However, none of these witnesses was successful in their efforts to obtain the Free-Westinghouse at the time they sought to purchase it. They were given various excuses and were shunted back and forth between the salesman and persons at the store, all to no avail. In several instances, the salesman would not take a deposit but told the customer to telephone the store or that a driver would get it. When they telephoned the store, they were given some excuse for not selling them the machine, such as the fact that respondents had "oversold" on the machine or that the machines in stock had certain attachments which the customer would have to take at additional cost. Several witnesses who were successful in getting the salesman to accept a deposit were later told, upon telephoning the store, that respondents were "oversold" on the machine. Several witnesses who went directly to the store in response to an advertisement, were told that respondents did not have any machines in stock.¹⁷ In most instances, according to the testimony of a number of these witnesses, shortly after they had been told that they could not obtain a Free-Westinghouse machine because respondents were "oversold" or for some other reason, they saw another advertisement by respondents in the newspaper offering to sell the machine. When several of them telephoned they were again met with an offer to send a demonstrator. One witness, after several months of telephoning, was finally told that she could have a Free-Westinghouse machine, but she had become so skeptical of the way respondents did business that she no longer wished to deal with them.

Counsel for respondents urge that the testimony of the witnesses called in support of the complaint not be credited because they were prejudiced against respondents and because their testimony was

¹⁶ The noisy performance of the Free-Westinghouse was alone sufficient to discourage one customer, without any active support from the salesman.

¹⁷ One of these witnesses had first telephoned respondents and stated that he wanted to buy the machine. He was met with an offer to send a demonstrator. After declining this offer and stating that he wished to buy the machine and not to have it demonstrated, he went directly to the store where he was told that the salesmen had all the machines out as demonstrators (R. 316).

contradicted by the witnesses who testified on behalf of respondents. Counsel apparently regard the witnesses who testified in support of the complaint as a group of disgruntled customers who embellished and distorted their experiences because of their "animus" toward respondents, aided and abetted by the "blueprint" furnished to them in the form of copies of the complaint herein.

The examiner is wholly in disagreement with counsel's evaluation of the testimony. If these witnesses had any "animus" toward respondents it would not be surprising in the light of the experiences which they related. However, after a careful review of their testimony and from his recollection of their demeanor in testifying, the examiner is convinced that the accounts they gave were essentially true. It is inconceivable to the examiner that such a large group of persons, so apparently lacking in guile and stratagem, could have all fabricated essentially similar accounts of their experiences with respondents. While counsel suggests that the centrality of their theme may be accounted for by the fact that they had received copies of the complaint in advance of the hearing, the hearing examiner cannot agree with this argument. Despite the similarity of their testimony in essentials, the wide variety in the details of their individual testimony was such as to indicate that it sprang from the wellspring of actual experience, rather than from some Machiavellian plot among them and possibly, counsel in support of the complaint. Moreover, the testimony of the witnesses called by respondents, so far from contradicting the testimony of those called in support of the complaint, in many respects corroborates it and tends to support the charges in the complaint.

Counsel for respondents called fourteen witnesses who had responded to advertisements for the Free-Westinghouse machine. Of this number, seven actually bought the machine and the remainder purchased the "American Home" Japanese machine.¹⁸ While many of these witnesses attested to the conclusionary fact, frequently in response to leading questions, that the salesman who demonstrated the Free-Westinghouse did not "disparage" or "criticize" it, the testimony of some of them reveals that the salesman did in fact engage in a tactic of discouraging the purchase of the Free-Westinghouse machine, albeit in some instances it was more subtle and less pronounced than that experienced by witnesses called in support of the complaint. Thus, one witness, when asked the leading question whether the salesman had "disparaged" the Free-Westinghouse machine, gave the answer: "No. If it was what I wanted, it was all right

¹⁸ It was stipulated that respondents could call four additional witnesses who would also testify that they had purchased the Free-Westinghouse machine. In addition, there were received in evidence nine sales invoices representing sales of Free-Westinghouse machines to other retail customers.

with him." When the same witness was asked what the salesman actually did say, he testified: "He told me I could get a better machine if I wanted one" (R. 723). The witness insisted, however, that he wasn't "pressured." Another witness, after testifying that he hadn't purchased the Free-Westernhouse because it "sounded like a rattletrap," when asked whether the salesman made any comment about this, replied: "I believe he made one statement to the effect that you probably wouldn't want this, you would want a little better machine" (R. 770). Another witness, while stating that the salesman "didn't run down" the Free-Westernhouse machine, testified that he told her that the American Home machine was "a much better machine" and "would last longer" (R. 840). Another witness was told by the salesman that the Free-Westernhouse would not go forward and reverse but that the American Home would although, as previously mentioned, this was one of the advertised features of the Free-Westernhouse machine. Several witnesses were told that the noisy performance of the machine was due to the fact that the Free-Westernhouse had a long bobbin, while the round bobbin on the American Home machine was quieter and better.

