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Opinion

It is ordered, That, as to respondents American Chinchilla Corporation, Lowell Thomas Page, Robert V. Fudge, and Gardner F. Tinnin, the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That, as to respondent John C. Green, Jr., the complaint be, and it hereby is, dismissed.

IN THE MATTER OF

LAMRITE WEST, INC., TRADING AS A. C. SUPPLY CO.,
ETC.

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

Docket C-1663. Complaint, Dec. 23, 1969—Decision, Dec. 23, 1969

Consent order requiring a Cleveland, Ohio, importer of foreign merchandise to cease importing and marketing dangerously flammable wood fiber chips used primarily for making artificial flowers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lamrite West, Inc., a corporation, also trading as A. C. Supply Co. and as Catan's Lamrite, and Pat Catanzarite, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lamrite West, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 6605 Clark Avenue, Cleveland, Ohio. Respondent also trades as A. C. Supply Co. and as Catan's Lamrite.

Individual respondent Pat Catanzarite is the principal officer of said corporate respondent. He formulates, directs and controls

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the acts, practices and policies of said corporate respondent and his address is the same as that of the corporate respondent.

Respondents are engaged in the sale of various consumer goods, including, but not limited to, wood fiber chips.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale and offering for sale, in commerce, and in the importation into the United States, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, fabrics, as the terms "commerce" and "fabric" are defined in the Flammable Fabrics Act, as amended which fabrics failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such fabrics mentioned hereinabove were wood fiber chips.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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

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

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

1. Respondent corporation is organized, existing and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 6605 Clark Avenue, Cleveland, Ohio.

Respondent Pat Catanzarite is an officer of said corporate respondent and his address is the same as the corporate respondent.

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

ORDER

It is ordered, That respondents Lamrite West, Inc., a corporation, also trading as A. C. Supply Co., and Catan's Lamrite or under any other name or names, and its officers, and Pat Catanzarite, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any fabric as "commerce" and "fabric" are defined in the Flammable Fabrics Act, as amended, which fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission an interim special report in writing setting forth the respondents' intention as to compliance with this order. This interim special report shall also advise the Commission fully and specifically concerning the identity of the fabric which gave rise to the complaint, (1) the amount of such fabric in inventory, (2)

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any action taken to notify customers of the flammability of such fabric and the results thereof and (3) any disposition of such fabric since October 2, 1968. Such report shall further inform the Commission whether respondents have in inventory any wood fiber chips or any other fabric, product or related material having a plain surface and made of silk, rayon or cotton or combination thereof in a weight of two ounces or less per square yard or made of cotton or rayon or combinations thereof with a raised fiber surface. Respondents will submit samples of any such fabric, product or related material with this report.

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

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

IN THE MATTER OF

MALOOLY'S FURNITURE AND CARPET CITY, ET AL.

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

Docket C-1664. Complaint, Dec. 24, 1969—Decision, Dec. 24, 1969

Consent order requiring an El Paso, Texas retailer of furniture, appliances and carpeting to cease falsely advertising and guaranteeing and misbranding its textile fiber products, making deceptive pricing claims, misrepresenting that it is endorsed by a Federal agency, and falsely claiming that it conducts factory bankrupt sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Malooly's Furniture and Carpet City, a partnership, and Edward T. Malooly, individually and as a copartner trading as Malooly's Furniture and Carpet City, and George J. Malooly, individually and as a copartner

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trading as Malooly's Furniture and Carpet City, and as Malooly's Discount Center, or under any other name or names, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Malooly's Furniture and Carpet City is a partnership organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 9220 Dyer Street, El Paso, Texas. George J. Malooly and Edward T. Malooly are individuals and copartners in said partnership, with their office and principal place of business located at 222 South Santa Fe Street, El Paso, Texas.

Respondent George J. Malooly is an individual trading as Malooly's Discount Center. Malooly's Discount Center is located at 600 North Main Street, Las Cruces, New Mexico. Individual respondent George J. Malooly maintains his office and principal place of business at 222 South Santa Fe Street, El Paso, Texas.

Respondents are primarily engaged in the retail sale of carpets. Sales of furniture and appliances are also made.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, sale, advertising and offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported or caused to be transported, textile fiber products, which have been advertised, or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or

otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were floor coverings which were falsely and deceptively advertised in the El Paso Times, a newspaper published in the city of El Paso, Texas, and having a wide circulation in the said State and various other States of the United States.

Also among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely floor coverings, which were falsely and deceptively advertised by means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, in that said floor coverings containing exempted backings, fillings or paddings, were described therein as "DuPont 501 Nylon" without a disclosure that such fiber content information applied only to the face, pile or outer surface of the floor coverings and not to be exempted backings, fillings or paddings. The respondents' description of said floor coverings without such disclosure had the tendency and capacity to mislead respondents' customers and others into the erroneous belief that said floor coverings were composed entirely of nylon when this was not the fact. Such failure to disclose a material fact was to the prejudice of respondents' customers and the purchasing public and constituted false and deceptive advertising under Section 4(a) of the Textile Fiber Products Identification Act.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that there were not on or affixed to said textile fiber products any stamps, tags, labels, or other means of identification showing the required information, in violation of Section 4(b) of the Textile Fiber Products Identification Act.

