

Complaint

IN THE MATTER

AMERICAN NATIONAL GROWERS CORPORATION, ET AL.

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

Docket 7240. Complaint, Aug. 28, 1958—Decision, Feb. 26, 1959

Consent order requiring a packer of fruits and vegetables under the "Blue Goose" and other labels with principal office in Los Angeles, Calif.—doing a net business in 1956 of over \$44,600,000—to cease violating Sec. 2(c) of the Clayton Act by paying the customary brokerage fee to brokers on direct sales for their own account for resale; and requiring three of its brokers to cease receiving or accepting such illegal payments.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and herein-after more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American National Growers Corporation, hereinafter sometimes referred to as seller respondent, or as respondent American, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office at 122 East Seventh Street, Los Angeles, Calif., and having three principal operating branches known as Texas Division at Weslaco, Tex., Western Division at Los Angeles, Calif., and Eastern Division at Fort Pierce, Fla. Respondent American was known as American National Foods, Inc. from January 1, 1954 to August 13, 1956, and is engaged in the growing, packing and marketing of fresh fruits and vegetables. Its Eastern Division with offices located in Fort Pierce, Fla., conducts growing, packing and marketing operations dealing principally with Florida citrus, vegetables and melons, and marketing operations with respect to peaches and apples.

Respondent Ballentine Produce, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Arkansas with its principal office and place of business located on Highway 71, North Alma, Ark. Respondent Ballentine Produce, Inc., hereinafter sometimes referred to as broker

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respondent, is engaged in business primarily as a distributor of fruits and vegetables and is directed and controlled by Harrell H. Ballentine, Herman Ballentine, and LuDell Ballentine, who are responsible for its acts and practices. Respondent Harrell H. Ballentine is an individual doing business both as Harrell H. Ballentine, broker, and as president of Ballentine Produce, Inc., with an office on Highway 71, North Alma, Ark., hereinafter sometimes referred to as broker respondent. Respondent Herman Ballentine is an individual with an office located on Highway 71, North Alma, Ark., and is vice president of respondent Ballentine Produce, Inc. Respondent LuDell Ballentine is an individual with an office located on Highway 71, North Alma, Ark., and is secretary-treasurer of respondent Ballentine Produce, Inc.

Respondent Hugh B. Campbell, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its principal office and place of business located at 234 SE. Alder Street, Portland, Oreg. Respondent Hugh B. Campbell, Inc. is engaged in business as a broker and distributor of fresh fruits and vegetables and is hereinafter sometimes referred to as broker respondent, and is directed and controlled by respondents Hugh B. Campbell, Robert Recken and Mary A. Campbell who are responsible for its acts and practices. Respondent Hugh B. Campbell is an individual with an office located at 234 SE. Alder Street, Portland, Oreg., and is president of respondent Hugh B. Campbell, Inc. Respondent Robert Recken is an individual with an office located at 234 SE. Alder Street, Portland, Oreg., and is vice president of respondent Hugh B. Campbell, Inc. Respondent Mary A. Campbell is an individual with an office located at 234 SE. Alder Street, Portland, Oreg., and is secretary-treasurer of respondent Hugh B. Campbell, Inc.

Respondents Oscar L. Davis, Jr. and Mrs. Oscar L. Davis, Sr., are individuals with offices located at 2426 West 13th Street, Chattanooga, Tenn., doing business as an equal partnership trading as O. L. Davis Brokerage Company, and are engaged in business as brokers of citrus fruits, potatoes, onions, apples and seed potatoes, and they are hereinafter sometimes referred to as broker respondents.

PAR. 2. Respondent American is now, and for several years past has been, selling fruits and vegetables under the "Blue Goose" and other labels and has been acting as selling agent for other packers and growers of citrus fruits and vegetables. Respondent American sells and distributes these food products

throughout the United States directly to buyers without the intervention of brokers, and to buyers through brokers who represent it in effecting such sales, and for the services of these brokers, respondent American pays them a brokerage fee or commission ranging from 5¢ to 10¢ per box. Respondent American is a substantial factor in the sale and distribution of fruits and vegetables and its net sales of all products during the year 1956 amounted to over \$44,600,000, over \$17,000,000 of which were made by its Eastern Division.

The broker respondents named herein are now, and for the past several years have been, engaged in the brokerage business representing various principals located throughout the United States. One of the principals represented by these broker respondents is the seller respondent American named herein. In representing respondent American in the sale of fruit and vegetable products, they were and are paid for their services a brokerage fee or commission ranging from 5¢ to 10¢ per box.

PAR. 3. In the course and conduct of its business in commerce, as "commerce" is defined in the aforesaid Clayton Act, respondent American has been for the past several years and is now selling and distributing fruit and vegetable products to buyers located in the several states of the United States, and has transported or caused such products, when sold, to be transported from its place of business in Fort Pierce, Fla., or from other places within said State, to buyers located in the various States of the United States other than the State of Florida. There is and has been at all times mentioned herein, a continuous course of trade in commerce in said fruit and vegetable products across state lines between respondent American and the respective buyers of said fruit and vegetable products, including the broker respondents named herein.

In the course and conduct of their business in commerce, as "commerce" is defined in the aforesaid Clayton Act, the broker respondents named herein have been and are now selling and distributing fruit and vegetable products for their principals located in the various States of the United States other than the States in which the broker respondents are located. Said respondents have transported, or caused said fruit and vegetable products, when sold, to be transported from their principals' places of business to said buyers' places of business located in other States, or to their customers located therein. There is and

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has been at all times mentioned herein, a continuous course of trade in commerce in the sale of said fruit products across State lines between the broker respondents and their respective principals, including respondent American.

PAR. 4. In some instances respondent American makes direct sales to some, but not all, of its brokers for their own account for resale, on which sales respondent American pays or grants, directly or indirectly, a commission or brokerage, or an allowance or discount in lieu thereof, to said brokers. The broker respondents named herein are some of the brokers who have made a number of such purchases for their own accounts from respondent American, on which purchases they received and accepted, directly or indirectly, said commission or brokerage, or allowances or discounts in lieu thereof, from seller respondent American.

PAR. 5. The acts and practices of seller respondent American in paying, granting, or allowing, directly or indirectly, something of value as a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, on sales of fruit and vegetable products to the broker respondents for their own accounts as alleged and described above, and the acts and practices of the broker respondents in receiving and accepting, directly or indirectly, something of value as a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, on their purchases of fruit and vegetable products as herein alleged and described, are each in violation of subsection (c) of Section 2 of the Clayton Act as amended (U.S.C., Title 15, Sec. 13).

Mr. Fredric T. Suss for the Commission.

Mr. Harry S. Dunmire, of Pittsburgh, Pa., for American National Growers Corporation.

Mr. Robert L. Recken, of Portland, Oreg., for Hugh B. Campbell, Inc., Hugh B. Campbell, Robert Recken, and Mary A. Campbell.

No appearance for other respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. An agreement for disposition of the pro-

ceeding by means of a consent order has now been entered into by counsel supporting the complaint, and all of the respondents, except Mrs. Oscar L. Davis, Sr., who is deceased. The term respondents as used hereinafter will not include this individual. The agreement provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent American National Growers Corporation is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office at 122 East Seventh Street, Los Angeles, Calif., and its three operating branches at Fort Pierce, Fla.; Weslaco, Tex.; and Los Angeles, Calif.

Respondent Ballentine Produce, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arkansas, with its principal office and place of business located on Highway 71, North Alma, Ark., and it is directed and controlled by respondents Harrell H. Ballentine, Herman Ballentine, and Ludell Ballentine, who are responsible for its acts and practices and all of whom have offices located on Highway 71, North Alma, Ark. Respondent Harrell H. Ballentine is an individual doing business both as Harrell H. Ballentine,

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broker, and as president of Ballentine Produce, Inc. Respondent Herman Ballentine is an individual and is vice president of respondent Ballentine Produce, Inc. Respondent Ludell Ballentine is an individual and is secretary-treasurer of respondent Ballentine Produce, Inc.

Respondent Hugh B. Campbell, Inc., is a corporation organized, existing and doing business under the laws of the State of Oregon, with its principal office and place of business located at 234 SE. Alder Street, Portland, Oreg., and is directed and controlled by respondents Hugh B. Campbell, Robert Recken and Mary A. Campbell, who are responsible for its acts and practices and all of whom have offices located at 234 Southeast Alder Street, Portland, Oreg. Respondent Hugh B. Campbell is an individual and president of respondent Hugh B. Campbell, Inc. Respondent Robert Recken is an individual and is vice president of respondent Hugh B. Campbell, Inc. Respondent Mary A. Campbell is an individual and is secretary-treasurer of respondent Hugh B. Campbell, Inc.

Respondent Oscar L. Davis, Jr., is an individual with office located at 2426 West 13th Street, Chattanooga, Tenn., doing business as O. L. Davis Brokerage Company.

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

ORDER

It is ordered, That the respondent, American National Growers Corporation, a corporation, and its officers, representatives, agents and employees, directly or indirectly, or through any corporate or other device, in connection with the sale of fruits, fruit products or vegetables in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer, or to any one acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of its said products to such buyer for his own account; or

2. Selling any of said products to a buyer at a price reflecting a reduction from the price at which sales of such products are currently being made by respondent to others, where such reduction is in lieu of brokerage or any part or percentage thereof.

It is further ordered, That respondents Ballentine Produce, Inc., a corporation, and Hugh B. Campbell, Inc., a corporation, their officers, and respondents Harrell H. Ballentine, Herman Ballentine, and Ludell Ballentine, individually and as officers of Ballentine Produce, Inc., Hugh B. Campbell, Robert Recken and Mary A. Campbell, individually and as officers of Hugh B. Campbell, Inc., Oscar L. Davis, Jr., individually and trading as O. L. Davis Brokerage Company, or trading under any other name, and their respective representatives, agents and employees, directly or through any corporate or other device in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products by or for their own accounts or for the account of any buyer for whom they are individually or collectively acting as agents, representatives or intermediaries who are subject to the direct control of said buyer.

It is further ordered, That the complaint be and it hereby is dismissed as to respondent Mrs. Oscar L. Davis, Sr.

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 shall, on the 26th day of February 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondents American National Growers Corporation; Ballentine Produce, Inc.; Hugh B. Campbell, Inc.; Harrell H. Ballentine; Herman Ballentine; Ludell Ballentine; Hugh B. Campbell; Robert Recken; Mary A. Campbell; and Oscar L. Davis, Jr., 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.

IN THE MATTER OF
MAX FACTOR & CO.

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

Docket 7280. Complaint, Oct. 15, 1958—Decision, Feb. 26, 1959

Consent order requiring a cosmetic house in Hollywood, Calif., to cease representing falsely by television, magazine, and other advertising that its "Natural Wave" spray would change the structure of naturally straight hair to naturally curly.

Mr. John T. Walker for the Commission.

Mr. Raymond S. Smethurst, of Washington, D.C., and *Mr. Ralph E. Lazarus*, of Los Angeles, Calif., for respondent.

INITIAL HEARING BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued October 15, 1958, charges the respondent with violation of the Federal Trade Commission Act in the sale and distribution of a cosmetic preparation designated "Natural Wave."

Respondent Max Factor & Co. is a corporation organized, existing and doing business under the laws of the State of Delaware, with its office and principal place of business located at 1655 North McCadden Place, Hollywood, Calif.

After the issuance of the complaint, respondent entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the acting director and assistant director of the Bureau of Litigation.

It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement, the respondent expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights it may have to challenge or contest the validity

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of the order to cease and desist entered in accordance with the agreement.

Respondent further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That Max Factor & Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the product Natural Wave, or any other product of substantially similar composition or possessing similar properties, whether sold under the same name or any other name, forthwith cease and desist from:

1. Disseminating or causing to be disseminated, any advertisement, by means of television continuity broadcasts in commerce, or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(a) That said product will change the structure of the hair;

or

(b) That said product will change naturally straight hair to naturally curly hair.

2. Disseminating or causing to be disseminated, any advertisement by any means for the purpose of inducing, or which is

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likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representations prohibited in paragraph 1 hereof.

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 shall, on the 26th day of February 1959, become the decision of the Commission; and, accordingly:

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

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IN THE MATTER OF
STANLEY FURS, INC., ET AL.

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

Docket 7135. Complaint, Apr. 30, 1958—Decision, Feb. 28, 1959

Consent order requiring furriers in Denver, Colo., to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices represented as regular retail selling prices, by deceptively identifying the animals producing certain furs on labels, setting forth the names of other animals on labels and invoices, and failing in other respects to label and invoice fur products as required; by advertising in newspapers which failed to disclose the name of the animal producing certain furs or contained that of another animal, failed to disclose that fur products contained artificially colored or cheap or waste fur, and misrepresented prices as cost plus tax or reduced from usual prices which were in fact fictitious; and by failing to maintain adequate records as a basis for such pricing claims.

Mr. Thomas A. Ziebarth for the Commission.

Mr. Lawrence M. Henry, of Denver, Colo., for Yvonne Cavanaugh.

Mr. Richard A. Zarlengo, of Denver, Colo., for all other respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with misbranding and with falsely and deceptively invoicing and advertising certain of their fur products, in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, all respondents except Yvonne Cavanaugh, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the director and an assistant director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Stanley Furs, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 1600 E. Colfax Avenue, Denver, Colo., and that the individual respondents, Stanley

Calkins and Raymond Hartman, are president and vice president, respectively, of the corporate respondent, and have the same address as said corporate respondent.

The agreement sets forth that all parties signatory thereto agree that, inasmuch as respondent Yvonne Cavanaugh is only nominally secretary-treasurer of the corporate respondent, has no policy-making authority, and did not formulate, direct or control the acts, policies or practices of said corporation, the complaint herein should be dismissed insofar as concerns said respondent.