There are undeniably a number of instances in the record where customers rejected the Free-Westernhouse machine because of its deficiencies in performance, particularly its unusual noise in operation, and where there is no evidence of any overt criticism or disparagement by the salesmen. However, this does not necessarily impugn the testimony of those witnesses who claimed that the salesman had discouraged them from purchasing the machine, nor does it necessarily disprove the bait advertising charge. In the first place, the examiner is not convinced that the noisy performance of the Free-Westernhouse machine was due entirely to the fact that it had a long bobbin, as contended by respondents. The testimony of so many of the witnesses on both sides concerning the unusually noisy performance of the machine suggests that the demonstrated models had been tampered with in some way so as to accentuate the noise.¹⁹ While long bobbin machines may be noisier than the round bobbin variety, the examiner is not convinced that the difference is as great as that of the machines here demonstrated.²⁰

¹⁹ The unusually noisy character of the machine was described by the witnesses in such terms as "rattletrap," "threshing machine," "terribly noisy," "terrific amount of noise" and "awful noise."

²⁰ One of respondents' own witnesses testified that she had owned an inexpensive long bobbin machine for ten years and that it was no noisier than the round bobbin Japanese machine which she purchased from respondents and was less noisy than the Free-Westernhouse which she rejected because she "couldn't stand the noise" (R. 841, 842). One of the witnesses called in support of the complaint testified that she and her husband decided to buy the Free-Westernhouse despite its noise because they felt the noise could be remedied by tightening a few screws.

Even assuming, however, that the noise was a normal incident of the operation of the machine which resulted in persuading many purchasers to buy the American Home machine in preference to the Free-Westinghouse, this does not disprove the claims of these witnesses who testified that they were discouraged from buying the machine by the salesman since it is possible that some salesmen engaged in open disparagement of the machine, while others did not, relying instead on the performance of the machine to do the job for them. The fact that respondents continued to advertise the machine three and four times a week in such glowing terms, creating the impression that here was a most wonderful machine which was being practically given away, while knowing that many customers would decline to buy it because of its disappointing performance and would be induced to buy a more expensive machine,²¹ is itself part of a pattern of bait advertising of a more subtle variety. Under these circumstances, it was unnecessary in many instances for the salesman to dissuade the customer from buying the Free-Westinghouse and to switch him to the American Home, since the salesman had a built-in dissuader in the form of the performance of the Free-Westinghouse machine which he demonstrated.

The fact that a number of respondents' witnesses were able to purchase the Free-Westinghouse machine does not, as argued by counsel for respondents, demonstrate the falsity of the testimony of the witnesses called in support of the complaint who claimed that they were unable to buy the machine. The fact that respondents refused to take orders or avoided taking orders for the advertised machine is not only attested to by the credible testimony of witnesses called in support of the complaint, but by the testimony of respondents' own sales manager who admitted receiving complaints with regard to salesmen not taking orders for the machines. While he claimed that this occurred only "once in a while," the examiner is not convinced that this was a sporadic occurrence. At least two salesmen engaged in this practice with sufficient regularity that, according to the sales manager's testimony, one of them was discharged and the other one was asked to resign. The witness also conceded that other salesmen had engaged in the practice as well. Since the salesmen were paid on a straight commission basis of 10 per cent, it would not be unusual if they sought to avoid selling the inexpensive Free-Westinghouse machine and tried

²¹ Respondents' sales manager testified that most customers commented on the noisy performance of the machine. Both he and one of the salesmen conceded that it did not have the advertised "forward and reverse feature."

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to sell the more expensive Japanese machine.²² Despite the claims of respondents' sales manager, the examiner is convinced that the practice of not taking orders for the Free-Washinghouse was not a sporadic practice among a few salesmen. The credible testimony in the record establishes that it was widespread and that even the respondents themselves participated in the practice of trying to avoid selling the advertised machine.²³ In any event, respondents are responsible for the acts of their salesmen acting within the scope of their apparent authority.²⁴

Counsel for respondents regard the allegation of refusal to sell the Free-Westingshouse machine as being the core of the bait-advertising charge and contend that the fact the record discloses a number of Free-Westingshouse machines were actually sold to customers disproves the charge that the offers to sell the machine were not genuine. Aside from the fact that the record also discloses there was a refusal to sell the machine in a number of instances, counsel's argument overlooks the fact that the sale (or the refusal to sell) was merely the culmination of a tactic of dissuasion, sometimes brazen and sometimes subtle, in which every effort was made to induce the purchase of something other than the advertised machine. This tactic was so successful, as demonstrated by the record, that in most instances there was no necessity of a refusal to sell because the customer was induced to buy a more expensive machine. So far from establishing that any considerable number of Free-Westingshouse machines were sold by respondents, as contended by counsel, the record indicates that the sale of such machines was a relatively minor factor in respondents' business, amounting to probably less than 14 a month.²⁵

²² The motivation of the salesman under these circumstances was described by the sales manager as follows:

"Well, a salesman wouldn't turn the order in because if he had only a dollar deposit he might go back and get a larger deposit and sell the person a more expensive machine."