PAR. 5. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were floor coverings which were falsely and deceptively advertised by means of advertisements placed by the respondents in the El Paso

Times, published in El Paso, Texas, and having a wide circulation in said State and various other States of the United States, in that the true generic names of the fibers in such floor coverings were not set forth.

PAR. 6. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. In disclosing the required fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such required fiber content information related only to the face, pile, or outer surface of the floor coverings and not to the backings, fillings, or paddings, in violation of Rule 11 of the aforesaid Rules and Regulations.

2. A fiber trademark was used in advertising textile fiber products, namely floor coverings, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41 (c) of the aforesaid Rules and Regulations.

PAR. 7. The acts and practices of the respondents, as set forth above, were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 8. Respondents are now and for some time last past have been engaged in the advertising, sale, offering for sale, and distribution of floor coverings, and other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, respondents have advertised their products in "The El Paso Times" a newspaper published in El Paso, Texas, and having a wide circulation in said State and various other States of the United States.

Also in the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in

the State of Texas to purchasers thereof located in various other States of the United States.

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

PAR. 9. Respondents in the course and conduct of their business, as aforesaid, have made guaranty statements in the El Paso Times, a newspaper published in El Paso, Texas, advertising their textile fiber products, namely, floor coverings, as:

"Guaranteed 10 Years."

PAR. 10. Through the use of such statements and representations as set forth above, and others similar thereto, but not specifically set out herein, the respondents have represented directly or indirectly, to the purchasing public, that said floor coverings are unconditionally guaranteed for ten years.

PAR. 11. In truth and in fact, said floor coverings are not unconditionally guaranteed for ten years and the nature and extent of the guarantee and the manner in which the guarantor will perform was not set forth in connection therewith. Moreover, the name and address of the guarantor were not set forth as required. Therefore, the statements and representations made by the respondents, as hereinbefore stated, were and are, false, misleading and deceptive.

PAR. 12. Respondents in the course and conduct of their business, as aforesaid, have made certain statements with respect to the pricing of their textile fiber products, namely, floor coverings, in the El Paso Times. Among and typical, but not all inclusive of such statements are the following:

\$10.95 sq. yd. to be sold for \$3.95 sq. yd.
\$10.95 sq. yd. to be sold for \$3.85 sq. yd.
\$10 sq. yd. to be sold for \$3.95.

PAR. 13. By and through the use of the above-quoted statements, and others of similar import not specifically set out herein, respondents have represented, directly or by implication, that the higher stated prices set out in said advertisements were the prices at which the advertised merchandise was sold or offered for sale by respondents, in good faith, for a reasonably substantial period of time in the recent regular course of their business, and that the prices of respondents' products were reduced from the higher stated prices and the amounts of such reductions represented savings to the purchasers thereof.

PAR. 14. In truth and in fact, the higher prices set out in said advertisements were not the prices at which the advertised merchandise was sold or offered for sale by respondents, in good faith, for a reasonably substantial period of time in the recent, regular course of their business, and the prices of respondents' products were not reduced from the higher prices; therefore, the amounts of such reductions did not represent savings to the purchasers thereof.

PAR. 15. In the course and conduct of their aforesaid business, and for the purpose of bolstering and reinforcing their claims that certain floor coverings were being offered for sale at greatly reduced prices, respondents have made statements in advertisements inserted in the El Paso Times and the El Paso Herald Post, newspapers published in El Paso, Texas and having a wide circulation in said State and various other States of the United States. Among and typical of such statements are the following:

Government Approved F.H.A. Carpet
Dupont 501, Factory Bankruptcy sale * * *

Malooly buys all remaining stock of Jackson Manufacturing Company, Jackson, Mississippi, and offers it to the public at Pennies on the Dollar!

Ring!! Ring!! Ring!! * * * Long Distance
call for Eddie Malooly! Curt Baxter,
President of Prestige Furniture at
Newton, North Carolina, calling. We
will give you up to 50% discount from
our wholesale prices.

PAR. 16. By and through the use of the above statements and others of similar import not specifically set out herein, respondents have represented, directly or by implication, that:

(a) The Federal Housing Administration had approved the respondents' business or the carpet respondents sell;

(b) Respondents were connected with or were conducting a bankruptcy sale;

(c) Respondents have acquired their products being offered for sale by means of special purchases from certain specific sources; and

(d) Through such special purchases savings are being afforded the purchasing public.

In truth and in fact:

1. Neither the Federal Housing Administration or any other agency has issued any "endorsement" or "approval" of respondents' business or any product of respondents' business.