The agreement provides, among other things, that the respondents signatory thereto admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents signatory thereto that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents signatory to the agreement waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered into accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

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

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise falsely identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured;
2. Representing on labels attached to fur products, or in any other manner, that certain amounts are the regular and usual retail prices of fur products when such amounts are in excess of the prices at which such products are usually and customarily sold by respondents at retail in the recent regular course of their business;
3. Failing to affix labels to fur products showing:
 - a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;
 - b. That the fur product contains or is composed of used fur, when such is the fact;
 - c. That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;
 - d. That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;
 - e. The name or other identification, issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

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- f. The name of the country of origin of any imported furs used in the fur product;
- g. The item number of such fur product;
4. Setting forth on labels attached to fur products:
 - a. Information required under §4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder in abbreviated form;
 - b. Information required under §4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder mingled with nonrequired information;
 - c. Information required under §4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder in handwriting;
 - d. The name or names of an animal or animals other than the name or names prescribed by §4(2) (A) of the Fur Products Labeling Act;
- B. Falsely or deceptively invoicing fur products by:
 1. Failing to furnish invoices to purchasers of fur products showing:
 - a. The name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;
 - b. That the fur product contains or is composed of used fur, when such is the fact;
 - c. That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;
 - d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
 - e. The name and address of the person issuing such invoices;
 - f. The name of the country of origin of any imported furs contained in the fur product;
 2. Setting forth on invoices of fur products:
 - a. The name or names of an animal or animals other than the name or names prescribed by §5 (b) (1) (A) of the Fur Products Labeling Act;
 - b. Information required under §5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations thereunder in abbreviated form;
- C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement

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or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products and which:

1. Fails to disclose:

a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

b. That the fur products contain or are composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

c. That the fur products are composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

2. Contains the name or names of an animal or animals other than the name or names prescribed in §5(a)(1) of the Fur Products Labeling Act;

3. Represents directly or by implication:

a. That the prices of fur products are at cost plus tax or words of similar import, when such is not the fact;

b. That prices of fur products are at cost of sale plus tax or words of similar import, when such is not the fact;

c. That respondents' regular price of any fur product is any amount which is in excess of the price at which respondents have regularly or customarily sold such products in the recent regular course of their business;

D. Making claims or representations in advertisements respecting comparative prices or that prices are reduced from regular or usual prices or that prices are at cost plus tax or that prices are at cost of sale plus tax unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That the complaint, insofar as it relates to respondent Yvonne Cavanaugh, 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 shall, on the 28th day of February 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Stanley Furs, Inc., a corpora-

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tion, and Stanley Calkins and Raymond Hartman, individually and as officers of said corporation, 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.

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IN THE MATTER OF
WARD LABORATORIES, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6346. Complaint, May 5, 1955—Decision, Mar. 4, 1959

Order requiring three associated New York City sellers to cease representing falsely in advertising that the common cause of baldness, or a significant one, is germ infection, and that use of their hair and scalp preparations would remedy such causes and remedy and prevent the common type of baldness, cause growth of new hair, and prevent excessive hair fall; and to cease representing falsely that they owned or operated a laboratory, through use of the word "Laboratories" in their corporate names or otherwise.

Morton Nesmith, Esq. for the Commission.

T. Stanley Block, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Preliminary Statement

The complaint in this matter, issued by the Federal Trade Commission on May 5, 1955, charges the respondents named in the caption hereof, are engaged in the business of selling and distributing cosmetic and medicinal preparations in interstate commerce for external use in the treatment of conditions of the hair and scalp. The complaint charges specifically that the respondents, through the use and dissemination of false and misleading advertisements concerning their said preparations, for the purpose of inducing and which were likely to induce the sale of said preparations to the public, falsely represented the efficacy of their said preparations as to their therapeutic effect for the prevention of baldness or partial baldness and that they will cause the growth of new hair and prevent excessive hair fall. It was further charged they represented that the common cause, or a significant cause, of baldness is due to germ infection and that use of their preparations will effectively remedy and obviate the common or significant cause of baldness thus resulting in new hair growth and the prevention of excessive hair fall.

Respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., were further charged in said complaint with the false, misleading and deceptive use of the word "laboratories" in their

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respective corporate names for the reason that said respondents do not own or operate a laboratory in connection with their said business.

On March 7, 1956, upon motion, the complaint was amended so as to allege the most common cause of baldness is not due to germ infection, as represented by respondents, but on the contrary is due to heredity, age and endocrine balance, such condition being commonly referred to as "male pattern baldness," and that the use of respondents' preparations will not effect any of the claimed remedial actions preventing complete or partial baldness or excessive hair fall, nor will they cause the growth of new hair.

Respondents' advertisements were further charged as false and misleading in that they failed to reveal facts material in the light of the representations made therein, such facts being that most cases of baldness or loss of hair is of a type known as "male pattern baldness" and when baldness is of this type respondents' preparations are of no value in the treatment thereof.

To the complaint, as amended, respondents filed their answer in which they admitted that their said preparations:

Will not prevent baldness, will not cause the growing of new hair and will not prevent excessive hair fall, except where the aforesaid conditions are caused by seborrhea.

In their original answer to the complaint prior to the amendment thereof, and reasserted in their answer to the complaint as amended, respondents set up, as an affirmative defense, that seborrhea is a significant or common cause of hair loss which may be controlled through use of respondents' preparations which latter would destroy the bacteria causing seborrhea and thus effect the elimination of hair loss.

Upon the issues thus joined the matter proceeded to trial during the course of which testimony was received in support of, and in opposition to, the charges of the complaint, all of which testimony has been reduced to writing, and, together with the evidence in the form of exhibits, has been duly filed in the office of the Commission in Washington, D.C., as required by law.

Proposed findings of fact and conclusions of law were submitted by all parties, oral argument thereon not having been requested. Rulings on such findings and conclusions appear elsewhere of record, as required by law.

This matter being now before the hearing examiner for final determination based upon the record as an entirety, he having

presided at all hearings, observed all witnesses, considered and ruled upon all testimony and exhibits of record, finds that this proceeding is in the interest of the public and makes his findings as to the facts, conclusions of law based thereon, and order.

During the course of the proceeding counsel representing all parties, being desirous of narrowing the issues and agreeing upon certain facts, thus obviating the necessity of receiving testimony thereon, executed a stipulation reciting such agreed facts. The stipulation appears of record herein¹ as well also certain minor agreements entered into between counsel, which latter appear in the transcript of testimony. The advertising matter of respondents, forming the basis of this action and adverted to in the stipulation aforesaid, are likewise matters of record herein.²

The facts agreed upon, and those arrived at as a result of testimony and other evidence, are incorporated in the following:

Findings as to the Facts

1. Respondent Ward Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 19 West 44th Street, New York, N.Y. Respondents Emile E. Kling and Joseph J. Seldin are individuals and president and secretary-treasurer, respectively, of Ward Laboratories, Inc., with the same address as the said corporate respondent.

Respondent Comate Laboratories, Inc., and respondent Sebacin, Inc., are corporations, organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal place of business located at 20 West 45th Street, New York, N.Y.

The individual respondents Emile E. Kling and Joseph J. Seldin formulate and control the policies, acts and practices of the said three corporate respondents, including the acts and practices hereinafter set forth.

2. The said respondents are now, and for more than two years last past have been, engaged in the business of selling and distributing cosmetic and medicinal preparations for external use in the treatment of conditions of the hair and scalp. Included among said preparations are (a) those sold by respondent Ward Laboratories, Inc., under the following names: "Ward's Formula

¹ Com. Exh. No. 1.

² Com. Exh. Nos. 3, 4, 5, 6, 7, and 8.

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Medicine for the Scalp and Hair," "Ward's Formula Medicinal Lubricant for Dry Scalp and Hair," "Ward's Formula Medicinal Compound for Oily Scalp" and "Ward's Formula Shampoo"; (b) those sold by respondent Comate Laboratories, Inc., under the following names: "Comate Medicinal Scalp Formula," "Comate Medicinal Emulsion," "Comate Scalp Conditioner," "Comate Dry Scalp Shampoo" and "Comate Oily Scalp Shampoo"; and (c) those sold by respondent Sebacin, Inc., under the following names: "Sebacin Basic Formula," "Sebacin Antiseptic Lubricant" and "Sebacin Shampoo." Said respondents cause said preparations, when sold, to be transported from their places of business in the State of New York to purchasers thereof located in the State of New York and various other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparations between and among the various States of the United States and the District of Columbia.

The preparations sold under the names of "Ward's Formula Medicine for the Scalp and Hair," "Comate Medicinal Scalp and Hair Formula" and "Sebacin Basic Formula" are substantially the same product. The active ingredients for said products are: Beta Naphthol (or B-Hydroxynaphtholene), Cinnamic Acid, Sodium Sulfocarbolate (or Phenolsulfonate), Alcohol 37½% by volume.

The preparations sold under the name of "Ward Formula Medicinal Lubricant for Dry Scalp and Hair," "Comate Medicinal Emulsion" and "Sebacin Antiseptic Lubricant" are substantially the same product. The active ingredients for said product are: Chloral Hydrate .27%, Sodium Phenolsulfonate (or Sulfocarbolate), Resorcinol Monoacetate, Sulfonated Castor Oil.

The preparations sold under the names of "Ward's Formula Medicinal Compound for Oily Scalp" and "Comate Scalp Conditioner" are substantially the same product. The active ingredients for said products are: Oxyquinoline Sulfate, Salicylic Acid, Menthol, Glycerine, Alcohol 84% by volume.

The preparations sold under the names of "Ward's Formula Shampoo," "Comate Dry Scalp Shampoo," "Comate Oily Scalp Shampoo" and "Sebacin Shampoo" are substantially the same product consisting of liquid soap.

"Ward's Formula Medicine for the Scalp and Hair," "Comate Medicinal Scalp and Hair Formula" and "Sebacin Basic Formula" contain the same or similar active ingredients, the "Ward Formula" bottle containing 5 oz., the "Comate Formula" bottle con-

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taining 12 oz., and the "Sebacin Formula" bottle containing 16 oz. as part of a Sebacin package deal consisting of the formula, shampoo and antiseptic lubricant.

That "Ward's Formula Medicinal Lubricant," "Comate Medicinal Emulsion" and "Sebacin Antiseptic Lubricant" contain the same or similar active ingredients. "Sebacin Antiseptic Lubricant" and "Comate Medicinal Emulsion" contain more expensive perfume.

That "Ward's Formula Shampoo," "Comate Dry Scalp Shampoo," "Comate Oily Scalp Shampoo" and "Sebacin Shampoo" contain different ingredients, all being classified in the general category of liquid soap.

3. In the course and conduct of their aforesaid business, the respondents have disseminated and have caused the dissemination of advertisements concerning said preparations by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations; and respondents have also disseminated and have caused the dissemination of advertisements concerning said preparations, by various means, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, in periodicals, leaflets, circulars, pamphlets and other advertising literature, disseminated and caused to be disseminated as hereinabove set forth are the following:

(a) Ward's Formula advertising:

SAVE YOUR HAIR

* * *

Millions of trouble-breeding bacteria, living on your sick scalp (see above) are killed on contact. Ward's Formula kills not one, but all four types of these destructive scalp germs now recognized by many medical authorities as a significant cause of baldness. Kill these germs—don't risk letting them kill your hair growth.

Once you're bald, that's it, friends! There's nothing you can do. Your hair is gone forever. So are your chances of getting it back. But Ward's Formula, used as directed, keeps your sick scalp free of itchy dandruff, seborrhea, and stops the hair loss they cause. Almost at once your hair looks thicker, more attractive and alive.

(b) Comate Formula advertising:

NOW!

The Amazing Facts about BALDNESS

... AND WHAT YOU CAN DO ABOUT IT

WARNING: The following facts are brought to the attention of the public because of a widespread belief that nothing can be done about hair loss. This belief has no basis in medical fact. Worse, it has condemned many men and women to needless baldness by their neglect to treat certain accepted causes of hair loss.

There are six principal types of hair loss, or alopecia, as it is known in medical terms:

1. Alopecia from diseases of the scalp
2. Alopecia from other diseases or from an improper functioning of the body
3. Alopecia of the aged (senile baldness)
4. Alopecia areata (loss of hair in patches)
5. Alopecia of the young (premature baldness)
6. Alopecia at birth (congenital baldness)

Senile, premature and congenital alopecia cannot be helped by anything now known to modern science. Alopecia from improper functioning of the body requires the advice and treatment of your family physician.

BUT MANY MEDICAL AUTHORITIES NOW BELIEVE A SPECIFIC SCALP DISEASE IS THE MOST COMMON CAUSE OF HAIR LOSS.

(c) Sebacin Formula advertising:

NEW MEDICAL EVIDENCE SHOWS HAIR CAN BE SAVED!

MEDICAL AUTHORITIES

BLAME GERM INFECTIONS

FOR COMMON BALDNESS

Washington, D. C.—New hope was offered to men and women suffering from the age-old problem of baldness, in recent testimony here by leading dermatologists.

* * * * *

* * * This impressive testimony by competent medical doctors now made public for the first time offers renewed hope for the treatment of sick scalps and the prevention of baldness.

4. It was further stipulated³ between counsel:

In the course and conduct of their business, respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., used the word "laboratories" in their corporation names in soliciting the sale of and selling their said preparations. In truth and in fact respondents do not own or operate a laboratory in connection with their said business.

The stipulated facts appearing in numbered paragraphs one to four, next preceding, are hereby found as facts for the purposes of this decision. The remaining facts necessary to be found under the issues framed, being predicated of scientific or medical testi-

³ Tr. 15-16.

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mony, are arrived at as a result of the evaluation of testimony produced by the parties in support of their respective positions.