²³ One witness who went to respondents' store in response to an advertisement was told by a person whom he identified as the respondent Barbara E. Martin, that the respondents did not have any machines other than those which the salesmen were using as demonstrators (R. 316). Another witness who went to the store testified that a man identified as Mr. Martin "more or less began to run down" the Free-Westingshouse machine and induced him to buy another one (R. 340). Another witness testified that Mr. Martin told him at the store that the Free-Westingshouse was a "toy" and that he wouldn't want it (R. 474, 501). Other witnesses testified to telephone conversations with Miss Martin in which they were told the advertised machine had been oversold."

²⁴ *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7, 13 (C. A. 2, 1954).

²⁵ While the evidence is somewhat fragmentary, insofar as showing the total sales of the Free-Westingshouse machine, it is possible to approximate such figures. According to respondents' sales manager, his sales of the Free-Westingshouse amounted to 1 or 2 a week as compared to 7 or 8 of the American Home. Another salesman estimated his sales of Free-Westingshouse as 10 to 15 a month as compared to 25 or 30 American Home. It may be doubted that the sale of the Free-Westingshouse ran even as high as these estimates since invoices of respondents' Free-Westingshouse purchases during the nine-month period August 1952 to April 1953 indicate that their total purchases of such machines, including some different and more expensive models, averaged only about 14 machines a month. It may be assumed that respondents didn't sell more machines than they purchased.

Any doubt as to whether respondents were seriously trying to sell the Free-Westinghouse machine or were merely advertising it as a way of getting leads for the purpose of selling the American Home machine and other more expensive machines is dissipated when consideration is given to the economic realities of the situation. The record discloses that the Free-Westinghouse machines advertised by respondents were actually being sold below the cost of such machines to respondents.²⁶ When other items of cost are included in addition to what respondents paid for the machines, such as salesmen's commissions and advertising costs, it is evident that respondents could not long remain in business if they relied on the sale of the Free-Westinghouse machine. Contrasting with the loss factor which the sales of the Free-Westinghouse represented, the evidence discloses that the American Home machine, which was usually involved in the competition with the Free-Westinghouse during the period in question, was being sold at well above the cost of such machine.²⁷ In the light of these stark economic facts, the possibility that respondents were seriously offering to sell the Free-Westinghouse machine becomes extremely remote. Such facts establish beyond doubt the reasonableness of the testimony of the witnesses called in support of the complaint.

The practice of respondents in offering to sell these machines at a loss cannot be analogized to the "loss leader" type of practice or, as suggested by counsel, to the practice of offering a product which is found by the customer, after examination, to be less desirable than another product of the vendor. In a "loss leader" situation the store advertises a product at a loss in the hope of getting the customer into the store where he will buy *additional* articles. Respondents' scheme here involves an effort to *substitute* another product for the advertised product.

Respondents' practices are wholly dissimilar to legitimate merchandising practices. Here the respondents have undertaken to advertise a product which they hope and intend not to sell, except on a very limited basis, and to substitute therefor another, more expensive prod-

²⁶ A console model (52 F-302) which respondents frequently advertised for \$35.88 and \$43.33, actually cost respondents \$59.96. A portable model (52F-1216) which was advertised for as low as \$29.50, actually cost \$46.63 and \$48.45. Counsel for respondents contend that evidence as to the prices paid by respondents is immaterial and cite a ruling of the examiner as purporting to uphold this position. However, the ruling which the examiner made was in connection with a line of examination which he understood as relating to another allegation of the complaint having to do with misrepresentation of the retail price and not with the bait advertising charge.

²⁷ The American Home machine, Model 772, which respondents sold for such prices as \$119.50 and \$189.50, actually cost respondents \$50. Model 771 which respondents sold for \$119.50, \$129.50 and \$139.50, cost respondents \$52.50. Model 300, which respondents sold for \$119.50 and \$189.50, cost respondents \$51 and \$52.50. Similar differentials appear in other models.

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uct. The product which they want to sell and on which they make a profit is usually an unknown product, a Japanese sewing machine which would have limited advertising appeal. The product which they advertise is an American product whose name is almost a household word. They embark upon a campaign to sell the unadvertised produce under the guise of offering to sell the well-known product. They embellish their advertisements with the latter product's familiar "You Can Be Sure" slogan, with a list of many desirable features, with a 20-year guarantee and with an extremely low price. When persons respond to the advertisements, respondents proceed to attempt to get them to switch to the nonadvertised product. The switch tactic revolves about the so-called demonstration. Persons who call in response to the ad and offer to buy the machine outright are frequently told they must have a demonstration. The demonstrator inevitably brings along with him a more expensive Japanese machine. Then by a process akin to "brain washing" the salesman seeks to induce a switch to the more expensive machine. Sometimes the salesman is quite frank and tells the customer the Free-Westingshouse is no good; sometimes he is more subtle and calls attention to features here and there which create doubt in the mind of the average housewife for whose benefit most of the demonstrations are performed; and in some instances the raucous performance of the machine does the trick. However, where the customer will not be switched from the Free-Westingshouse, the salesmen seek in many instances to avoid selling the machine.