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2. Respondents' were not conducting or connected with a bankruptcy sale.

3. Respondents did not acquire the products being offered for sale by special purchase from sources designated in the advertisement; and

4. Savings were not afforded the purchasing public as represented.

PAR. 17. The aforesaid acts and practices of the respondents, as herein alleged in Paragraphs Nine through Sixteen, were and are, all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

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1. Respondent Malooly's Furniture and Carpet City is a partnership with its office and principal place of business located at 9220 Dyer Street, El Paso, Texas.

Respondent George J. Malooly and Edward T. Malooly are individuals and copartners in said partnership, with their office and principal place of business located at 222 South Santa Fe Street, El Paso, Texas.

Respondent George J. Malooly is an individual trading as Malooly's Discount Center. Malooly's Discount Center is located at 600 North Main, Las Cruces, New Mexico.

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

ORDER

It is ordered, That respondents Malooly's Furniture and Carpet City, a partnership, and Edward T. Malooly, individually and as a copartner trading as Malooly's Furniture and Carpet City, and George J. Malooly, individually and as a copartner trading as Malooly's Furniture and Carpet City, and as Malooly's Discount Center, or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such

products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Falsely and deceptively advertising textile fiber products by:

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

2. Failing to set forth in disclosing the required fiber content information as to floor coverings containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, filling or paddings.

3. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement in immediate proximity and conjunction with the generic name of the fiber plainly in legible and conspicuous type.

It is further ordered, That respondents Malooly's Furniture and Carpet City, a partnership, and Edward T. Malooly, individually and as a copartner trading as Malooly's Furniture and Carpet City, and George J. Malooly, individually and as a copartner trading as Malooly's Furniture and Carpet City, and as Malooly's Discount Center, or under any other name or names, and respondents' representatives, agents and employees, directly or through

any corporate or other device, in connection with the advertising, sale, offering for sale, or distribution of floor coverings, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the name of the guarantor, the address of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith.

2. Representing, directly or by implication, that any price, whether accompanied or not by descriptive terminology is the respondents' former price of any such product when such price is in excess of the price at which such product has been sold or offered for sale in good faith by the respondents for a reasonably substantially period of time in the recent regular course of business, or otherwise misrepresenting the price at which any such product has been sold or offered for sale by respondents.

3. Falsely representing that savings are afforded to the purchaser of any such product or misrepresenting in any manner the amount of savings afforded to the purchaser of such product.

4. Falsely representing that the price of any such product is reduced.

5. Falsely representing that the Federal Housing Administration, or any other agency of the United States Government, has issued an approval or endorsement of respondents' business or falsely representing that respondents' products have been endorsed by any other organization or person.

6. Falsely representing that respondents are conducting, or are in any way connected with, a "factory bankruptcy sale."

7. Falsely representing that respondents have acquired any products by means of special purchases or that through such special purchases, savings are being offered to the consuming public misrepresenting in any manner the source from which any of respondents' merchandise was obtained.

It is further ordered, That the respondents henceforth maintain full and adequate records supporting all pricing claims made by them.

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

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

AVON PUBLICATIONS, INC., ET AL.

Docket 6911. Opinion and Order, July 15, 1969

Order adopting hearing examiner's recommendation that show cause order be vacated and that proceeding to determine whether Hearst Corporation was to be considered the successor to any of corporate respondents be dismissed.

OPINION OF THE COMMISSION

This matter presents a single narrow issue for the determination of the Commission: Is the Hearst Corporation a successor to the respondent corporations herein such that it may be bound by the consent order entered against those respondents?

On October 21, 1958, the Commission issued a consent order against Avon Publications, Inc., Avon Publishing Company, Inc., Avon Book Sales Corporation,¹ Joseph M. Mann, and Harry Rebell, prohibiting continuance of certain misleading practices with respect to the titling of books, *Avon Publications, Inc.*, 55 F.T.C. 619. The respondent corporations were part of a group of publishing companies, owned entirely by Joseph Meyers and Harry Rebell, which had been separately incorporated for tax and other business purposes. Mr. Meyers, who owned 85 per cent of the stock of these corporations and was responsible for formulating company policy and managing daily operations, died on November 3, 1957, prior to issuance of the order against the Avon companies. Mr. Meyers' interest in the publishing companies comprised the major portion of his estate and, from the time of Mr. Meyers' death, the attorneys representing the Meyers' estate urged Mr. Rebell—who owned the remaining 15 percent of the stock in the corporate group—to liquidate the Meyers' interest.

¹ Before the order issued, Avon Publishing Company, Inc., was merged into Avon Publications, Inc. In this opinion, the corporations subject to the 1958 consent order are sometimes referred to as "the Avon companies."