5. It is found, as a fact, that from a reading of the various advertisements published and circulated by respondents of and concerning their various products, all as hereinabove set forth, respondents have represented, directly and by implication, that the common cause, or a significant cause, of baldness is due to germ infection and that the use of their preparations will (a) remedy the common cause, or a significant cause, of baldness; (b) remedy the common type of baldness; (c) prevent baldness or partial baldness; (d) cause the growth of new hair, and (e) prevent excessive hair fall; that this finding is made upon analysis, evaluation and reasonable construction of the overall tenor and effect of said representations and the construction which would be placed thereon by the average reader, meaning thereby those members of the consuming public who would, or might, be misled thereby, and while there is no testimony as to public acceptance or interpretation of the said advertisements none such is necessary, it being the especial province of this Commission to avail of its expertise herein *sua sponte*, without the necessity of supporting testimony, and this has been consistently held to be an attribute of quasi-judicial and expert bodies such as this Commission.

6. It is further found as a fact that said advertisements are misleading in material respects and constitute false advertisements in that, contrary to fact, they represent that the common cause, or a significant cause, of baldness is due to germ infection. In truth and in fact the most common cause of baldness is due to heredity, age and endocrine balance, commonly referred to as male pattern baldness; that this type of baldness constitutes 95% of all cases of baldness and regardless of the exact formula or the combination of the ingredients or preparations, or the methods of application of respondents' preparations, such will not remedy or cure the common cause, or a significant cause, of baldness; will not remedy or cure the common type of baldness; will not prevent baldness or partial baldness; will not cause the growth of new hair; and will not prevent excessive hair fall.

This examiner lays no claim to any special competence in the scientific fields of dermatology, trichology, endocrinology, bacteriology, pharmacology, cosmetology, physiology, chemistry and anatomy, all of which are touched upon in this proceeding, and

has had to be content with the testimony and conclusions set forth by the experts. There is no lay testimony. In other words, the examiner has acted as the finder of the facts portrayed and has carefully adhered to his special province in marshaling the evidence and making his findings and conclusions based thereon. In order that the findings may be shown to be based upon demonstrable facts, reasonably arrived at, and to negate any thought that there has been an arbitrary selection of one segment of scientific thought over another, the ability so to do by this examiner being subject to challenge because of lack of scientific competence, and further in order to support the specific finding of fact, which is now here made, that there is no controlling divergency of expert opinion in the instant matter, a review of the salient testimony and evidence forming the predicate of these findings is in order.

In arriving at a final determination the examiner has not only been persuaded by his personal observation of the respective witnesses while testifying, as well also the testimony itself as it appears in the printed transcript, but also has taken into consideration as determinative and persuasive factors, the professional backgrounds, education and experience of the respective witnesses. This being so it is felt that the last mentioned qualifications of the individual witnesses should be stated and accordingly such are succinctly set forth and incorporated herein as "Marginal Note No. 1," immediately following these findings of fact, such note embracing pages 23 to 27 hereof. In dealing with testimony the names of witnesses have been used in order that the testimony may be related to the particular witness and, by reference to the Marginal Note, his competency to express his opinions may be evaluated.

The Testimony

Dr. Howard T. Behrman, a witness called by the Commission, testified to his qualifications as an expert, such qualifications appearing in detail in Marginal Note No. 1, hereinbefore referred to. After qualification the witness was examined on the *voire dire* upon the conclusion of which counsel for respondents expressed himself satisfied with the competency of the witness.

The witness testified that his specialty in the practice of medicine is confined to dermatology which concerns itself primarily with the diagnosis and treatment of the skin, both in health and in disease, and this includes the hair and scalp; that the matter

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of diminished hair growth, excessive hair loss, baldness, dandruff, itching and irritation of the scalp are all within the same field of witness' specialty and he is familiar with all of these conditions, having devoted himself since 1939 to the practice of dermatology to the exclusion of the other branches of medicine; that he has averaged between 50 and 100 patients a day for some years past in his private practice, exclusive of hospital work and clinics, and that between 25 and 50 percent of that number were cases involving hair and scalp disorders.

The subject of baldness, known to the profession as alopecia, may be divided into two main groups, the first thereof to include all cases of congenital baldness, being baldness at birth or associated with congenital disturbances of some type. The second category would be acquired baldness or the type that occurs subsequent to birth. This latter may in turn be separated into two main groups, that is, the group associated with scarring as well as baldness, and the other group being unassociated with scarring. Both of these major sub-groups may be further subdivided into the local and the systemic forms of baldness. Under the local form may be found baldness due to various physical agents, such as heat, X-ray, atomic radiation, and chemical action or substances of that type, as well also virus and fungi of different types. The remaining subdivision in this category forms the major and most important type of baldness which may be described as "just plain ordinary baldness of the garden variety type" which is referred to as the male pattern baldness. The baldness caused by systemic reasons, such as syphilis, high fevers, endocrine disturbances and things of that nature are not here considered because we are not concerned therewith under the issues at trial in this matter. Witness testified that: "When we speak of baldness, the disease, what we primarily talk about is ordinary male pattern baldness, common baldness"; that this particular type of baldness constitutes at least 95 percent or more of all cases of baldness and that all of the other types of baldness above described, come within the remaining 5 percent; that germ infection is not the cause of common baldness, otherwise known as the "male pattern type," nor is the matter of germ infection a significant cause of baldness.

Witness thereupon undertook to describe the causes leading up to baldness of the male pattern type and said that it is his opinion, and there is "more or less" universal agreement among

dermatologists, endocrinologists, anatomists and the like on the subject that such is due to three things: 1. *Heredity*. In other words, certain racial groups, strains and families have a tendency toward this type of baldness; 2. *Hormonal balance*. In other words, the relationship between the circulating hormones, primarily the male and female sex hormones; that it is known where an imbalance or preponderance of male, in contradistinction to female, hormones is encountered, we generally find baldness, which is the reason the disease is so named, it being primarily prevalent among men rather than women; 3. *Age*. In other words, with age there is a certain amount of hair loss which is gradual and occurs as time passes on.

The witness is familiar with the use, application and action of all of the ingredients used by respondents in the manufacture of their various preparations and, in fact, has used most of them in his practice; that he is of opinion there is no foundation for respondents' assertions concerning the efficacy of any of these ingredients, either singly or in combination, for the treatment and condition or cure of baldness of the common or male pattern type, nor would use of respondents' preparations remedy the common cause of baldness; that the said preparations will not cure or remedy a significant cause of baldness, nor remedy the common type of baldness, nor will said preparations, in this vast majority of cases, prevent baldness or partial baldness, and likewise, such preparations will not cause nor facilitate the growth of new hair.

From the foregoing it will be seen that this witness attributes 95 percent of all cases of baldness to the common or "male pattern" type. As to the remaining 5 percent witness said these cases could be attributed to several hundred causative factors but was of the firm opinion that adequate treatment thereof could only be devised and administered after full clinical examination and laboratory study of individual cases; that it is possible in certain instances in this percentage category some of respondents' preparations might be of value, while in other instances they might, and possibly could, aggravate and worsen the condition. On this line considerable testimony was had which is not here dealt with for the reason we are primarily concerned, under the issues herein, with that great body of cases of baldness comprising 95 percent plus and as to this percentage category respondents' preparations will have no effect in promoting hair restoration, hair growth, prevent falling hair or in any other

wise fulfilling the representations of respondents as disclosed in their advertisements.

Dr. Herbert Rattner, a witness called at the instance of the Commission, whose professional qualifications are set set forth in the Marginal Note No. 1 hereinbefore referred to, testified that he is engaged exclusively in the practice of dermatology which is that branch of medicine having to do with the care of the skin and its appendages, the latter being the nails, hair, and the adjacent mucous membrane; that from the time he began to specialize in dermatology, in the year 1927, he has treated many cases of diminished hair growth, excessive hair loss, baldness, dandruff, itching and irritation of the scalp, all of such being within his particular field; that the witness sees and attends individuals with the foregoing ailments practically every working day.

Witness testified that ordinarily, when the term "baldness" is used, it is taken to mean the "common garden variety" or "male pattern type" of baldness; that there are different types and causes of baldness other than the male pattern type which are roughly subdivided into "patchy" and "diffuse baldness," and the one with which we are principally here concerned is in the latter category; the patchy type of baldness can be due to several causes, some related to disease—alopecia areata, syphilis, pupus erythematous, folliculitis decalvans, (which latter is probably due to a germ), ringworm in children and instances of this type. Then there is diffuse baldness, the male pattern type, the cause of which is not known but according to the witness it is "pretty evident" that such is due to endocrine imbalance which is inherited. Also in the diffuse baldness category this type appears at times following high fever, or the taking of certain drugs, or after the skin of the scalp has been inflamed by chemicals, but in these last mentioned instances the bald condition is temporary in nature and the hair recurs but this is not true of the male pattern baldness. Witness gave as his opinion that the proportion of bald-headed people, or semi-bald people, which would come under the heading of the male pattern type in men is very close to 100 percent, and was very positive in his statement reiterating that at least 99½ percent or "very close to 100 percent" belong in the male pattern type and that all other patterns or varieties of baldness, other than the male pattern type, would be encompassed within one percent. When speaking of these percentages

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the witness was not influenced by the fact that baldness occurs sometimes with women, but only very infrequently and would not change his opinion as above expressed; that some women who are under treatment for certain types of cancer receive the male sex hormones as part of the treatment as a result of which they may become bald as long as they are taking the medicine, that is to say, the male sex hormone, and this is but another evidence of the reason why this widely prevalent condition of baldness is denominated "the male pattern type."

Referring to seborrhea as a causative factor of the male pattern type of baldness, as represented in respondents' advertisements, the witness denies that such is a causative agent; that he has seen many patients with seborrhea who are not bald and, referring to himself as an example, testified: "I have a lot of seborrhea where I have hair. Where I have a few hairs I still have seborrhea dermatitis; I do not [have seborrhea] where I am bald"; that seborrhea and baldness are frequently associated, but not causatively, that is to say, many men who are bald also have seborrhea and many who are bald do not have seborrhea, and also many people who have seborrhea are not bald. The witness has never in his experience seen any instances in which scalp germ infections were the causative agent in the loss of hair in the common male pattern type of baldness; that germs may be the causative agent in certain types of patchy baldness but never in the common male pattern type; that these instances of patchy type of baldness would fall within the one percent previously alluded to by the witness.

Having had read to him a list of all of the ingredients comprised in the makeup of the several preparations of respondents here involved, the witness said that he is familiar with many of them and in fact had used the same or similar ingredients in his practice and those which he had not so used he had "looked up" and was prepared to testify to the effects which could be expected from their usage; that substantially all of the ingredients are mild antiseptics, except menthol which is used for its cooling effect, which are much like an after-shave lotion, and alcohol which has the effect of drying the hair; that glycerin and castor oil are simply vehicles and the various combinations of respondents are designed to be mild antiseptics, to dissolve dandruff and "furnish a little hair dressing."

The witness was positive in his statement that none of the ingredients as listed, whether singly or in combination, would

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have any synergistic or additive effect the result of which in his opinion would cure baldness or stop falling hair, and in fact would have no effect whatsoever on common baldness of the male pattern type. He further testified that the use of respondents' preparations will not cause the growth of new hair; will not prevent excessive hair fall and will not remedy any significant cause of common baldness.

Upon having read to him various of the respondents' advertisements such as:

Millions of trouble-breeding bacteria, living on your sick scalp are killed on contact. Ward's Formula kills not one, but all four types of these destructive scalp germs now recognized by many medical authorities as a significant cause of baldness * * *

The witness gave as his expert opinion that said statement was false and misleading and not substantiated by his own experience or by any competent authorities within his field who are known to the witness. The witness was equally positive in testifying concerning several of the other advertisements of the respondents and his criticism was based upon the same reasoning; that senile and premature and congenital baldness cannot be helped by anything known to medical science and that the loss of hair or baldness due to scalp germs and infection are exceedingly rare and further that the male pattern type of baldness has no relation whatsoever to destructive scalp germs or infection.

Dr. Albert M. Kligman, a rebuttal witness called by the Commission and whose qualifications appear herein in Marginal Note No. 1. Upon conclusion of his qualification as an expert, respondents' counsel volunteered the statement:

May I state that I concede the qualifications of the doctor?

The witness thereupon testified that his medical specialty is dermatology which is the study of the skin and its principal appendages, the hair and the nails; originally the witness was interested with mycological investigation of fungus infection, but in the past four or five years has paid particular attention to the study of the hair, particularly those studies relating to its anatomy and the physiology of hair growth. The witness has read the testimony of respondents' witnesses in this case. Referring to the testimony of respondents' witness Traub, he did not agree with the latter's finding as to the percentages of all causes of baldness and that, contrary to such testimony, said that considerably less than one-tenth of one percent of all of

the causes of baldness, in the opinion of the witness, is caused by infection; that there are many causes of baldness ranging over a great number of diseases in general, from constitutional and hereditary defects; mechanical causes such as the pulling of the hair; physical causes such as radiation and burns; chemical causes such as toxins, external or internal; allergy causes such as a drug reaction; psychosomatic causes involving emotional problems of the individual; infectious causes due to virus, bacteria, fungi and the like, so that the cause of baldness is as wide as the subject of dermatology itself; that in his opinion the most common type of baldness is the "male pattern" baldness, which type he estimates to constitute 99 percent of all cases of baldness, and in fact is "very close to, and could be, 100 percent."

According to the witness the male pattern type of baldness is an hereditary disorder, one which has to be born with the genes that predispose toward its development, and when it emerges as a clinical symptom it is accompanied by the presence of other factors, such as age; coupled with the foregoing is the consideration of the endocrine and hormonal status of the individual; that this type of baldness does not appear until an individual has gone through his adolescence because baldness of this type requires the presence of male hormone; that those who are castrate and genetically immature do not develop baldness; in addition there is a third condition which has to do with sex because this disease appears principally in males, but not exclusively; the male pattern type of baldness may occasionally appear in females who inherit a double dose of these genes from both sides of the family, but this is rare.