While respondents do sell a limited number of the Free-Westingshouse machines where they have been unable to induce the customer to purchase the more expensive machine, this is a mere incidental by-product of their fundamental strategy and is intended to give respondents' practices an aura of legitimacy. Since the Free-Westingshouse machines are sold below cost and respondents would go bankrupt if they continued to sell them in large numbers, the laws of probability suggest that they would bend every effort to sell the Japanese machines and avoid selling the Free-Westingshouse. The record in this case amply demonstrates that respondents and their salesmen have not failed to do the expected.

It is accordingly concluded and found that respondents' offers to sell the Free-Westingshouse machine were not genuine and bona fide but were made for the purpose of obtaining leads and information as to persons interested in purchasing a more expensive machine and that when persons responded to their advertisements, respondents or their salesmen disparaged the advertised machine, made no effort to sell it or ignored it and attempted to sell a more expensive machine, usually

one of Japanese origin, and where persons indicated a desire to purchase the advertised machines respondents or their salesmen in many instances refused to see it.²⁸

C. The Misrepresentation as to Price

The complaint charges respondents with having misrepresented the regular price of the Free-Westinghouse machine in their advertisements and the amount of savings to be realized at the price offered by respondents. Typical of the statements charged as misleading, which appear in the advertisements, is one referring to the machine as "\$119.50 Value," offering to sell it for \$38.88, and stating that this will "Save \$80.62." Respondents have admitted in their answer advertising the machine in the manner indicated, but deny that this constituted a representation that the stated value was the regular price of the machine.

The primary issue which arises under this allegation of the complaint revolves about the meaning of the term "value" in the context of respondents' advertisements. The theory of counsel supporting the complaint is that by stating that the machine had a particular "value," respondents were representing that that was the price at which the respondents themselves had currently been selling the machine. The position of counsel for respondents is that by advertising the machine in this manner respondents were not claiming that the stated "value" was their regular price for the machine, but rather that it was the "regular market value" of the machine, by which the examiner assumes counsel means the "regular market price" of the machine.

The examiner does not agree with counsel supporting the complaint that a statement that a product has a certain "value" amounts to a representation that the figure indicated has been the regular price of the particular advertiser. In the opinion of the examiner a product may be said to have a certain "value" if the product is being sold regularly, i.e., to any substantial extent, at that price in the community, even though the particular advertiser has never sold it at that price.

The question which next arises is whether the statements made by respondents concerning the "value" and the concomitant "savings" on the machines are true or false. Most of the advertisements in the record involve the same model Free-Westinghouse machine, a console 52-F-302. There is only a minor difference in the testimony concerning the retail price of this machine. According to the testimony of the

²⁸In making the above findings the examiner has placed no reliance on matters dehors the record herein which are referred to in the proposed findings of counsel supporting the complaint, such as the action taken by the Council of State Governments, the Massachusetts bait advertising statute, and a brochure of the Better Business Bureau.

witnesses called in support of the complaint, the retail price of this machine at the time it was advertised was \$79.95, while according to the testimony of the respondent Barbara E. Martin it was \$89.95. Even accepting the latter figure, it is obvious that the regular retail price of the machine was substantially below the advertised "value" of \$119.50.²⁹ Although respondents make the doubtful claim that the current price of one of the other models advertised (8-F-1482) was actually \$119.50, there are a sufficient number of other instances of price misrepresentation in the record to sustain the charges in the complaint, without regard to the advertisement in question.³⁰

The only justification which respondents offered for advertising the Free-Westinghouse machine as a \$119.50 "value" was based upon the testimony of respondent Barbara E. Martin that the value was arrived at by taking the current list price of the machine, \$89.95, and adding thereto the value of certain additional items which were included in the price of the machine, *viz.*, a pinking shears and ten sewing lessons. The examiner cannot accept this explanation as establishing the truthfulness of the representations made in the advertisements. In the first place, the value of the additional items cannot be deemed part of the value of the machines. The advertisements patently refer to the value of the machine and not to any ancillary items. Such items were offered "free" or "at no extra cost" and cannot, therefore, be regarded as part of the represented value of the machine.³¹