The principal consideration leading to disposition of both the Meyers and Rebell interests in the publishing companies was the desire of Mr. Rebell to find a more profitable and more easily manageable investment for himself and for Mr. Meyers' widow than was afforded by investment in a group of publishing companies. Consequently in late 1958, after the order against the Avon companies had issued, Mr. Rebell contacted Fred Lewis, vice president of Hearst Corporation, regarding the possible sale of Avon's assets.² Negotiations between Lewis and Rebell, evidently at arm's length and guided carefully by experienced counsel,³ culminated in an agreement dated May 5, 1959, for the transfer to Hearst of most of the assets of the Avon companies, including the inventories, trademarks, trade names, and the goodwill of the businesses.⁴ Not all of the Avon assets were transferred, however; for example, the accounts receivable were not sold.

The evidence is uncontradicted that the Hearst Corporation never received actual notice, prior to consummation of the agreement, of the order issued against the Avon companies, and there is evidence that Hearst would not have purchased the Avon assets had it known of the order.

After the transfer of the Avon assets to Hearst, only two major employees of Avon—neither an Avon stockholder—were retained by Hearst. Neither of these employees became officers of Hearst and both left the employ of Hearst within a few years of the transfer. The Avon company operations became the operations of the Avon Division of Hearst Magazines of Hearst Corporation and, within a year of the transfer, were moved from their previous location to the Hearst Corporation's main building.

² Prior to this time, there had been other dealings between Hearst and the Avon companies. International Circulation Distributors, a division of the Hearst Corporation, had been a distributor of Avon's pocketbooks for seven years to wholesalers and retailers throughout the United States. This relationship between Hearst and Avon was not an exclusive one; Hearst had competitors in the field and it performed distribution services for many other customers.

³ The final agreement encompassed 15 pages of typewritten provisions specifying the details of the arrangements and how they were to be carried out. Among other things, a representation was secured by Hearst that there was no litigation pending or threatened that would affect the trademarks or trade names transferred; moreover, Avon's attorney represented that only one suit was pending against any Avon company and that was probably barred by the statute of limitations.

⁴ The other publishing companies which belonged to the group of publishing companies owned by Meyers and Rebell but not named in the Commission order were also parties to this agreement.

On November 10, 1960, the Avon companies—which had continued to exist as independent corporations—underwent a change of name and, on the same day, were formally dissolved.

On August 17, 1967, the Commission, in view of the fact that similar orders issued against other publishers contained provisions which were broader in scope than those entered against the Avon companies and which were more appropriate for the protection of the public interest, issued an order to show cause why its 1958 consent order against the Avon companies should not be reopened and modified. The order to show cause was served upon the Hearst Corporation as the alleged successor of the Avon companies. Hearst appeared specially, contesting the jurisdiction of the Commission; counsel for the Commission also moved, on December 15, 1967, to vacate the show cause order. On October 28, 1968, however, the Commission, having determined that a substantial factual issue was presented requiring the receipt of evidence pursuant to Section 3.72(b)(3) of the Commission's rules,⁵ ordered the taking of evidence to determine whether Hearst was to be considered the successor to any of the corporate respondents named in the order against the Avon companies. Following the taking of such evidence, which resulted in the findings summarized above, the examiner concluded that Hearst was not the successor of the Avon companies for purposes of enforcement of the 1958 consent order and recommended that the order to show cause be vacated and that these proceedings be dismissed. We adopt the recommendations of the examiner.

While the order entered here is not expressly binding upon the "successors" of respondents,⁶ it is fundamental that parties subject to an order may not, through transfer of the business or otherwise, nullify its provisions by carrying out prohibited acts through persons who were not parties to the original proceeding.

⁵ Rule 3.72(b)(3) provides in relevant part: "Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto * * *. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner * * *. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter."

⁶ The Commission has, in other cases, entered orders which were expressly binding upon the "successors and assigns" of the respondent, see, *e.g.*, *Sherwin-Williams Co.*, 36 F.T.C. 25, 72 (1943).

Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14-15 (1945). An order may, therefore, be enforced against the transferee of a corporation subject to the order where the transfer was made in circumstances indicating an attempt by the transferor to evade the order with the aid or, at least, with the knowledge, of the transferee; mere succession to the assets of the transferor is, however, insufficient to invoke this principle. *Ibid.* Stated otherwise, "Whether a successor corporation is liable is a question of fact which turns on whether, for example, it is the alter ego of the original respondent or whether it has participated in an attempted evasion of obligations * * *." *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170, 180 (2d Cir., 1965).