Upon being asked if infection is a cause of the male pattern type baldness the witness answered: "Emphatically no"; that seborrhea is not a cause of the male pattern baldness, nor is the condition known as seborrhea dermatitis a causative agent; that in unusual cases certain types of bacterial diseases and some types of fungus diseases may contribute to the loss of hair but this loss is in no way analogous to that which ensues in the male pattern type. The process of balding in the male pattern category takes place wholly independently of any infection of the hair roots and is not a consequence of inflammation due to skin irritation or infection; that the two conditions are markedly different because in instances of bacterial infection such would not be localized to a particular area and would show no definite pattern and have no characteristic way of developing but, in the areas

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where it did make itself evident, would be characterized by exudation, by swelling, and usually crusting, pain and tenderness and an upheaval in the tissue, as a consequence of which the hair would be thrown off; that such described localized conditions are not prevalent in the male pattern baldness and have no physiological or other connection therewith.

When respondents' witness Lewis was on the stand, there was introduced through him Respondents' Exhibit No. 5, being a brochure titled "Dandruff and Seborrhea" by McKee and Lewis, published April 1938. The record shows that author McKee is deceased and coauthor Lewis is the same Dr. George M. Lewis who testified for the respondents. Under the accepted rule that the writings of an expert may not, ordinarily, be used to support his testimony as an expert witness, no weight is accorded this exhibit by the examiner who has preferred to consider only the oral testimony of the witness as given on the stand. However, the respondents, obviously laying store in the comments and summary contained in said brochure, this witness was asked to comment on said exhibit from a technical standpoint in which comments the witness said that he is familiar with the contents of the paper and that its general purport is to support the major finding of the authors to the effect that certain types of organisms tended to be associated with baldness which the witness declared to be an obsolete idea; that the experiments described in the paper were not carried out completely from a scientific standpoint in that it does not involve quantitative techniques, nor does it estimate the number of organisms which were isolated from the scalp during the experiments; that it is a rather "crude work" and not modern [1938]; that the organisms recovered were not specifically designated by their scientific terminologies and as an instance the witness pointed out that the authors found "increased infections of scurf staphylococcus on the surface of the scalp," which statement has no scientific basis for existence and that is not the manner in which experts designate organisms; that the work is wholly insufficient to afford any basis in fact or significant information bearing upon the subject that any specific type of bacteria is associated with male type of baldness; that, so far as witness knows, no one has clearly demonstrated that the microflora, (the bacteria flora), of the scalp of people with baldness is in any manner different than that of normal people; that the witness himself is well versed in the bac-

teriological field and teaches a course in bacteriology of the skin; specifically referring to the various categories of the staphylococcus, germs or substances as found on the scalps of the experimentees, referred to on page 136 of the aforesaid Respondents' Exhibit No. 5, the witness said that all of these are normal organisms which can be found upon sampling any population of men and that such are not indicative of, nor can they be related to, the male pattern baldness.

Further examination of the witness went into extensive technical discussions and explanations for the opinions and conclusions he has expressed—such as microscopical examination of biopsies of the skin and hair;⁴ microscopical examinations of scalp scale culture, fungus, bacteria and micro-organisms; the effect, (in producing baldness), of the male chromosomes and genes in the hereditary apparatus, and other testimony not necessary to be here reviewed but a reading of which serves to convince and render comprehensible to the lay mind the scientific bases for the reasonableness and truth of the testimony of this witness.

Also extensive examination, both on direct and cross, was had of this witness which explored the subject of seborrhea dermatitis and its noneffect in producing the male pattern type of baldness. No attempt is here made to relate or review any therapeutic effect of respondents' medicaments in this insignificant percentage of cases, such constituting less than one-half of one percent, as opposed to the overwhelming percentage of cases of the male pattern type.

Dr. Peter Flesch, a witness called by the Commission in rebuttal, and whose qualifications are listed in Marginal Note No. 1 aforesaid, testified that he is a research physician in the fields of chemistry and the physiology of the skin, specializing in certain aspects thereof such as the pigmentation of the skin, keratinization, hair growth and the development of new methods of research. After qualification of the witness by Commission counsel as an expert and examination on the *voir dire* by respondents' counsel, the latter announced: "I have no objections to the qualifications of the witness."

This witness is the same person who conducted certain experiments and propounded certain theories upon which respondents' witness, Dr. Traub, placed much reliance in his testimony and the general purport of the testimony of this witness, Flesch, is to

⁴ See testimony affecting Commission's Exhibit No. 14 which is a schematic drawing, made under the supervision of the witness, of a normal hair and its surrounding tissue.

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the effect that Traub had misinterpreted the results of the tests and experiments which Flesch had conducted and, based thereon, he had postulated certain theories, which were *only* theories, and which the witness Traub had construed to be definitive results which could be accepted as explanatory of the causative reason for baldness in human beings. The gist of this witness' testimony is as follows: Witness had read and is familiar with the testimony heretofore given in this case by all of respondents' witnesses and particularly with that of the witness Traub; that Traub was in error in making the following statements:

I think the chemical evidence we now have from Flesch on this squalene and other fatty acids that are produced in excessive oily conditions of the scalp may be the thing that is important, is the important one in bringing about hair loss.

and further:

The only person who has done any extensive work [on this subject] has been Flesch, and his work has been that of animals, but he definitively proved that rubbing of this material in the skin of the animal, experimental animal, produced a hair loss and alopecia, and if that is the case, that may be the explanation of all of this type of common baldness.

Witness said that his experiments could not be correctly interpreted to the effect that baldness, either in human or lower animals, is commonly caused by infection or that it is commonly caused by sebum or seborrhea; that his studies and experiments have failed to develop that there is anything commonly present on the hair or the scalp, such as seborrhea, squalene and fatty acids, or any infection which explains the existence or the causation of the common type of baldness or which explains "why one person gets bald and the other fellow doesn't"; that he knows of no substance or factor of the human scalp or hair which may be removed and thus change in any way, either by retardation, postponement or the overcoming of the common type of baldness and that anyone who so interprets his experiments as so indicative is in error.

The respondents offered testimony to the following effect:

Dr. Eugene F. Traub, whose qualifications are set forth in Marginal Note No. 1 above referred to, a witness on behalf of the respondents, has specialized in the practice of dermatology for 36 years; that he has read and is familiar with the testimony of the witnesses on behalf of the charges of the complaint and fixes at approximately 90 to 95 percent the incidence of the infectious or so-called premature-senile-hereditary types of bald-

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ness, although he did not undertake to separate or break down the percentages in the various subtypes; he discounts the hereditary factors, upon which Commission's witnesses laid great stress, by observing that he does not believe, "[a]nybody at the present time knows what 'hereditary factors' mean"; he discounts the endocrine factor or theory, advocated by Commission witnesses, as causative of, or influencing, baldness because: "[j]ust how much stress one can put on the different types of hormones that comprise the endocrine chain is hard to say," but in evaluating the causes of many types of baldness, and contrary to the expressed opinions of Commission's witnesses, he places stress upon dandruff, seborroid dermatitis, pityriasis capitis and germicidal infections as significant causative factors; it is his testimony that loss of hair is attributable to large measure to germ infections which are present on the scalp and, especially so, in the presence of dandruff of the two types mentioned.

A portion of this witness' direct testimony partook of having read to him certain responses to questions and opinions expressed by Commission's witnesses, the net result of his answers tending to show that he was not in agreement with many of the opinions of Commission's witnesses, viz: That in his opinion, seborrhea, particularly of the fatty type, is a causative factor of the male pattern baldness, although he was frank to say that there is no complete agreement among dermatologists that his opinion in this behalf reflects the consensus on this subject; that he is of the opinion that germ infection is a significant cause of baldness, which opinion he bases upon his clinical and medical practice as well also upon the work of those who are engaged in the field of scientific research on hair, as also the textbooks and pamphlets on the subject, but did not cite any authoritative work in support thereof. The witness further testified that in determining proper treatment for a bald condition it is essential to appraise the individual case in order to properly diagnose and prescribe and that this is desirable, not only at the outset, but that continued supervision is important in order to determine what, if any, remedial progress is being effected; that in his practice he has made use of a "host" of local remedies, mostly of the mild anti-septic type which, coupled with their germicidal effects plus the attendant massaging of the scalp in their physical application, the latter having a tendency to reduce skin tightness and tensesness thus improving circulation, contributing to a beneficent

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result in avoiding excessive hair failure. Specifically advertising to respondents' preparations, with which he testified he was familiar, both as to their composition and effect in use, witness classified all of them as "mild antiseptics" which, if used, would have a tendency to destroy the infection and as a result "improve the scalp situation." The witness was very frank in saying that, as to baldness of the hereditary factor type:

There isn't anything to do about the endocrine factor so we are left with the local management where we hope to achieve some result and, by the local treatment, of course, we use various preparations on the scalp.

Upon being asked:

Q. Does that mean, doctor, that you are relegated to the infectious type, exclusively, for any remedial action?

A. That's what it boils itself down to, sir.

Q. Is that the way you wish to express it?

A. I think that's about it.

Dr. George M. Lewis, a witness for respondent, testified that he is a practicing physician specializing in dermatology and has devoted extensive study to the hair and scalp. His *curriculum vitae* is delineated in Marginal Note No. 1 aforementioned. Testifying concerning the various groups into which baldness may be categorized, witness gave the most common and largest to be that of alopecia prematura or the "ordinary type of baldness," referred to in this proceeding as the "male pattern type," saying that such group comprises from 90 to 95 percent of the bulk of all loss of hair, thus agreeing in this connection with the testimony of the witnesses on behalf of the complaint. Witness places all other categories of baldness in the remaining 5 to 10 percent. However, from this point forward, in differing with the expressions of opinions by Commission's witnesses, this witness said that in the 95 percent group aforesaid the condition of pityriasis capitis and seborrhea dermatitis "are very important components of this disease syndrome," [otherwise baldness], and then goes on to give a description of the several types of dandruff referred to and his theories of their causative importance in hair loss, basing his opinion on clinical experience and his contacts with his professional colleagues and men with whom he has worked on this subject. Much of the testimony of the witness was given over to his methods of treatment of pityriasis capitis and seborrhea dermatitis which testimony is not here reviewed because, contrary to the views expressed by this witness on their causative importance, these views are considered to be at irre-

concilable variance with the views on the identical subject expressed by Commission's witnesses, to wit, that these morbid conditions of the scalp are not significant causes of hair loss in the male pattern type with which we are here primarily concerned.

The witness is familiar with the component ingredients and recommended usage of the products of respondents, as hereinbefore described, has used the same or similar products in his own practice and summarizes their effects under two different actions, (1) antiseptics and (2), stimulation, i.e. the agitation or manipulation of the scalp in the form of massage upon application of the product thereto. Of the two he believes the former is the more important in its action on the flora of the scalp and that the effect would be to diminish or eliminate the scaling or dandruff and in time to decrease the loss of hair. Witness gave as his opinion that in the insipient stages of the male pattern type of baldness he has "convinced himself" that local treatment is effective in preventing further loss of hair, but that once the hair falls out it is a complete loss. In the matter of self-diagnosis and self-treatment for hair loss by a sufferer, the witness is of opinion that particularized treatment is much more to be desired than the use of a generalized remedy which is claimed to be applicable to any and all conditions of hair loss and is of opinion that it would be better to consult a doctor than to attempt self-treatment with a universal formula.

Without in anywise intending to impugn the honesty and rectitude, or to disparage the professional opinions of the preceding two witnesses as above epitomized, it is found, as a fact, that the views expressed are so at variance with the testimony of the Commission's witnesses, (to which latter the examiner ascribes the greater weight), that he finds it impossible to attempt to reconcile the same and to accept the verity thereof in preference to the opinions expressed to the contrary.

Dr. Louis C. Barail, a witness called by the respondents, is a consulting biochemist and toxicologist. Through this witness the respondent unsuccessfully attempted to show the germicidal efficacy of the respondents' product, known as "Ward's Formula," in certain tests which were conducted by the witness some six or seven years prior to the time of testifying, the witness being then an employee of the United States Testing Company. The obvious intent was an attempt to show that the product named, as well also other products of the respondents here in issue, were efficacious in the control of the various forms of dandruff and

scalp flora, thus tending to substantiate respondent's representations concerning their products, provided the defense theory prevailed, that dandruff and germs are significant causes of hair loss, especially in the male pattern type of baldness. At the time of the making of the tests attempted to be proved, the witness had no personal knowledge of the correct chemical formulae of the products, either quantitatively or qualitatively; was unable to produce his laboratory notes concerning the experiments, the results of which he attempted to give, and his report, based upon those experiments, upon being tendered in evidence, was refused. No further attempt was made by respondents to avail themselves of the testimony of this witness wherefore his testimony is disregarded as having no weight whatever in aid of a determination of the issues here involved.

Marginal Note No. 1 (Referred to on Pages 12 to 22)

In support of the allegations of the complaint the Commission called four witnesses, three of whom are practicing physicians in New York City, Chicago and Philadelphia, and the fourth a licensed physician in Hungary engaging in research specializing in dermatology. All of these witnesses are actively engaged in the field of dermatology and their respective qualifications are given as follows:

Dr. Howard T. Behrman, whose curriculum vitae appears of record as Commission's Exhibit No. 2, is a practicing physician specializing in dermatology in the city of New York; an A.B. from the University of Pennsylvania, M.D. New York University College of Medicine; Research Fellow, University of Pennsylvania; internship, Beth Israel Hospital, New York City; graduate study three-year special postgraduate course in dermatology at Bellevue Hospital in New York University College of Medicine; special training in the physics of dermatologic radio therapy and also in mycology, New York Skin and Cancer Hospital and Mount Sinai Hospital, New York; Fellow of the American Academy of Dermatology; American Medical Association; American Academy of Compensation Medicine and American Academy of Science; Fellow in Dermatology, New York Academy of Medicine; Diplomate, American Board of Dermatologists; member of the Committee on Cosmetics, American Medical Association; New York County Medical Society; Eastern Medical Society; Metropolitan Medical Society; New York Physicians Medical Society; author of approximately 100 scientific articles on skin diseases;

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coauthor of four books, one dealing with hair, one with skin, one on "Cutaneous Manifestations of Internal Disease" and a text on "The Scalp in Health and Disease"; author of the chapters on skin and hair in "The Home Medical Advisor," by Dr. Morris Fishbein, and in Davis' Series on Medicine. This witness has been actively engaged in the field of dermatology since completing his internship in 1939 and is now so engaged.