Moreover, the examiner is convinced that respondents' explanation is merely a bit of *ex post facto* rationalizing and has nothing to do with respondent's reasons for fixing the "value" of the advertised machine. In 1952 respondents had used the phrase "regular value" in advertising their machines. According to the testimony of the respondent Barbara E. Martin, she was advised by a Commission investigator in October 1952, that this amounted to a representation that the figure stated was the regular price of the machine and for

²⁹ Counsel for respondents argue that there was no showing as to what the regular price of the machine in the Washington, D. C., market was since there was no evidence as to the number of retailers in the market and as to what their prices generally were. However, counsel supporting the complaint did establish what the current list price of this machine was, that retailers usually sold at or about the list price, that at least two retailers in the Washington area were selling the machine at that price, and that respondents were selling it below the price. From this it may be readily inferred that the regular market price of the machine was substantially less than \$119.50. The burden of showing that any sizable number of retailers were actually selling the machine at or about \$119.50 would then shift to respondents.

³⁰ Respondent Barbara E. Martin testified that the list price of this machine was \$119.50 at the time it was so advertised. Counsel for respondents contend that her testimony was corroborated by that of a representative of the manufacturer of the machine. However, the latter's testimony was to the effect that this was the price of the machine in 1950 and 1951, and that it had not been manufactured since that time. The manufacturer's price list, which was introduced in evidence, fails to contain any price for this model.

³¹ Cf. *Walter J. Black, Inc.*, Docket No. 5371, September 11, 1953.

that reason the word "regular" was dropped from the advertisements thereafter. In the advertisements in evidence in which the phrase "regular value" was used, the amount mentioned coincides in most instances with the former list price of the machine. The amounts stated in the advertisements in evidence for 1953, in which the word "value" alone was used, all coincide with the former list price of the machines. It seems evident that respondents were merely trying to continue their former practice of claiming that the old list price was the value of the machine, while purporting to meet the objections of the Commission investigator by dropping the word "regular." The examiner is convinced that this, rather than any additional value, created by the offer of sewing lessons and pinking shears, is the explanation for the amounts chosen by respondents as the value of the machine. It may be noted, in this connection, that the word "value" appeared in the advertisements without regard to whether pinking shears and sewing lessons were offered or not, and even though in some instances both of these additional inducements were offered while in others only one of them was offered.

It is accordingly concluded and found that by advertising that the Free-Westinghouse machines had a "value" of \$119.50 or some other amount, respondents represented that such amount was the price at which said machines were regularly being sold in the market, and that the amount which the purchaser would "save" was based upon the regular market price of said machines. It is further concluded and found that such representations were false, misleading and deceptive in that a number of the advertised machines were not being sold in the Washington, D. C. market for the price indicated to be the value of the machines, at or about the time they were so advertised, and the amount of the savings which would be realized was substantially less than the amount represented, based on the regular market price of said machines.

D. *The "Guarantee"*

The complaint alleges that respondents in their advertising have represented that their sewing machine carries a "20 Year Guarantee." It is further alleged that the use of such statements of guarantee without disclosing the terms and conditions of the guarantee, the name of the guarantor and the manner in which the guarantor will perform is confusing and misleading. Respondents admit in their answer advertising a 20-year guarantee, but allege that since October 1952 the advertised guarantee has clearly contained the name of the guarantor and, substantially, the terms of such guarantee. It is further alleged that to require respondents to publish additional details of the guarantee would be unduly burdensome.

The evidence with respect to the advertising of a 20-year guarantee relates primarily to the Free-Westinghouse machine.³² The record discloses that in advertising such machines respondents used the phrase "20 Year Guarantee." This phrase appeared in a prominent place in the advertisements, usually directly underneath a picture of the Free-Westinghouse machine, and was printed in bold letters approximately $\frac{3}{8}$ of an inch in height.

The contention of respondents with regard to changing their advertising is based on the testimony of respondent Barbara E. Martin, that around October 1952, a Commission investigator advised her that the advertisements should state what the guarantee covered, and that thereafter she changed the advertisements so as to indicate that the guarantee was on parts only.³³ The change in advertising, upon which respondents rely, does not involve any modification in the use of the phrase "20 Year Guarantee," which continues to have the same prominent place in their advertisements as before. There is no reference in this portion of the advertisement to the fact that the guarantee is limited to parts. However, in another portion of the advertisement in which are listed the "Features" of the machine, there appears the phrase "20 Year Parts Guarantee." This phrase is included in the middle of a number of performance "features" of the machine and is printed in small letters, approximately $\frac{1}{16}$ of an inch in height.

The contention of counsel supporting the complaint that the "guarantee" allegation of the complaint has been sustained by the evidence is based primarily on testimony and other evidence relating to a "Guarantee Bond," which was given or promised to purchasers of respondents' Japanese "American Home" machine.³⁴ The authority which counsel cites in support of his position, the *Bega Sewing Machine* case,³⁵ relates to a "Warranty Certificate" which was advertised in connection with the sale of Japanese machines. However, in

³² Most of the advertisements offered in evidence by counsel in support of the complaint in which there is reference to a 20-year guarantee involves the Free-Westinghouse machine. There are two exhibits relating to a Singer machine (CX 6 and 7) and one exhibit relating to an unknown brand of machine (CX 11).