With due regard to these principles, we find no basis in precedent⁷ or policy for holding Hearst, as the successor to the Avon companies, liable under the Avon order. There is neither substantial identity of parties nor any attempt to evade the order here.⁸ Rather, this was an arm's length transaction involving a sale of the major assets of a group of corporations; the incentives for the transfer on both sides were independent of the order; the selling corporations existed after the transfer and were dissolved after a change of name; only two major employees went over to the successor corporation, neither of whom became officers and both of whom have since left; and the evidence is uncontradicted that the transferee, Hearst, had no actual notice of the outstanding order.⁹ Under these circumstances, we do not see how this

⁷ We are not aware of a single case in which an administrative order was held binding upon a successor corporation where there was not substantial identity of parties or some element of active participation by the successor in an attempt to evade the order. See, e.g., *N.L.R.B. v. Tempest Shirt Mfg. Co.*, 285 F.2d 1 (5th Cir., 1960); *N.L.R.B. v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir., 1960). Moreover, it should be noted that the circumstances of this case are readily distinguishable from the facts in *Crowell-Collier Publishing Co.*, Dkt. 7751 (1969) [75 F.T.C. 241], recently decided by the Commission. In that case, the successor corporation was a subsidiary of the same parent as the respondent corporation and the Commission found an "identity of interest and of business operations" between the respondent and its successor; this is obviously not the case here.

⁸ We note the examiner's specific finding that "The Hearst Corporation did not take any action that, if it had been a respondent, would have violated the consent order; and its policy as to titling books, in a manner to prevent confusion, was in accord with the Commission's expressed policy." *Certification of Record*, February 27, 1969, p. 20.

⁹ Even if Hearst had received actual notice there is some question as to whether it would be bound by the order under the circumstances of this case. The Supreme Court has very recently held that: "Although injunctions issued by federal courts bind not only the parties-defendant in a suit, but

order can be enforced against Hearst without doing violence to the salutary principle which forbids enforcement of an order "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear, supra*, 324 U.S. at 13. Moreover, we believe that a contrary conclusion would lead to bewildering consequences. The transaction here involved a transfer of some, but not all, of the Avon assets. Who would be subject to the Avon order if the assets had been transferred to several different parties? If a sale of assets *per se* is sufficient to hold a "successor" liable under an order entered against the transferor, how few or how many assets must be transferred? Is a transferee constrained to purchase the transferor's liability as well as any of its assets? Are the assets perpetually to be encumbered by the outstanding order regardless of the number of transfers made?

We believe that the present rule, by which a successor corporation is liable under an order entered against a predecessor where there is substantial identity of parties or knowing participation in an attempt to evade the order, adequately protects the public interest and is in accord with sound policy. Since, therefore, the evidence in this case does not remotely suggest that this transaction involved any of these factors, we adopt the recommendations of the examiner; the order will issue accordingly.

ORDER VACATING ORDER TO SHOW CAUSE

This matter having come before the Commission upon the hearing examiner's certification of record and recommendation pursuant to Section 3.72(b)(3) of the Commission's Rules of Practice, and the hearing examiner having recommended that the Commission's order to show cause issued in this matter on August 17, 1967, be vacated and this proceeding be dismissed; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the examiner's recommendations should be adopted:

It is ordered, That the Commission's order to show cause issued in this matter on August 17, 1967, be, and it hereby is, vacated.

Commissioner Nicholson concurring in the result.

also those persons 'in active concert or participation with them who receive actual notice of the order by personal service or otherwise,' Fed. Rule Civ. Proc. 65(d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 37 U.S. Law Week 4424, 4426 (May 19, 1969).

MAREMONT CORPORATION

Docket 8763. Order, July 23, 1969

Order denying respondent's motion for reconsideration of Commission's order denying respondent's request to withdraw matter from adjudication for the purpose of negotiating a consent order and for oral presentation.

ORDER DENYING REQUEST FOR RECONSIDERATION OF PRIOR
ORDER AND FOR ORAL PRESENTATION

This matter is before the Commission upon respondent's motion filed July 9, 1969, for reconsideration of the Commission's order of June 27, 1969, and a renewal of its request for oral presentation, asserting that apparently certain pertinent documents had not yet reached the Commission at the time it issued such order.

The Commission having considered all the documents filed in this proceeding, including the hearing examiner's amended order of certification filed June 20, 1969, and respondent's memorandum and request for oral presentation filed June 25, 1969, has determined that these contain no new or different facts or circumstances sufficient to justify modification of the Commission's order issued June 27, 1969, denying respondent's request for withdrawal from adjudication. The Commission has further determined that it is fully advised by the submissions of counsel and that oral presentation would serve no useful purpose in the circumstances.

The Commission, in denying respondent's request to withdraw this matter from adjudication for the purpose of negotiating a consent settlement, directed that the parties in any further such request submit in a motion a concrete proposal of settlement. The Commission in this connection notes that if there is a possibility of a consent settlement of the case in whole or in part on the basis of an agreement between the parties and the entry of a consent order in the absence of a record of evidence, then the parties must negotiate the issues first and present a concrete proposal to the hearing examiner for his consideration and action pursuant to Section 3.22 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's motion for reconsideration of the Commission's order of June 27, 1969 be, and it hereby is, denied.

It is further ordered, That respondent's request for oral presentation be, and it hereby is, denied.