Dr. Herbert Rattner, a practicing physician in the city of Chicago, Ill., specializing in dermatology and whose curriculum vitae is of record herein as Commission's Exhibit No. 9 (A-B), as well also his bibliography consisting of some 54 articles and 7 books, all on the subject of dermatology or closely allied therewith. Witness received his M.D. in 1926 from Northwestern Medical School. At the time of testifying he was chairman of the Section of Dermatology of the American Medical Association, (1956-1957); since the year 1927, and currently, is exclusively engaged in the practice of dermatology; a diplomate of the American Board of Dermatology and Syphilology; historian of the American Dermatological Association; member of the American Academy of Dermatology and Syphilology; Society of Investigative Dermatology; Institute of Medicine of Chicago; Chicago Medical Society; Society of Railroad Surgeons; dermatologist at Passavant Memorial and Cook County Hospitals and a consultant in dermatology at St. Vincent's Hospital, all of the State of Illinois; consultant to the Veterans Administration Research Hospital; chairman of the Nomenclature Committee for Dermatology of the American Medical Association; editor of the Archives of Dermatology; chairman of the Editorial Committee of the Academy of Dermatology and Syphilology and author of the section on Dermatology of the Encyclopedia Britannica Year Book and has been so engaged in the latter for the past four years; former president of the Chicago Dermatological Society.

Dr. Albert M. Kligman, a practicing physician in the city of Philadelphia, specializing in dermatology, whose curriculum vitae appears herein as Commission's Exhibit No. 12 (A and D) and whose publications are listed in Commission's Exhibit No. 13 (A, B, C and D). Academic degrees: B.S., Penn State, 1939; Ph.D., University of Pennsylvania, 1942; M.D., University of Pennsylvania, 1947; diplomate, American Board of Dermatology and Syphilology, 1951; currently associate professor of dermatology

in the Graduate School of Medicine of the University of Pennsylvania; member of the American Association for the Advancement of Science; American Medical Association; Society for Investigative Dermatology and American Academy of Dermatology. In the last four or five years witness has given special attention to the study of the hair, particularly relating to its anatomy and the physiology of hair growth.

Dr. Peter Flesch, whose profession is that of a research physician and whose curriculum vitae appears herein as Commission's Exhibit No. 15. There also appears, as Commission's Exhibit No. 16 (A, B and C), a list of publications of this witness, many of said publications dealing with hair growth and the physiology and chemistry of the skin, the majority dealing with the subject of dermatology in one form or another. Witness is at present engaged at the University of Pennsylvania, Department of Dermatology, in research involving the chemistry and physiology of the skin, including pigmentation of the skin, keratinization, hair growth and the development of new methods in research; lectures on these subjects to the graduate students of the University of Pennsylvania. While the witness is not a licensed medical practitioner in the State of Pennsylvania, he does treat patients in his field but under the supervision of a licensed physician such latter being Dr. Albert M. Kligman, a witness whose qualifications have been set forth in the next preceding paragraph. Witness holds an M.D. degree from the Medical School of the University of Budapest, 1939; M.S. from the University of Chicago, 1943; research associate, Department of Pharmacology, University of Chicago, Cancer Society Fellow; Ph.D. in Pharmacology, University of Chicago; assistant professor of dermatology, University of Pennsylvania; author of a number of publications dealing with research in dermatology.

The respondents called the following witnesses whose qualifications are reviewed:

Dr. Howard T. Behrman. The qualifications of this witness have been hereinbefore reviewed, he having been originally called by the Commission. For the purpose of further exploring the witness' testimony in chief, the results of which are reported in the findings of fact, respondents called this witness as their own.

Dr. George M. Lewis, a practicing physician in the State of New York, specializing in dermatology and whose curriculum vitae appears herein as respondents' Exhibit No. 4. Said exhibit likewise contains a list of the witness' publications in the form

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of books, chapters in books and articles in journals dealing with the subject of dermatology. Degrees and qualifications: M.D., University of Alberta, Canada, 1925; L.M.C.C., 1925, Medical College of Canada; F.A.C.P., 1937, American College of Physicians; diplomate, American Board of Dermatology and Syphilology; licensed to practice in New York State since September 1926. House physician, New York Skin and Cancer Hospital, November 1, 1925 to November 1, 1926; fellowship, New York Post-Graduate Medical School and Hospital; attended University of Pennsylvania Graduate School with special course in mycology and pathology, 1927; assistant attending dermatologist and syphilologist, Skin and Cancer Unit, New York Post-Graduate Hospital, 1928-1933; attending dermatologist and syphilologist, Skin and Cancer Unit of the same hospital, 1933-1939; assistant in radiology, New York Hospital, 1931-1932; assistant physician to out-patients, 1932-1940; attending dermatologist, St. Clare's Hospital; visiting dermatologist, Welfare Hospital, New York City; attending physician, New York Hospital, consulting dermatologist to Memorial Hospital, James Ewing Hospital, both of New York; and Vassar Brothers Hospital, Poughkeepsie, N.Y.; consulting dermatologist, Polyclinic Hospital, New York City; instructor in clinical medicine, (dermatology) Cornell University Medical College; instructor, New York Post-Graduate Medical School, Columbia University; and professor of clinical medicine (dermatology) Cornell University Medical College, 1949.

Witness is a member of the New York County Medical Society; New York State Medical Society; American Medical Association; New York Academy of Medicine; Manhattan Dermatological Society (president, 1944-1945) (1947-1948) (1956-1957); American College of Physicians; American Academy of Dermatology and Syphilology, (president, 1956); American Dermatological Association, Incorporated; Society for Investigative Dermatology, Incorporated; Mycological Society of America; American Board of Dermatology and Syphilology, Incorporated (president, 1954-1955), and a member of the editorial boards of "Archives of Dermatology," "New York State Journal of Medicine" and "Journal of Investigative Dermatology."

Dr. Lewis C. Barail, of the State of New York, formerly a practitioner of medicine in France and Switzerland, now a consulting biochemist and toxicologist whose curriculum vitae, denoted by him as: "Principal activities of Dr. Lewis C. Barail, Consulting Biochemist and Toxicologist," appear herein as re-

spondents' Exhibit No. 6. A reading of this exhibit discloses that the witness asserts to an M.S. degree in chemistry and an M.D. with 30 years' experience in biological research. He also asserts to be a former professor and lecturer at several universities and colleges including Columbia, New York, Fordham and Temple Universities but no specific details thereof are furnished in the exhibit, nor does the testimony given by the witness enlarge upon his professional qualifications in this connection. His "activities" according to this exhibit, and the professional societies of which he is a member are apparently more or less commercial in nature, involving sanitation, toxicology and operations research in the fields of biologicals, cosmetics, disinfectants, food products, packaging materials, pesticides, pharmaceuticals and plastics.

Dr. Eugene F. Traub, a practitioner of dermatology for 36 years, presently residing in Cambridge, Md., whose curriculum vitae appears herein as respondents' Exhibit No. 1. This witness is also a practicing physician in the field of dermatology with offices in New York City; B.S., University of Michigan, 1916 and M.D., University of Michigan, 1918; internship, resident physician, University Hospital, Ann Arbor, Mich., 1919-1920; internship and residency, New York Skin and Cancer Hospital, and Skin and Cancer Unit, from 1921 to July 1, 1947; has served as attending dermatologist in New York and Cornell Universities; clinical professor of dermatology and syphilology, Post-Graduate Hospital, Columbia University; professor of dermatology, University of Vermont, 1928-1949; medical director, Skin and Cancer Hospital of Philadelphia, 1954-1956; is at present professor of dermatology, New York Medical College; consulting dermatologist in the following hospitals—Central Islip Hospital, Meadowbrook Hospital, Nassau Hospital, Beth David Hospital, Wyckoff Heights Hospital, Prospect Heights Hospital and Cambridge Hospital, of Cambridge, Md.; director of the Department of Dermatology in the following hospitals—Flower and Fifth Avenues Hospitals, Morrisania Hospital, Metropolitan Hospital, Bird S. Coler Memorial Hospital and Home, Queens General Hospital, and Otisville Hospital. At present is clinical professor of dermatology at Temple University, Philadelphia. A member of the American Dermatological Association; New York Dermatological Society; Fellow, New York Academy of Medicine; Fellow, American Academy of Dermatology; Fellow, American Medical Association; American Dermatologists and Syphilologists of Greater New

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York; a member of the Board of Directors of the Association of Dermatosyphilologists of Greater New York, and a diplomate of dermatology and syphilology, Compensation and Industrial Dermatoses. The said exhibit also includes a list of the various publications of this witness.

7. It is further found, as a fact, that respondents' advertisements are also misleading in a material respect and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, by reason of the respondents' failure to reveal facts material in the light of the representations made therein. In advertising their cosmetic and medicinal preparations as a cure or remedy for destructive scalp germs or infections, which respondents represent are a significant or the most common cause of hair loss or baldness, they suggest that there is a reasonable probability that baldness is due to the presence of destructive scalp germs or infections and that their preparations will be of benefit and constitute an effective treatment therefor. In truth and in fact, the instances in which loss of hair or baldness is due to scalp germs or infection are rare. In the great majority of cases, loss of hair or baldness is a male pattern type, having no relation to destructive scalp germs or infection, and when baldness is of this type respondents' preparations will be of no value whatever in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldness is caused by a condition for which the respondents' preparations may be beneficial, and respondents' advertising is misleading because of failure to reveal the fact that in the great majority of cases, loss of hair or baldness is of the type known as male pattern baldness and that when baldness is of that type, respondents' preparations are of no value in the treatment thereof.

8. Respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., use the word "Laboratories" in their corporate names in soliciting the sale of and selling their said preparations. Through the use of the word "Laboratories" as aforesaid, the said respondents represent that they own and operate laboratories in connection with their said business. Such representations are false, misleading and deceptive in that said respondents do not own or operate a laboratory in connection with their said business.

9. The use by the respondents of the foregoing false and misleading statements and representations, disseminated as aforesaid, has had and now has the capacity and tendency to mislead

and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of said preparations because of such erroneous and mistaken belief.

CONCLUSIONS

1. The aforesaid acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

2. Respondents urge dismissal of the complaint on the asserted ground that "the Commission does not have the power to support the scientific opinion which happened to favor its complaint and to thus arbitrarily disregard the opposing equally valid medical opinion," citing in support thereof *F.T.C. v. Lambert Pharmacal Co.* 38 F.T.C. Dec. 726 (Docket No. 4232). A reading of the lengthy memorandum opinions of the several commissioners, which are largely reviews of the voluminous expert testimony in the case, does not bear out the construction which respondents place thereon as grounds for dismissal, and nowhere does it appear that the case was dismissed solely because of conflicting scientific or medical opinions, (albeit such existed), but rather dismissal was occasioned by failure of the Commission to sustain the burden of proof. That this is true is apparently borne out by one of the commissioners of the majority who, in his concurring memorandum, said:

It is the duty of the Commission to decide issues of fact, whether or not medical or scientific questions are involved, by the greater weight of the evidence—the burden of proof being on the Commission. In my opinion * * * the allegations of the complaint have not been sustained by the greater weight of the evidence.

This quotation is a fair statement of the duty of the Commission to arrive at appropriate findings after due appraisal of all relevant evidence and irrespective of conflict of opinions of witnesses, which conflicts are prone to occur in all cases involving the inexact sciences, as here, which is exactly the reason why they are called the "inexact sciences." Were it otherwise any complaint would have to be dismissed where the respondent could muster sufficient experts to raise the cry of "conflict." However, administrative proceedings, unlike criminal cases, do not have to be proved beyond a reasonable doubt but merely "as supported

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by and in accordance with the reliable, probative, and substantial evidence" of record.

This view of the law of evidence as here applicable gave rise to the statements of the examiner contained in the first and second paragraphs on page nine of this decision.

3. As a corollary of the foregoing reasoning, and consonant with the opinion in *Universal Camera Corporation v. N.L.R.B.* 340 U.S. 474 et seq., directing that the "substantial evidence" rule, (above referred to), to support an order must be based upon the "entire record" which, perforce, includes evidence *contra* that introduced in support of the charges of the complaint, it was considered apropos to set forth in fair detail all pertinent evidence in order to disclose that all defense matter has received the due consideration which it merits.

4. It will be observed that the order hereto appended, (par. 1(b)) requires affirmative disclosure that respondents' products, under certain conditions therein set forth, will have no value in preventing baldness or excessive hair loss. As authority therefor see:

Sec. 15(a) (1) F.T.C. Act; *Paul v. F.T.C.* 169 F. 2d 294, 295; *Dorfman v. F.T.C.* 144 F. 2d 737, 739; *Haskelite Mfg. Co. v. F.T.C.* 127 F. 2d 765, 766; *The Elmo Company, Inc.*, D. 5959 (48 F.T.C. 1379); *Amer. Library of World Literature* D. 5811 (49 F.T.C. 220); *The Thorikon Company*, D. 6004 (49 F.T.C. 613); *Aberty v F.T.C.* 182 F. 2d 36, 39.

In the *Aberty* case the Court decided that a condition precedent to requiring an affirmative disclosure is a specific finding that failure to make such disclosure is misleading because of the things claimed in the advertisement. Such a definitive finding will be found herein under "Findings of Facts," paragraph No. 7, page 28.