³³ The record discloses that as late as November 5, 1952, respondents were still advertising the Free-Westinghouse as bearing a 20-year guarantee, without qualification. The earliest evidence of an advertisement referring to the guarantee as being limited to parts is an advertisement dated March 11, 1953. It will be assumed, however, for purposes of this decision that sometime between November 1952 and March 1953, there was a change in respondents' advertising which is reflected in the advertisement of March 11, 1953, appearing in the record.

³⁴ Counsel's argument in this respect is as follows:

"The writing itself shows on its face that there is neither a 20 year warranty nor any other kind of warranty, and no warranty backs up one of these imported Japanese machines when either wholesaled or retailed for the reason that any warranty or guaranty bond is backed up by the force of its manufacturer for warranties on bonds and not the retailer."

³⁵ Docket No. 5893, September 18, 1953.

the instant case the complaint is not based on the insufficiency of any "guarantee bond" or "warranty certificate" advertised or given in connection with the sale of Japanese machines. The complaint alleges a failure to make full disclosure of a "20-year guarantee" referred to in advertisements placed by respondents in newspapers. However, as already indicated above, such advertisements relate primarily to the Free-Westinghouse machine, and there is no evidence that the "Guarantee Bond" given in connection with the sale of the Japanese machines is the same as the 20-year guarantee advertised in connection with the Free-Westinghouse machines.

Despite the irrelevance of much of the argument of counsel supporting the complaint, there is, nevertheless, sufficient evidence in the record to sustain the allegations of the complaint without regard to any guarantee given in connection with the Japanese machines. As has already been found, respondents advertised the Free-Westinghouse as carrying a "20 Year Guarantee." Many readers seeing such advertisement would assume that it reflected a full 20-year guarantee, without limitation. While respondents did in the latter part of 1952 or early 1953 include an additional phrase in their advertisements relating to parts, this phrase appeared in much smaller print and in a less prominent place in the advertisement. In the opinion of the examiner, in order to properly inform the public that the guarantee was limited to parts, either the word "parts" should have been inserted in the prominently used phrase "20 Year Guarantee," or the separate phrase, "20 Year Parts Guarantee" should have been placed in close proximity to the phrase "20 Year Guarantee" and in letters of substantially the same size.³⁶ It is accordingly found that both the former and the present arrangement of respondents' advertisements tend to confuse and mislead the public in that they fail to adequately disclose material limitations with respect to the terms and conditions of the guarantee or the manner of performance thereof.

Respondents' advertisements of a 20-year guarantee are objectionable for the additional reason that they fail to disclose the identity of the guarantor. While respondents state in their answer that the name of the guarantor is now clearly disclosed as a result of the changes which occurred around October 1952, reference to the advertisements indicates that there has been no change in this respect.

³⁶ See in this connection *Parker Pen Co. v. FTC*, 159 F. 2d 509 (C. A. 7, 1946), involving an unqualified guarantee appearing in large letters in a conspicuous place in advertisements, and a limitation on the guarantee appearing in small letters in a less conspicuous place, where the court commented:

"We conclude that the objection to petitioner's advertisement is that the limiting words of the guarantee appear in small print, plus the further fact that the location of the limiting words is some distance from the words of the guarantee."

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The name of the advertiser "Household Sewing Machine Company" appears in the advertisements now, as it did prior to the alleged change in format. However, there is no indication whether that company or the manufacturer of the Free-Westinghouse machine is the guarantor under the advertised guarantee.

Counsel for respondents argue that no case has been established because there has been no showing that anyone was misled or confused by respondents' advertisements. However, it is elementary that evidence of actual deception is unnecessary since it is sufficient if the advertisements have the capacity to deceive.³⁷ The finding here made that there is a tendency to mislead and deceive is not based on any "naked allegation [in the complaint] alone," as counsel appear to assume, but on the advertisements which are in evidence and the admitted fact that the guarantee is limited to parts, from which the Commission and its examiner can appropriately draw inferences without the use of so-called public witnesses.³⁸

Neither the *Astor Industries* nor the *Modern Sewing Machine* cases,³⁹ cited by counsel for respondents, is in any way inconsistent with the position here taken and with the authorities above cited. In the *Astor Industries* case, the allegation of deception was based on a "Guarantee Bond" appearing in a booklet given by respondents to their retailers, who in turn gave it to purchasers. It was alleged that the guarantee bond did not sufficiently set forth the terms and conditions of the guarantee. However, since the terms of the guarantee were actually set forth in the bond *in extenso*, the issue narrowed down to whether the bond was sufficiently clear as to whether it was a guarantee by the manufacturer or the dealer. Based on the plain wording of the bond, which provided for signature by the "Dealer," and the testimony of reliable witnesses, it was found that the guarantee was not misleading. This does not amount to a holding that the Commission and the examiner cannot find a guarantee to be misleading based on the guarantee document itself or on an advertisement relating to it.⁴⁰

³⁷ *Parker Pen Co. v. FTC, supra*; *Charles of the Ritz Co. v. FTC*, 143 F. 2d 676 (C. A. 2, 1944).