Commissioner Elman not concurring.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, July 24, 1969

Order denying respondent's request to file appeal from hearing examiner's ruling against motion to dismiss.

ORDER DENYING LEAVE TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the request filed by respondent on June 23, 1969, for leave to file an interlocutory appeal from the hearing examiner's order filed June 12, 1969, denying its motion to dismiss the complaint at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case; upon complaint counsel's opposition thereto filed June 30, 1969; and upon a reply filed by respondent on July 9, 1969; and

The Commission having determined that respondent has made no showing that the hearing examiner abused his discretion in denying its motion to dismiss the complaint and, further, that respondent has made no showing, as required by Section 3.23 of the Commission's Rules of Practice for an interlocutory appeal, that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice:

It is ordered, That respondent's request, filed June 23, 1969, for leave to file an interlocutory appeal from the hearing examiner's order denying its motion to dismiss the complaint be, and it hereby is, denied.

Commissioner Elman dissenting.

NATIONAL DAIRY PRODUCTS CORP.

Docket 6651. Order, July 25, 1969

Order requiring parties to file briefs on existence of issues of fact requiring evidentiary hearings and issues of law raised by previously filed papers.

ORDER ESTABLISHING SCHEDULE FOR HEARINGS, BRIEFING
AND ORAL ARGUMENT

The Commission having issued an order on April 17, 1969, ordering respondent to show cause why the Commission should not reopen this proceeding and modify the original order herein in certain respects; and

Respondent having filed answers to the averments in the Order to Show Cause and alternative Motions to Dismiss or to Strike and respondent having further requested alternatively that the matter be set for hearing before a hearing examiner; and

Counsel in support of the order having filed a cross-motion; and

The Commission being of the opinion that briefs should be submitted, and oral argument had, on the existence of factual issues warranting an evidentiary hearing and on all legal issues raised by the papers previously submitted on the Order to Show Cause, *It is hereby ordered*, That the parties hereto shall submit briefs on Sept. 15, 1969, on the following subjects:

1. The existence of issues of fact, if any, in the present proceeding requiring an evidentiary hearing.
2. The issues of law raised by the papers filed heretofore in the present proceeding;

Either party may file answering briefs on or before Oct. 1, 1969. Oral argument will be scheduled promptly thereafter.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

KNOLL ASSOCIATES, INC.

Docket No. 8549. Order, July 25, 1969

Order withdrawing complaints from adjudication due to procedural problems attendant on excising material produced by or obtained through witness Herbert Prosser.

ORDER WITHDRAWING COMPLAINT

This matter is now before us on respondent's motion of June 12, 1969 to withdraw the complaint herein and to accept a new proposed agreement to cease and desist.

The complaint in this matter was issued by the Commission on December 27, 1962. The hearing examiner's opinion finding a violation of Section 2(a) of the Clayton Act was rendered on Febru-

ary 25, 1965, and the Commission's decision upholding the examiner was issued on August 2, 1966 [70 F.T.C. 311].

Respondent appealed to the United States Court of Appeals for the Seventh Circuit. In an opinion dated June 18, 1968 the Court of Appeals for the Seventh Circuit remanded the proceeding to the Commission for reconsideration, the court excepting from the record all evidence or testimony produced by or obtained through the witness Herbert Prosser. *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F.2d 530 (7th Cir. 1968). The Court of Appeals did not pass on any of the substantive Robinson-Patman issues in the case.

Rather than attempt to resolve all the procedural problems attendant of excising the Prosser material, it is the view of the Commission (upon the urging of both the complaint counsel and respondent) that this matter should be withdrawn from adjudication and that complaint counsel should be authorized to execute the agreement in the form annexed to the affidavit submitted in support of respondent's motion.

Accordingly, the motion of respondent will be granted, and

It is ordered, That this matter be, and it hereby is, withdrawn from adjudication.

Commissioner Elman concurring in the result, and Commissioner MacIntyre not participating.

MAREMONT CORPORATION

Docket 8763. Order and Opinion, July 28, 1969

Order denying two of respondent's requests for leave to file interlocutory appeals from adverse rulings pertaining to discovery requests.

ORDER AND OPINION DENYING RESPONDENT'S REQUESTS FOR PERMISSION TO APPEAL

On April 18, 1969, respondent filed its request for leave to appeal from the hearing examiner's order dated April 7, 1969, denying, except as to certain "interrogatories" respondent's motion for discovery filed February 25, 1969. Thereafter, on May 26, 1969, respondent filed another request to file an interlocutory appeal; this second request relating to the hearing examiner's order of April 2, 1969, which allegedly unduly bars respondent's access to certain survey data.

From our review of all the examiner's orders and opinions, respondent's motions, responses thereto, and replies, we find the examiner has carefully weighed the merits of both of respondent's discovery requests and there is no showing, as required by Section 3.23 of the Rules of Practice, that interlocutory review by the Commission before the conclusion of the hearing is essential to serve the interests of justice.