ORDER

It is ordered, That the respondents, Ward Laboratories, Inc., a corporation, and its officers, and respondents Emile E. Kling and Joseph J. Seldin, individually and as officers of Ward Laboratories, Inc., and Comate Laboratories, Inc., a corporation, and its officers, and Sebacin, Inc., a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their cosmetic and medicinal preparations designated as Ward's Formula Medicine for the

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Scalp and Hair, Ward's Formula Medicinal Lubricant for Dry Scalp and Hair, Ward's Formula Medicinal Compound for Oily Scalp, Ward's Formula Shampoo, Comate Medicinal Scalp Formula, Comate Medicinal Emulsion, Comate Scalp Conditioner, Comate Dry Scalp Shampoo, Comate Oily Scalp Shampoo, Sebacin Basic Formula, Sebacin Antiseptic Lubricant, and Sebacin Shampoo, or any other preparation or preparations of substantially similar composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of said preparations alone or in conjunction with any method of treatment will:

(a) Prevent or overcome baldness or excessive hair loss, unless any such representation be expressly limited to cases other than those known as male pattern baldness, and unless the advertisement clearly and conspicuously reveals the fact that the great majority of cases of excessive hair fall and baldness are the beginning and more fully developed stages of said male pattern baldness and that in such cases respondents' preparations will be of no value in preventing or overcoming baldness or excessive hair loss;

(b) Induce new hair to grow, cause the hair to become thicker or otherwise grow hair, unless any such representation be expressly limited to cases other than those arising by reason of male pattern baldness, and unless the advertisement clearly and conspicuously reveals the fact that the great majority of cases of excessive hair fall and baldness are the beginning and more fully developed stages of said male pattern baldness and that in such cases respondents' preparations will not induce the growth of hair or thicker hair.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparations, any advertisement which contains any of the representations prohibited in paragraph 1 above, or which fails to comply with the affirmative requirements of paragraph 1 above.

3. Using the word "Laboratories," or any other word of simi-

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lar import or meaning, as a part of or in connection with the respondents' corporate or trade names, or otherwise representing, directly or by implication, that respondents own or operate a laboratory unless and until such a laboratory is actually so owned and operated.

OPINION OF THE COMMISSION

By GWYNNE, Chairman :

The complaint charges respondents with the use and dissemination of false and misleading advertising in the selling and distributing of cosmetics and medical preparations in interstate commerce for use in the treatment of conditions of the hair and scalp.

After a hearing, the examiner found against respondents and entered an order accordingly. Respondents' appeal therefrom has been presented both in written brief and oral argument.

No new legal propositions have been raised in this appeal. The hearing examiner made detailed findings of fact which are supported by the record.

The appeal of respondents is denied. The initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard on the respondents' appeal from the hearing examiner's initial decision, and the Commission having filed its opinion denying the appeal and adopting the initial decision as the decision of the Commission :

It is ordered, That the respondents, Ward Laboratories, Inc., a corporation, Emile E. Kling and Joseph J. Seldin, individually and as officers of Ward Laboratories, Inc., and Comate Laboratories, Inc., and Sebacin, Inc., corporations, 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 contained in the aforesaid initial decision.

Findings

IN THE MATTER OF
THE FAIR

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

Docket 6822. Complaint, June 17, 1957—Decision, Mar. 4, 1959

Order requiring a Chicago department store to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements; by advertising in newspapers which failed to disclose the names of animals producing certain furs, represented prices as reduced from purported regular prices which were in fact fictitious, and used comparative prices and percentage savings claims not based on current market values or a designated time; and by failing to keep adequate records as a basis for such pricing claims.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on June 17, 1957, issued and subsequently served its complaint in this proceeding upon the respondent charging it with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. After the filing of answer by respondent, hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint was received into the record. In an initial decision dated April 29, 1958, the hearing examiner held that certain of the complaint's charges were sustained and that others should be dismissed. The initial decision contained a provisional order to cease and desist.

The Commission having considered the cross appeals filed from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and the appeal of respondent denied in part and granted in part and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclu-

sions drawn therefrom and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Fair, is a corporation duly organized and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business and office located at 140 South State Street, Chicago, Ill. Respondent is engaged in the general retail merchandising of consumer goods including the retail sale of fur products in its fur department.

PAR. 2. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondent has advertised and offered for sale its fur products in commerce and has sold, advertised and offered for sale fur products which were made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act.

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

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

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was abbreviated on labels in violation of Rule 4 of the aforesaid Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was mingled with nonrequired information on labels in violation of Rule 29(a) of the aforesaid Rules and Regulations.

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

(d) Labels affixed to fur products composed of two or more sections containing different animal furs failed to set forth separately the furs composing such sections in violation of Rule 36 of the aforesaid Rules and Regulations.

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

PAR. 6. Certain of said fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling Act, as they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that the information required under Section 5(b) (1) of the Act was set forth in abbreviated form in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements concerning said fur products, which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 8. Among and included in the advertisements, as aforesaid, were advertisements of respondent which appeared in issues of the Chicago Tribune, which newspaper is published in Chicago, Ill., and has wide circulation in the State of Illinois and other States of the United States.

By means of the aforesaid advertisements respondent falsely and deceptively:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur products, as set forth in the Fur Products Name Guide, in violation of Section 5(a) (1) of the Fur Products Labeling Act.

(b) Represented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondent in the recent and regular course of its business, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the aforesaid Rules and Regulations.

PAR. 9. Respondent, in making the pricing claims and representations referred to in paragraph 8(b) hereof, failed to main-

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tain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44(e) of the aforesaid Rules and Regulations.

PAR. 10. Respondent in advertising its fur products misrepresented the grade, quality or value of certain of said fur products by the use of illustrations depicting higher priced or more valuable products than those actually available for sale at the advertised selling price, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(f) of the aforesaid Rules and Regulations.

PAR. 11. The respondent in the regular course of its business has been in substantial competition with other corporations, individuals, and firms likewise engaged in the retail sale and distribution of fur products.

CONCLUSIONS

The aforesaid acts and practices of the respondent, as herein found, have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Evidence was also submitted at the hearings relevant to the charges of alleged violations of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(b) of the aforesaid Rules and Regulations through the use of comparative prices and percentage claims which were not based on current market values and without giving the designated time of a bona fide compared price. Those charges are not sustained on the record, and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That respondent, The Fair, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as "commerce,"

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“fur” and “fur products” are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

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

(f) The name of the country of origin of any imported furs used in the fur product.

(2) Setting forth on labels attached to fur products:

(a) Required information in abbreviated form or in handwriting;

(b) Nonrequired information mingled with required information.

B. Falsely or deceptively invoicing fur products by:

(1) Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

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(e) The name and address of the person issuing such invoices;
(f) The name of the country of origin of any imported furs contained in the fur product.

(2) Setting forth required information in abbreviated form.

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

(1) That the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

(2) That such product is of a higher grade, quality or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means.

D. Making pricing claims or representations of the type referred to in paragraph C(1) above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based.

It is further ordered, That the charges of the complaint relating to alleged violations of Rule 44(b) of the Rules and Regulations promulgated under the Fur Products Labeling Act be, and the same hereby are, dismissed.

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

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter is before the Commission for final decision on the merits on cross appeals by respondent and by counsel supporting the complaint from the hearing examiner's initial decision. Briefs have been submitted and oral argument had.

The complaint charges that respondent has violated the Fur Products Labeling Act¹ and the Rules and Regulations promulgated thereunder² by (a) *misbranding* fur products, (b) falsely

¹ 15 U.S.C. 69 *et seq.*

² 16 C.F.R. 301.

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and deceptively *invoicing* fur products, (c) falsely and deceptively *advertising* fur products, and (d) failure to keep *adequate records*.

The hearing examiner found that respondent had violated Section 5 of the Federal Trade Commission Act through use of false and deceptive pricing representations and he issued a cease-and-desist order prohibiting such practices in the advertising and sale of "fur products, or any other products or commodities." He dismissed all other charges of the complaint, including allegations of violation of the Fur Products Labeling Act. As will hereinafter appear, the Commission has concluded that the initial decision is erroneous in these respects.

Respondent challenges the findings as to its pricing claims and contends that the hearing examiner erred in not dismissing the complaint by reason of respondent's discontinuance of the questioned pricing practices and in failing to find that certain rules promulgated under the Fur Products Labeling Act were invalid. Respondent also attacks the scope of the proposed order to cease and desist as apparently applying to all merchandise sold in The Fair's department stores instead of being limited to fur products.

In their appeal, counsel supporting the complaint assert that the hearing examiner erred in holding (1) that guaranties furnished respondent by manufacturers, or other suppliers, protected respondent where misbranding was apparent on the face of labels, (2) that the aforesaid guaranties protected respondent from its own actions in falsely advertising fur products, (3) that alleged violations of the Rules and Regulations promulgated under the Fur Act were not established, and (4) that retail sales slips are not "invoices" within the meaning of the Fur Products Labeling Act. They disagree with respondent's contention regarding the scope of the order to cease and desist, as a matter of law, but take no position on the question of discretionary propriety of such an order.

Jurisdiction

In its answer, respondent admitted the jurisdiction of the Commission; and the hearing examiner made the requisite jurisdictional finding.

However, during the hearings before the examiner, and on appeal, respondent in effect suggested that, because there is no

direct evidence of sales by it in commerce of improperly labeled or misbranded fur garments, the Commission is without jurisdiction to enter an order with respect to mislabeling. The evidence in the record of sales for fur products by respondent indicates that the customers involved resided in the State of Illinois.³

Section 3(a) of the Fur Act defines as unlawful "the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced."

Moreover, Section 3(b) bans "the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely and deceptively advertised or invoiced."

For the purposes of the Fur Act, misbranding is described and defined in Section 4, while false or deceptive advertising and false or deceptive invoicing are described in Section 5. Section 8 of the Act confers upon the Commission jurisdiction over violations of the Act and the Rules and Regulations promulgated thereunder.

The record before us discloses that respondent did, in fact, misbrand and falsely and deceptively advertise and invoice fur products sold by it. It further establishes that respondent advertised and offered fur products for sale in commerce within the meaning of Section 3(a), through the Chicago Tribune, which has substantial circulation outside the State of Illinois.⁴ The manufacturers' or suppliers' invoices of record⁵ also disclose that the fur products involved in this proceeding were "made in whole or in part of fur which has been shipped and received in commerce" within the meaning of Section 3(b) in that they show the origin of the fur pelts contained in such fur products to be Turkey, Iran, Russia, Sweden, Afghanistan, Canada and the United States of America.

We conclude that respondent's dealings in fur products are well within the scope of the Act.⁶

³ Respondent's sales slips, Commission Exhibits 8-13, 15, 19-21.

⁴ Commission Exhibits 1-4, incl.

⁵ Commission Exhibits 5, 14, 16-18, incl.

⁶ *Pelta Furs*, Docket 6297; *Mandel Brothers, Inc.*, Docket 6434; *Benton Furs*, Docket 6501.

Respondent's Appeal

The first specific issue raised by respondent in its appeal relates to the sufficiency of the evidence to support the hearing examiner's finding that certain of respondent's pricing representations were false and deceptive.

The complaint attacks respondent's pricing claims in two respects. It alleges first that respondent engaged in "fictitious pricing" by advertising that the prices at which fur products were offered were "reduced from regular or usual prices * * * at which said merchandise was usually sold by respondent in the recent and regular course of its business," in violation of section 5(a)(5) of the Act and Rule 44(a) of the Rules and Regulations. Secondly, the complaint alleges that respondent "used comparative prices and percentage savings claims which were not based on current market values," in violation of section 5(a)(5) of the Act and Rule 44(b) of the Rules and Regulations.

As to the first charge, the record shows, and the hearing examiner found, that respondent advertised and offered its fur products for sale in the Chicago Tribune a recognized interstate medium. One of the advertisements introduced in evidence, for example, featured several major price groups—some fur products being offered for \$299, "Usually \$399 to \$499"; still others for \$399, "Usually \$499 to \$599"; and another group for \$499, "Usually \$649 to \$699." Similar claims were made in other advertisements received of record. The record also discloses that respondent customarily attached to manufacturers' and suppliers' invoices "aprons" upon which respondent entered the intended regular and usual price which, according to respondent's buyer were "never varied from." For example, the "aprons" attached by respondent to its suppliers' invoices disclosed entries of retail prices for certain garments as \$299 which were advertised as "Usually \$399 to \$499." They had never been priced as advertised. Among garments advertised for \$299 as "Usually \$399 to \$499" were some, the regular retail price of which was shown on invoice aprons as \$299; and also some offered for \$399 as "Usually \$499 to \$599," the regular retail price of which was \$399. One of respondent's advertisements offered "\$399 capes and stoles" for \$288. The apron attached to the invoice for one such item showed the regular retail price to be \$288. It had never been priced at \$399. A Commission investigator testified in support of the complaint that through identifying stock item

numbers he traced particular garments through respondent's records from the advertisements introduced in evidence back to the invoices and aprons previously mentioned, thus establishing that certain garments sold as a result of the questioned advertising actually were the garments advertised. The relationship of the sales and advertising in question thus was clearly established. The record fully supports the conclusion that respondent actually engaged in "fictitious" pricing in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder.

In this connection, the hearing examiner in his initial decision was wrong in two respects: he found that respondent's "fictitious pricing" constituted, in and of itself, a violation of Section 5 of the Federal Trade Commission Act, and he failed to find that such a practice violated the Fur Act. The complaint does not charge a separate violation of Section 5 of the Federal Trade Commission Act, but that respondent through its pricing practices violated the Fur Act and that, by virtue of such violation of the Fur Act, the Federal Trade Commission Act was violated. The findings of fact, conclusion, and order to cease and desist entered by the Commission correct this compound error.

Furthermore, in regard to respondent's pricing practices, the initial decision can be construed to suggest that respondent may have available to it the defense of good faith acceptance of its suppliers' guaranties provided for in Section 10(a) of the Fur Act. We discuss below in some detail the extent to which such a defense may be available under the terms of the Fur Act and note here in passing that, to the extent the initial decision may be so construed as indicated, it errs.