³⁸ *Zenith Radio Corporation v. FTC*, 143 F. 2d 29 (C. A. 7, 1944); *Rhodes Pharmacal Company, Inc. v. FTC*, 208 F. 2d 382 (C. A. 7, 1953).

³⁹ Docket No. 5889, February 17, 1954; 49 FTC 1111.

⁴⁰ Counsel for respondents refer, in this connection, to a ruling of the examiner which they contend requires that the guarantee itself be produced in order to establish a prima facie case. This was not the holding of the examiner in the ruling to which counsel refer. The occasion for the ruling was an effort by counsel supporting the complaint to establish the terms of the warranty through a facsimile contained in a booklet. The substance of the examiner's ruling was that, to the extent counsel was seeking to establish the terms of the guarantee, he should do so through a copy of the guarantee and not by some facsimile in a booklet.

In the *Modern Sewing Machine* case, the allegation of deception was based on circulars in which respondents described their machines as "Guaranteed factory rebuilt sewing machines." It was found that there was no likelihood of confusion to the disadvantage of customers since the evidence showed that respondents either furnished another machine or refunded the purchase price to dissatisfied customers. This decision amounts to a holding that by using the expression "guaranteed" respondents had, in effect, represented that their machines were fully guaranteed without qualification, and that since the evidence showed respondents had fully performed on their guarantee there was no likelihood of deception. In the present case there is not a full guarantee but a partial guarantee, which is not sufficiently disclosed in the advertisements nor is it adequately disclosed who the guarantor is.

It is accordingly concluded and found that in advertising that their machines carry a "20 Year Guarantee" respondents have, in effect, represented that their machines are fully guaranteed without limitation, and have failed to adequately disclose a material limitation on the nature and extent, or manner of performance, of the guarantee, and the identity of the guarantor. With respect to respondents' argument that it would be burdensome to set forth all the terms and conditions of the guarantee in advertisements, it may be noted that the examiner does not understand that they are required to do so. Only to the extent that there is a material limitation on what might otherwise appear to be an unlimited guaranty, is there an obligation to make reference to it in their advertisements.

E. *The Advertising of Attachments*

The complaint alleges that respondents in their advertising represented that their machines would perform certain functions with the use of attachments, but failed to disclose that the cost of the attachments was not included in the advertised price. The advertisements complained of are mainly those for the Free-Westinghouse machine. It is not disputed that respondents stated in a number of their advertisements that their machines would perform certain functions with the use of attachments, such as embroidering, buttonholing, darning, etc., and that they failed to disclose in certain of these advertisements that the price of the attachments necessary to perform these operations was not included in the advertised price of the machine. It is also undisputed that at some time after the visit of the Commission investigator, previously referred to, respondents changed their advertisements in order to make reference to the fact that the attachments were available at additional cost. Such change involved the addition of

the words "Attachment Extra" in small letters, beneath a list of "Features" of the machine. The position of counsel for respondents on this issue is, (a) that there is a deficiency in the proof offered in support of the complaint since there has been no showing that any member of the public was misled by respondents' former practice, and (b) there is no longer any need for corrective action since the practice was discontinued prior to the issuance of the complaint.

The examiner cannot agree with the contention of counsel based on the alleged lack of evidence of actual deception. Where an advertisement states that a machine will perform certain functions with the use of attachments and offers to sell the machine at a specified price, it is implied that the price includes the machine with the attachments which will perform the stated functions. The fact that there is actually an additional charge for the attachments is a material fact which should be clearly revealed in the advertisements, the failure to reveal which, has a tendency to mislead and deceive the public. That the failure to reveal this fact has such a tendency is a matter which the Commission and its examiner can infer and find from the advertisements without the necessity for testimony of actual deception.

With respect to counsel's second contention, based on the alleged change in respondent's method of advertising with respect to attachments, it may be noted, first, that it is not entirely clear that respondents have abandoned the objectionable practice. The use of the phrase "Attachment Extra," appearing in small letters at a point removed from the description of the items which may be performed "with the aid of wonderful easy-to-use attachments," is hardly calculated to give the reader clear notice of the additional cost of such attachments. It may be noted further, in this connection, that in respondents' more recent advertising they have dropped specific reference to the operations which may be performed with the aid of the attachments and have eliminated the phrase that the price of the attachments is extra. However, they have continued to include among the so-called "Feature" items of the machine the phrase: "Cover feed for embroidering, darning, monogramming, hemstitching and buttonholing." There is no question that these latter operations can only be performed with the use of attachments. Counsel for respondents argue that the reference to a "cover feed" for the attachments is not the same as referring to the attachments themselves. However, while a sophisticated housewife who is thoroughly experienced in the fine points of the sewing art may appreciate this distinction. It is the opinion of the examiner that many persons, less well-informed, would assume that the attachments for performing these operations were included in the offer.