The Commission ordinarily accepts the hearing examiner's determination in such areas unless there is a clear showing of the abuse of his discretion or other unusual circumstances. The examiner has the responsibility and adequate powers to resolve these discovery and procedural issues. Frequently, a great deal can be, and if possible should be, accomplished on discovery by agreement between counsel. Where there is disagreement, however, the resolution of the issues raised is primarily the responsibility of the examiner, and as stated, the Commission ordinarily will not dispute his rulings thereon, and we do not in this instance.

Respondent has already received substantial discovery through informal agreement with complaint counsel and by direction of the examiner. Moreover, the examiner has indicated that he is quite willing upon a proper showing to allow such future discovery as may be necessary. Indeed, as the hearings develop, respondent may be able to make a more substantial showing of necessity for the material covered in its two requests. The examiner, of course, retains full discretion to reconsider such requests and in exercising that discretion he is encouraged to follow the Commission's policy of allowing a respondent maximum discovery. Specifically, the examiner is encouraged to look to our recently revised Section 4.11 of our rules, and the accompanying press release dated June 20, 1969, for guidance. If respondent remains unsatisfied at the conclusion of the hearings, it may include the discovery issue in the Commission's review of this matter on the merits. Accordingly,

It is ordered, That respondent's requests filed April 18, 1969, and May 26, 1969, for leave to file interlocutory appeal be, and they hereby are, denied.

Commissioner MacIntyre concurring only in the result.

ARTHUR MURRAY STUDIO OF WASHINGTON,
INC., ET AL.

Docket 8776. Order, Aug. 6, 1969

Order contingently withdrawing case from adjudication if respondent accepts the new paragraph 10 in a consent order relating to customer's right to rescind dance contracts.

ORDER CONTINGENTLY WITHDRAWING MATTER FROM
ADJUDICATION

This matter is before the Commission upon the examiner's certification of July 10 of a joint motion by complaint counsel and counsel for respondent dated July 8, 1969, that the above-captioned matter be withdrawn from adjudication and the settlement agreement with consent order be accepted.

The Commission is of the opinion that Paragraph 9 of the consent order does not afford an adequate basis for settlement. An acceptable order for settlement purposes would require respondents to cease and desist from:

9. Entering into one or more contracts or written agreements for dance instruction or any other service provided by respondents' dance studios when such contracts or written agreements obligate any party to pay a total amount which at any one time exceeds \$1,500.

To avoid confusion, the last sentence of existing Paragraph 9 should be redrafted as new Paragraph 10 as follows:

10. Entering into any contract or written agreement for dance instruction or any other service provided by respondents' dance studio unless such contracts or written agreements, regardless of the obligation incurred, shall bear the following notation in at least 10-point bold type:

Notice: You may rescind (cancel) this contract, for any reason whatever, by submitting notice in writing of your intention to do so within seven (7) days from the date of making this agreement.

If you rescind (cancel) this contract, the only cost to you will be a fair charge for any lessons or services actually furnished during the period prior to rescission, and all moneys due will be promptly refunded.

All paragraphs following should be renumbered to reflect these changes. In the event counsel submit an executed consent agreement, including the foregoing revision of Paragraphs 9 and 10 within 30 days of the date of this order,

It is ordered, That upon receipt of such agreement, the matter be withdrawn from adjudication.

It is further ordered, That unless an amended executed consent agreement be received in accordance with the foregoing, this matter not be withdrawn from adjudication.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Opinion and Order, Aug. 13, 1969

Order denying respondent's motion to dismiss complaint on grounds of alleged prejudgment and remanding case to hearing examiner.

ORDER AND OPINION DENYING MOTION TO DISMISS COMPLAINT

This matter is before the Commission upon the hearing examiner's certification of the respondent's motion to dismiss the complaint, filed July 17, on the grounds of alleged prejudgment of the Commission, and complaint counsel's reply thereto filed July 31, 1969.

Respondent argues that the following points are evidence of the Commission's asserted prejudgment:

1. The claimed adoption of the staff economic Report on Mergers and Vertical Integration in the Cement Industry published in April 1966 (Economic Report);
2. The public hearings of the Commission on the cement industry held in 1966;
3. The adoption of the Commission's Enforcement Policy with Respect to Vertical Mergers in the Cement Industry; and
4. The Commission's asserted reliance upon the Economic Report in specific adjudicative proceedings.

The complaint in this matter was issued June 10, 1969, subsequent to the completion of the hearings in the cement industry in 1966 and to the issuance of a document on January 3, 1967, entitled "Enforcement Policy With Respect To Vertical Mergers In The Cement Industry." The issue here is similar to that of the alleged bias of the Commission in the case of *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). In that case Marquette Cement Manufacturing Company charged that the Commission had previously prejudged the issues and to support such charge introduced exhibits which were mainly copies of Commission reports made to Congress or the President under Section 6 of the Federal Trade Commission Act. As to this, the Court said:

These reports as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Com-

mission as a result of its prior official investigation. But we also agree with the court's holding that this belief did not disqualify the Commission. (*Id.* at 700.)