With respect to respondent's use of misleading "comparative prices," the examiner appears to have assumed that the burden is upon respondent to prove that fur garment prices advertised by it as "usual" were, in fact, current market values or prices at which similar garments were being offered for sale by respondent's competitors. Actually, it is incumbent upon counsel supporting the complaint to establish what the current market values, or prices, actually are; and to show that they were, in fact, misrepresented by the seller. A respondent can be called upon to rebut a charge of false advertising through the use of misleading "comparative prices" only if it be first established prima facie that the practice has been engaged in.

Concerning this charge the record shows the respondent's costs,

its usual and customary markup, and its retail sales prices. Also, there is a modicum of inconclusive evidence as to the prevailing markup among competitive fur dealers in the Chicago area. But there is no persuasive evidence establishing the actual market values, or prices, of the fur products involved in this proceeding. The allegation that respondent has violated Section 5(a)(5) of the Fur Act and Rule 44(b) of the Rules and Regulations promulgated thereunder through the use of comparative prices and percentage savings claims which were not based on current market values has not been established.

Respondent next contends that the examiner erred in not dismissing the complaint by reason of respondent's discontinuance of the pricing practices complained of and because it had actually gone out of the fur business before issuance of the complaint on June 17, 1957.

Respondent asserts that in February 1957 it entered into a lease agreement with I. Himmel & Sons, Inc., by the terms of which Himmel took over the operation of the fur departments in respondent's stores as an independent entity. Under the lease all fur business done by Himmel is to be done in the name of The Fair; The Fair must approve all of the lessee's employees before they are employed in the leased department and, according to the record, The Fair actually hires the lessee's employees through its own personnel department; The Fair shares in the lessee's profits through payment to it of a percentage of the lessee's gross sales; customer lists become the property of The Fair; and The Fair makes independent adjustments of customer complaints and accounts. Furthermore, all fur advertising must be done in The Fair's name and is subject to prior approval of The Fair, which also retains the right to approve any and all advertising media used.

Customers of The Fair's fur department have no way of knowing that they are dealing with an alleged "independent contractor." Indeed when respondent's Assistant Comptroller was asked whether The Fair was still in the fur business, he testified, "Well, as far as the customers are concerned, I suppose it is in the fur business."

These circumstances by no means support respondent's argument that no order should be entered against it because of discontinuance of the pricing practices complained of and because respondent had gone out of the fur business prior to issuance of the complaint.

We consider next respondent's argument that Rules 4, 29(a), 29(b) and 36, promulgated pursuant to the Fur Products Labeling Act, are invalid because they are difficult or impossible to comply with⁷ and that Rule 44, prohibiting price and value misrepresentations with respect to fur products, as promulgated by the Commission, is not authorized by the Fur Products Labeling Act. The latter point should be, and it hereby is, decided adversely to respondent on the authority of the *Pelta*⁸ and *Mandel*⁹ cases, and does not merit further discussion.

To buttress the contention that Rules 4, 29 and 36 are invalid because compliance with their requirements is difficult or impossible respondent cites the testimony of several independent witnesses, fur dealers thoroughly familiar with the trade. It urges that, since this evidence went unchallenged and uncontradicted, the challenged rules, therefore, are invalid. Congress directed the Commission, in Section 8 of the Fur Products Labeling Act, to prescribe rules and regulations governing the manner and form of disclosing information required by the Act and such as might be necessary and proper for purposes of its administration and enforcement. Accordingly rules and regulations, including those here questioned by respondent, were issued pursuant to that authority and statutory direction after due notice and full opportunity for all interested persons to be heard. Since the effective date of those rules and regulations the Commission has observed through its inspection programs that hundreds of fur retailers subject to the Act have complied with those rules without great inconvenience or hardship. Taking into consideration all of the factors involved, including the testimony relied upon by respondent, the Commission concludes that it must reject respondent's contention that the questioned rules are invalid because of difficulty or impossibility of compliance with their requirements.

Appeal of Counsel Supporting the Complaint

The appeal of counsel supporting the complaint poses first the question of the extent to which Section 10(a) of the Fur Products

⁷ Rule 4 prohibits use of abbreviations and ditto marks on labels and invoices and in advertising. Rules 29(a) and (b) prohibit the use of handwriting on labels and set forth certain other requirements as to disclosure on labels. Rule 36 concerns requirements as to disclosure where fur products are composed of two or more sections.

⁸ *DeGorter v. FTC*, 244 F.2d 270 (9th Cir., 1957).

⁹ *Mandel Brothers v. FTC*, 254 F.2d 18 (7th Cir., 1958), cert. granted, 79 S. Ct. 54.

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Labeling Act is available as a defense to charges of misbranding and certain false advertising. That subsection reads as follows:

No person shall be guilty under Section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received, that said fur product is not misbranded or that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the fur product or fur guaranteed, in which case it may be on the invoice or other paper relating to such fur product or fur; or (2) a continuing guaranty filed with the Commission applicable to any fur product or fur handled by a guarantor, in such form as the Commission by rules and regulations may prescribe.

We note that there may be an unresolved question as to whether the protection afforded by Section 10(a) of the Fur Act [through reliance in good faith upon guaranties furnished sellers by their suppliers] was intended by the Congress to apply to charges of misbranding brought by the Commission in an administrative proceeding under Section 8 of the Act, or whether it was intended to be limited as a defense to criminal charges brought under Section 11 of the Act. It is our opinion, however, that it is unnecessary to determine that question now, in view of the disposition made of these appeals.

The record here shows, and the examiner found, that the fur products in question were the subject of guaranties furnished by manufacturers or suppliers from whom respondent purchased. The examiner further found, as to labeling, that "Most of the faulty labeling was not glaringly obvious and could have been easily overlooked * * *. To have discovered some of the defects would have required the careful scrutiny of the garments by one skilled in furs and well versed in the language of the Fur Act and of the Rules and Regulations." He concluded, therefore, that "* * * respondent is entitled to the benefit of §10(a), and cannot be found guilty of misbranding under §3 of the Act."

Our review of the record convinces us that the foregoing holding of the hearing examiner is erroneous.

Respondent's fur buyer testified that she had twenty-one years'

experience in the fur business, fourteen of which were with The Fair, and that she was the fur buyer for respondent during the period when the misbranding occurred. We also learn from the record that she was in complete charge of respondent's fur department; that she was thoroughly acquainted with the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder; that she was a skilled buyer and was familiar with the fur industry and its various manufacturing and dyeing methods, countries of origin, etc.; and that she examined all fur products that came into her department and checked the labels for accuracy and compliance with the Act.

The deficiencies on labels attached to fur garments sold by respondent were substantial in number—113 violations. These defects were readily apparent on the face of the labels. Further, respondent was legally obligated to examine the labeling of fur products purchased and advertised and sold by it and to correct any erroneous labels. Rule 34(a) of the Fur Rules and Regulations provides:

If a person subject to Section 3 of the Act with respect to a fur product finds or has reasonable cause to believe the label affixed thereto is incorrect or does not contain all the information required by the Act and the Rules and Regulations, he shall correct such label or replace same with a substitute containing the required information.

Respondent asserts that the questioned labels were those of its suppliers, and that appears to be true. However, the defects in the labels clearly could have been discovered with the exercise of ordinary diligence. Respondent obviously should have been aware of those defects; its contention that it relied "in good faith" on the suppliers' guaranties is not convincing.

With respect to certain of respondent's advertising claims, the hearing examiner also interpreted Section 10(a) of the Act "as requiring that the respondent be found not guilty of having violated §3 of the Act by failure to disclose in its advertising the name or names of the fur-producing animal or animals." Counsel supporting the complaint appeal from that holding.

The typical advertising defects noted by the hearing examiner were the failure to include the use of the word "lamb" in describing "Persian Paw jackets" and "Black Dyed Broadtailed jackets." Counsel supporting the complaint point out that the Fur Products Name Guide, which is an integral part of the Rules

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and Regulations promulgated under the Fur Act, clearly indicates that these are not acceptable names, and argue that a knowledgeable merchant could not, in good faith, compound the misbranding on labels and invoices received from its suppliers and include such terminology in its advertising when, on the very face, of the labels and invoices, and even in the format of the advertisements of record, such terminology clearly is erroneous. They further argue that, unlike the misbranding charges which were errors of omission, the advertising charges in the complaint are bottomed upon positive, affirmative acts of respondent in preparing its own advertising copy.

Respondent cannot rely on guaranties furnished to it by suppliers to excuse representations made by it in its own advertising on the theory that those representations were made in good faith through acceptance of information set forth on suppliers' labels. With the exercise of reasonable diligence, respondent could have corrected the erroneous information contained on labels and carried over by it into advertising copy originating in its own fur department. Section 10(a) of the Act ought not to be available as a defense to false and misleading advertising resulting from respondent's own affirmative acts.

Respondent's concluding argument in this connection is that the number of proven mistakes in advertising was limited, only three or four being established, and these were trivial. Respondent's argument as to the minimal effect of its advertising representations is rejected, and the appeal of counsel supporting the complaint on this phase of the case is being granted. *Mandel Brothers*, Docket 6434.

We turn now to the appeal of counsel supporting the complaint from the hearing examiner's holding that violations by respondent of Rules 44(e) and (f) were not established.

Rule 44(e) requires the maintenance of full and adequate records disclosing facts upon which certain types of pricing claims and representations are made. And not only should those records disclose all facts relied upon as a basis for such pricing representations, but they should be kept in sufficient detail, and in such form, as affirmatively to disclose the accuracy of the representations. Otherwise the Commission has no alternative but to hold the records to have been inadequately maintained.

In our consideration above of respondent's appeal, we have found that respondent engaged in "fictitious pricing." In view of

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this it is obvious that respondent did not maintain the full and adequate records required by Rule 44(e). It follows that the hearing examiner was in error in concluding that respondent "violated * * * [no] law insofar as the maintenance of records is concerned."

Rule 44(f) prohibits the use in the advertising of a fur product of "* * * an illustration which shows such * * * fur product to be a higher priced product than the one so advertised." The record shows, and the hearing examiner found, that respondent prepared and placed an advertisement in which appeared a depiction of a "let-out mink jacket" although the garments advertised in fact were "split mink jackets." Split mink jackets, the examiner noted, are cheaper than let-out mink jackets. He concluded, however, that "It is doubtful if any member of the purchasing public was or could have been deceived by the advertisement," and further that "As to the technical violation of the Fur Act, the *de minimis* rule is applicable." For the reasons hereinabove set forth with reference to respondent's use of unacceptable constituent fur names in its advertising, this conclusion of the examiner must be rejected.

The appeal of counsel supporting the complaint from the hearing examiner's findings that violations of Rule 44(e) and (f) were not established is granted.

Counsel supporting the complaint also appeal from the hearing examiner's finding that retail sales slips furnished to respondent's customers are not "invoices" under the Fur Products Labeling Act. The Commission considered that identical question in the *Mandel* case, *supra*, and there held that a retail sales slip is an "invoice" within the meaning of that term as defined in Section 2(f) of the Act, and that the invoicing requirements of the Act and of pertinent rules and regulations promulgated thereunder are applicable to retail sales. In its disposition of a petition for review filed by the respondent in that case, the Seventh Circuit Court of Appeals reversed the Commission on this issue, but the case is now pending in the Supreme Court on a writ of certiorari. The hearing examiner's conclusion that "retail sales slips cannot be considered as invoices" is consistent with the Seventh Circuit Court's decision, but is not in accord with our views on that question.¹⁰ Until this issue has been ultimately resolved in the courts, the Commission adheres to its original

¹⁰ Docket No. 6434, decided July 5, 1957.

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position. Accordingly, the appeal of counsel supporting the complaint on this aspect of the case is granted.

Finally, we consider the form of the order to cease and desist contained in the initial decision. As noted previously, respondent attacks the scope of that order, asserting that it appears to apply to all merchandise sold by it instead of being limited to fur products. We believe respondent's position in this regard to be well taken. The order will accordingly be modified.

Counsel supporting the complaint, inferentially at least, question the scope of the initial decision as inhibiting only violations of the Federal Trade Commission Act. Having determined above that certain of respondent's practices were violative of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, we are issuing our own findings as to the facts, conclusions, and order to cease and desist in lieu of the initial decision of the hearing examiner, which is vacated and set aside.

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IN THE MATTER OF
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

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

Docket 6450. Complaint, Nov. 18, 1955—Order, Mar. 4, 1959

Order dismissing on jurisdictional grounds on the authority of the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), complaint charging a New York City insurance company with false advertising concerning its policies providing indemnification for losses resulting from accidental injury and sickness.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Donald K. King, *Mr. J. W. Brookfield, Jr.* and *Mr. Eugene Kaplan* for the Commission.

Mr. Haughton Bell and *Mr. Arthur C. Kaiser*, of New York City, for respondent.

FINAL ORDER

This matter having come on to be heard by the Commission upon the record herein and upon briefs in support of and in opposition to the appeal of counsel supporting the complaint from the initial decision of the hearing examiner finding in part that respondent's methods of advertising have been voluntarily abandoned and that such matters are *de minimis* and dismissing the complaint for lack of jurisdiction; and

The Commission having considered the initial decision and the appeal briefs, together with the stipulated facts of record, and having concluded that it disagrees with the initial decision to the extent that said decision is based upon the *de minimis* rule and the finding that respondent voluntarily abandoned its questioned advertising practices; but that it agrees the proceeding should be dismissed on jurisdictional grounds on the authority of the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958) :

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

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

It is further ordered, That respondent's request for oral argument before the Commission be, and it hereby is, denied.

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IN THE MATTER OF
ROUX DISTRIBUTING CO., INC.