In any event, assuming that there has been a material change in respondents' advertising practices so as to eliminate the confusion which existed concerning the matter of attachments, it is the opinion of the examiner that there is still a need for corrective action in this respect. As counsel for respondents themselves recognize, the mere discontinuance of an illegal practice does not necessarily dispense with the need for the issuance of an order in the public interest.⁴¹ The facts here indicate violations of the Federal Trade Commission Act on a wide scale and the engagement in some practices which were deliberately calculated to deceive the public. Although respondents purported to modify some of their advertising practices on advice of a Commission investigator, they did so grudgingly, and in a manner calculated to bring them just barely within the law—the letter of the law, and certainly not its spirit. Under all the circumstances, it is the opinion and finding of the examiner, that there is still a need for corrective action with respect to the practice here at issue and that unless appropriate provision is made, there is a reasonable possibility that respondents may resume the objectionable practices in the same or in an altered form.

F. *The Offer of Free Sewing Lessons*

The complaint alleges that respondents stated in their advertising that a purchaser would be entitled to and would receive ten sewing lessons upon the purchase of a sewing machine. It is alleged that this representation was untrue in that respondents "did not furnish any sewing lessons in the sense that the word 'lessons' is generally understood, that is, personal instruction" but that any so-called lessons given by respondents were written.

As stated in the examiner's order of September 29, 1954, denying respondents' motion to dismiss at the close of the evidence in support of the complaint, there is a failure of proof with respect to this allegation of the complaint. Provision for dismissal thereof will, accordingly, be hereinafter made.

IV. Effect of the Illegal Practices

The failure of respondents to adequately disclose on their sewing machine heads that they are made in Japan and also the use of the trade or brand name "American Home De Luxe" has had and now has the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that respondents' sewing

⁴¹ See, e. g., *Consolidated Royal Chemical Corp. v. F. T. C.*, 191 F. 2d 896; *Hillman Periodicals, Inc. v. F. T. C.*, 174 F. 2d 122.

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machines are of domestic manufacture and to induce the purchase of their sewing machines because of such erroneous and mistaken belief. Further, the use by respondents of the other false, misleading and deceptive statements and practices hereinabove found has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said statements were true and into the purchase of respondents' sewing machines because of such erroneous and mistaken belief.

Respondents, in the course and conduct of their business, are in substantial competition in commerce with the makers and sellers of domestic machines.⁴² As a result of the false, misleading and deceptive statements and practices hereinabove found, it may reasonably be inferred that substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and that substantial injury has been and is being done to competition in commerce.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors, and 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.

ORDER

It is ordered, That respondents Barbara E. Martin, Hershel Martin and Dennis Martin, individually and as co-partners doing business as Household Sewing Machine Company, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines, sewing machine heads, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such a manner that it cannot readily be hidden or obliterated.

⁴² The complaint also alleges that respondents are in competition with other sellers of imported machines some of whom adequately inform the public as to the source of origin of their said products. There is no evidence to sustain the allegation with respect to other sellers of imported sewing machines adequately informing the public concerning the origin of their product, and accordingly no finding to this effect is made.

2. Representing, directly or by implication, that a specified amount is the value of merchandise being offered for sale when such amount is in excess of the price at which said merchandise is regularly and customarily sold in the normal course of business in the same trade territory.

3. Representing, directly or by implication, that any savings are afforded on the sale of merchandise represented as having a certain value, unless the represented savings are based upon the price at which said merchandise is regularly and customarily sold in the normal course of business in the same trade territory.

4. Representing, directly or by implication, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

5. Representing, directly or by implication, that their sewing machine heads or sewing machines are guaranteed for 20 years or for any period of time, or that they are otherwise guaranteed, without clearly and conspicuously disclosing the existence of any material limitations upon the nature and extent of such guarantee or the manner of performance thereof, and the identity of the guarantor.

6. Representing, directly or by implication, that the price of a sewing machine includes any attachments for which an additional charge is made.

7. Using the word "Home," or any simulation thereof, as a trade or brand name, or as a part of a trade or brand name, to designate, describe, or refer to their sewing machines or sewing machine heads; or representing, through the use of any other word or words, or in any other manner, that their sewing machines or sewing machine heads are made by anyone other than the actual manufacturer.

It is further ordered, That with respect to any issue raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did on the 16th day of September, 1955, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.