The Court reasoned in part that “* * * the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices,” (*Id.* at 701.) The Court further stated:

Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are “unfair,” from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the interdiment of Congress. For Congress acted on a committee report stating: “It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.” Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess. 10-11. (*Id.* at 701-702.)

See also *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962); *All-State Industries of North Carolina, Inc., et al.*, Docket No. 8738 (order issued March 18, 1968) [73 F.T.C. 1242]; *Lehigh Portland Cement Company v. Federal Trade Commission*, 291 F. Supp. 628 (D.C.E.D. Va. 1968); *Lehigh Portland Cement Company*, Docket No. 8680; *Marquette Cement Manufacturing Company*, Docket No. 8685; and *Mississippi River Fuel Corporation*, Docket No. 8657 (order issued February 6, 1967) [71 F.T.C. 1618].

Respondent, of course, will have an opportunity for a full and complete hearing before the hearing examiner and the Commission in accordance with the Administrative Procedure Act. The burden of proving the allegations of the complaint will be upon complaint counsel and this in no way will be diminished or affected by the Commission's aforementioned statement of enforcement policy. Thus, there is no issue here of unfairness.

The Commission rejects the charges made by the respondent of prejudgment of the issues in this proceeding. Accordingly,

It is ordered, That respondent's motion to dismiss the com-

plaint on the grounds of alleged prejudgment be, and it hereby is, denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

CURTISS-WRIGHT CORPORATION

Docket 8703. Order, Aug. 14, 1969

Order denying respondent's request to file interlocutory appeal from examiner's denial of motion to stay compliance with subpoena duces tecum.

ORDER DENYING REQUEST FOR PERMISSION TO FILE
INTERLOCUTORY APPEAL FROM ORDER DENYING MOTION
TO STAY COMPLIANCE WITH SUBPOENA

This matter is before the Commission upon respondent's request for permission to file an interlocutory appeal from an order of the hearing examiner filed July 23, 1969, denying respondent's and Martin A. Sherry's (Sherry) motion to stay compliance with a subpoena *duces tecum* and fixing the return date for such subpoena.

Respondent and Sherry argue principally that they are in good faith in seeking judicial review of the order of the United States District Court for the District of Columbia (Civil No. 398-69) dated June 25, 1969, calling for compliance with the Commission's subpoena dated October 12, 1967, and that they should not be required to comply with the subpoena, which they assert may be invalidated upon review.

Respondent and Sherry fundamentally present one basic question, that is, whether or not the Commission should direct a stay of compliance with the aforementioned subpoena, as to which the District Court for the District of Columbia has directed compliance, for the purpose of providing respondent and Sherry time for review proceedings. Such issue was fully briefed before the hearing examiner. His order denying the request and setting the return date for compliance with the subpoena shows that he carefully considered all of respondent's arguments, which are essentially the same arguments which are now presented to the Commission. His reasons for the denial are clearly set forth. In all the circumstances we are not persuaded that his order is incorrect. Furthermore, respondent has not justified its appeal under Section 3.23(a) of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal from the hearing examiner's order filed July 23, 1969, denying respondent's and Martin A. Sherry's motion to stay compliance with a subpoena *duces tecum* be, and it hereby is, denied.

Commissioner Elman not concurring.

HARRY'S LINOLEUM COMPANY, ET AL.

Docket 8275. Order, Aug. 27, 1969

Order to show cause why decision of Commission dated December 27, 1961, should not be reopened and prior cease and desist order modified to require recordkeeping to substantiate claims relative to prices and savings.

ORDER TO SHOW CAUSE WHY PROCEEDING SHOULD NOT BE
REOPENED AND PRIOR CEASE AND DESIST ORDER
ALTERED OR MODIFIED

The Commission on December 27, 1961, having adopted the hearing examiner's initial decision herein issued November 8, 1961, and

It appearing that the order therein requires the respondents, in connection with the offering for sale, and sale and distribution of merchandise to cease and desist from:

1. Representing directly or by implication:

(a) That any amount is respondents' usual and customary retail price of merchandise unless such amount is the price at which the merchandise has been usually and customarily sold at retail by respondents in the recent regular course of business.

(b) that any saving is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

(c) that any merchandise, sold or offered for sale is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(d) that any merchandise is given away "free" with a purchase of other merchandise, or in any other manner, unless such is the fact.

(e) that carpeting made from duPont 501 Nylon is indestructible.

(f) that respondents are the only sellers of duPont 501 Nylon carpeting in a trade area where such a representation is made, unless such is the fact.

2. Using the words "made to sell for" or any other words or terms of similar import in connection with prices of merchandise unless such prices are