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

Docket 6636. Complaint, Sept. 14, 1956—Order, Mar. 4, 1959

Order dismissing for failure of proof, complaint charging a New York City distributor of beauty preparations for the hair with requiring its wholesale customers to restrict their sales to a limited class of accounts.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Jerome Garfinkel and *Mr. Lewis F. Depro* for the Commission.

Mr. William J. Hayes, of New York City, for respondent.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

This matter has come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint for failure of proof. The complaint charges that respondent has required its wholesale customers to agree to restrict their sales to a limited class of accounts and that the practices involved are in violation of Section 5 of the Federal Trade Commission Act. The issue before us is whether the examiner properly dismissed for insufficiency of evidence.

The essential facts as to the method of distribution employed by respondent are not in dispute. Respondent, Roux Distributing Co., Inc. (sometimes hereinafter referred to as Roux), is now and has been engaged in the sale and distribution of beauty preparations for the hair in interstate commerce. Its customer accounts include direct retailers, beauty schools, drug wholesalers and beauty supply dealers.

On March 18, 1953, Roux notified all its wholesale accounts that a new discount schedule of 25% off trade price (it was then 35%) would be initiated April 1, 1953. The following classifications were set up:

1. Jobber—one who subjobs, sells to, trades or exchanges Roux products with drug wholesalers or beauty supply dealers or other jobbers.

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2. Drug wholesaler—one who sells Roux products to drug stores, toilet goods counters of department stores and similar retailers only.

3. Beauty supply dealer—one who sells Roux products to beauty salons, beauty schools and beauty operators only.

The beauty supply dealer, under the new schedule, could receive an additional 10% (a total of 35%) in consideration for an agreement, among other things, to resell only to beauty shops, beauty schools and beauty operators and not to subjob, sell to, trade or exchange Roux products with drug wholesalers, jobbers or other beauty supply dealers.

On April 28, 1953, respondent sent its customers a further notice announcing it would henceforth sell its products only to those of its wholesale customers whose Roux sales unmistakably fall into but one of the three classifications defined by respondent ("drug wholesaler," "beauty supply dealer" or "jobber"). All wholesale customers were requested to sign and return the notice, signifying that they would operate exclusively within the classification they had chosen.

It is quite clear that the wholesale customers signing and returning either of the aforementioned notices, or both, agreed to confine their sales to particular customer classifications. Primarily what this meant was that drug wholesalers were limited to selling Roux products to drug stores and toilet goods counters of department stores and similar retailers; the beauty supply dealers were limited to selling Roux products to beauty salons, beauty schools and beauty operators. Many of respondent's customers signed and returned these notices.

The record shows that as a result of this method of selling, customers of Roux formerly selling in several classifications had to give up accounts outside their chosen classification. Respondent vigorously enforced its sales policy and discontinued customers which would not classify themselves or which sold outside of their classification.

The hearing examiner in his initial decision cites *United States v. Colgate & Company*, 250 U.S. 300 (1919), and other cases involving "refusal to sell," concluding, among other things, that none of the factors necessary to take this case out from under the general rule relating to freedom of a manufacturer to select its customers are shown to exist in this proceeding.

It should be clear, however, that this matter contains a more fundamental issue than whether or not the respondent may re-

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fuse to deal with certain of its customers failing to comply with its conditions of sale; the issue here is whether the agreements with customers containing the restrictions as to resale of Roux products are lawful. If the agreements are lawful, then a refusal to sell for failure to comply with the terms of such agreements is not in violation of Section 5.

Certain restrictions as to the resale of a product may violate the Sherman Act as well as Section 5 of the Federal Trade Commission Act. For example, under some circumstances a distributor of a trademarked article may not lawfully limit by agreement the persons to whom its purchaser may resell, particularly where the agreement is tied in with a system of distribution which includes the unlawful fixing of resale prices. *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944). We do not believe, however, that a restriction or limitation as to whom a purchaser may resell is illegal *per se*. Cf. *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29 (1923); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (1949), cert. den. 338 U.S. 948 (1950).

The question here is whether respondent's practices constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. It is well settled that practices violating this Act are not confined to those condemned by the Sherman Act. *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953). But, in a case of this kind, a violation of Section 5 is not shown unless the record contains some evidence of the competitive effect of the practices. This does not mean there must be a showing of some actual elimination or suppression of competition, but there at least should be some basis in the record for a finding that competition may be substantially lessened.

The complaint specifically alleges that respondent's practices have a dangerous tendency only to eliminate competition among respondent's customers in the sale and distribution of Roux products. Thus, all the evidence received concerning the alleged effects relates to the competition among respondent's customers. There is no evidence that competition otherwise has been lessened or of any other restraint on trade.

This evidence, however, concerning competition among respondent's customers and the alleged tendency to eliminate such competition is very inconclusive. It is true, as alleged by the complaint and admitted, that respondent, among its 1700 customers,

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had approximately 550 drug wholesalers and 500 beauty supply dealers. It is also admitted that prior to April, 1953, each of respondent's wholesale customers competed freely with each other such customer selling in the same trade area. This alone, however, does not support a finding of competition between drug wholesalers on the one hand and beauty supply dealers on the other. The competition so admitted may have been only that among the customers within a class located in a given trade area. Trade areas are not defined and there is no development of the competition which existed in any particular locality. It is uncertain from this record that drug wholesalers and beauty supply dealers, the two principal classes of customers involved, were ever in substantial competition, since it is not shown that they engaged in business in the same trade areas.

There is evidence that respondent's practices caused some of its customers to lose sales (primarily beauty supply dealers losing drug store accounts) and caused certain customers or former customers to suffer reductions in profits. This, however, does not prove that any competition has been adversely affected. Merely to show a loss of sales or profits by individual customers has no necessary competitive significance in the circumstances. As heretofore indicated, it has not been shown clearly that competition existed between drug wholesalers and beauty supply dealers; consequently it cannot be determined to what extent competition has been or may be harmed by respondent's practices.

The position of counsel in support of the complaint appears to be that the limitations on resale imposed by respondent on its wholesale customers means that competition is necessarily diminished among such customers and that this is enough to violate Section 5. To accept such reasoning would be to consider resale restrictions of this nature "unfair methods of competition" in themselves, regardless of their effects on competition. We do not so view the law.

In the circumstances, we concur in the hearing examiner's holding that the charges in the complaint are not sustained by the record. Although normally the matter would be remanded to the hearing examiner to receive any proper evidence concerning the competitive effect of the practices, such action will not be taken in this instance. The Commission assumes that this evidence if available to counsel in support of the complaint would have been adduced into the record and, therefore, that upon a remand it would have to be originally obtained. Respondent,

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however, has instituted a new program under which it sells two distinguishable lines of products. In connection with this program, operating since August, 1956, the beauty supply dealer is not precluded from selling to drug accounts. The discounts now follow the line of products rather than the customer classification. The evidence in question, since it would concern practices engaged in prior to the present program and more than two and one-half years ago, clearly would be difficult to develop at this late time. Under all the circumstances, we do not believe that it would best serve the public interest to remand the case to the hearing examiner.

The appeal of counsel in support of the complaint is denied. It is directed that an order be issued herewith dismissing the complaint in this proceeding without prejudice.

Chairman Gwynne concurred in the result.

ORDER DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, having denied the aforesaid appeal, and having directed the issuance of an order dismissing the complaint without prejudice:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

Chairman Gwynne concurring in the result.

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IN THE MATTER OF
KEYSTONE MANUFACTURING COMPANY, INC., ET AL.

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

Docket 7118. Complaint, Apr. 10, 1958—Decision, Mar. 5, 1959

Consent order requiring manufacturers of home movie equipment, slide projectors, and related items, with sales in 1955 in excess of \$10,000,000, to cease paying special allowances to a large Pennsylvania jewelry chain for advertising their products while not making such allowances available on proportionally equal terms to competitors of the chain.

Count II of the complaint charging said jewelry chain with knowingly inducing and receiving the allowances in question was settled by a consent order on Dec. 18, 1958, p. 885, herein.

COMPLAINT

The Federal Trade Commission, having reason to believe that Keystone Manufacturing Company, Inc., a corporation, and Keystone Camera Company, Inc., a corporation, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended by the Robinson-Patman Act, and the Commission having further reason to believe that Associated Barr Stores, Inc., a corporation, and Myer B. Barr, as an individual and as president of Associated Barr Stores, Inc., have violated and are now violating the provisions of Section 5 of the Federal Trade Commission 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 with respect thereto as follows:

Count I

PARAGRAPH 1. Respondents Keystone Manufacturing Company, Inc., and Keystone Camera Company, Inc., hereinafter sometimes referred to as respondents Keystone Companies, are corporations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with their principal offices and places of business located at Hallet Square, Boston 24, Mass.

PAR. 2. Respondent Keystone Manufacturing Company, Inc., is engaged in the business of manufacturing home movie equip-

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ment, slide projectors, and related items at its factory located in the Commonwealth of Massachusetts.

Respondent Keystone Camera Company, Inc., is engaged in the business of distributing and selling home movie equipment, slide projectors, and related items manufactured by and supplied to it by respondent Keystone Manufacturing Company, Inc.

Respondent Keystone Camera Company, Inc., is a wholly owned subsidiary of respondent Keystone Manufacturing Company, Inc. Said respondent is an instrumentality of its parent in that its only functions are the distribution and sale of products manufactured by its parent corporation and activities incidental to those functions.

Respondents Keystone Manufacturing Company, Inc., and Keystone Camera Company, Inc., operate as one integrated business enterprise rather than as two distinct establishments.

Sales made by respondents Keystone Companies are substantial, being in excess of \$10,000,000 for the year 1955.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents Keystone Companies are now engaged, and for many years have been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, having sold and distributed their home movie equipment, slide projectors, and related items manufactured in their factory in Massachusetts and caused the same to be transported from their place of business in Massachusetts to purchasers located in other states of the United States and other places under the jurisdiction of the United States in a constant current of commerce.

PAR. 4. Respondent Associated Barr Stores, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, having its principal office and place of business at 1112-1114 Chestnut Street, Philadelphia, Pa.

PAR. 5. Respondent Associated Barr Stores, Inc., is now and for many years has been engaged in the operation of a chain of retail jewelry stores selling jewelry and a variety of other products, including movie equipment, slide projectors, and related items to the consuming public. Said respondent operates six retail jewelry stores in and around Philadelphia, Pa., and one retail jewelry store in Norfolk, Va.

Respondent Associated Barr Stores, Inc., is affiliated with four other corporations, all of which are engaged in the retail jewelry business in the Delaware Valley area of Pennsylvania and New

Jersey. It is the practice of said respondent to purchase the merchandise requirements for all these affiliates as well as for its own requirements. These affiliates are: Barr's Jewelers, located in Camden, N.J.; Barr's, Inc., located in Chester, Pa.; Gemcraft, Inc., located in and around Philadelphia, Pa.; and Gemcraft of New Jersey, Inc., located in and around Camden, N.J. For brevity these affiliates will hereinafter sometimes be referred to as affiliated corporations. In addition to acting as buyer for said affiliated corporations, respondent Associated Barr Stores, Inc., also handles substantially all advertising, including that of the products of respondents Keystone Companies, sold in the stores of said affiliated corporations.

Sales made by respondent Associated Barr Stores, Inc., are substantial, being approximately \$2,140,000 for the fiscal year ending June 30, 1955.

PAR. 6. Respondent Myer B. Barr, an individual, is president of respondent Associated Barr Stores, Inc., and personally directs and supervises its policies and operations. Substantially all the stock of respondent Associated Barr Stores, Inc., and its affiliated corporations, as hereinbefore set out, is owned by the said Myer B. Barr and individual members of his family. The acts and practices of respondent Associated Barr Stores, Inc., as described herein have been and now are under the direct personal supervision of the said Myer B. Barr.

PAR. 7. In the course and conduct of its business in commerce as set forth in paragraphs 2 and 3 above, and more specifically during the years 1955, 1956, and 1957, respondents Keystone Companies have sold and distributed substantial quantities of their home movie equipment, slide projectors, and related items to a number of retail dealers in such products in Philadelphia and Chester, Pa., Norfolk, Va., and Camden, N.J., including respondent Associated Barr Stores, Inc., and affiliated corporations. Respondents Keystone Companies have transported such products or caused the same to be transported from said respondents' factory in Massachusetts or from other places located outside the Commonwealths of Pennsylvania and Virginia and the State of New Jersey to such retailer customers, including respondent Associated Barr Stores, Inc., and its affiliated corporations located in the cities of Philadelphia and Chester, Pa., Camden, N.J., and Norfolk, Va.

PAR. 8. In the course and conduct of its business as aforesaid,

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respondent Associated Barr Stores, Inc., and its affiliated corporations are now and for many years have been in competition with other corporations, partnerships, firms, and individuals located in and around the cities of Philadelphia and Chester, Pa., Camden, N.J., and Norfolk, Va., who are also engaged in the selling at retail of home movie equipment, slide projectors, and related items manufactured, sold, and distributed by respondents Keystone Companies.

PAR. 9. In the course and conduct of their business, as aforesaid, and more specifically within the years 1955, 1956, and 1957, respondents Keystone Companies have paid or contracted for the payment of money, goods, or other things of value to or for the benefit of respondent Associated Barr Stores, Inc., and affiliated corporations as compensation or in consideration for services or facilities, including newspaper advertising, furnished or agreed to be furnished by or through respondent Associated Barr Stores, Inc., and affiliated corporations in connection with the handling, sale, or offering for sale by respondent Associated Barr Stores, Inc., and affiliated corporations of the home movie equipment, slide projectors, and related items manufactured, sold, and distributed by respondents Keystone Companies, and respondents Keystone Companies have not made available or contracted to make available, or authorized such payments, allowances, or considerations on proportionally equal terms to all other customers competing with respondent Associated Barr Stores, Inc., and affiliated corporations in the handling, selling, or offering for sale of the home movie equipment, slide projectors, and related items manufactured, sold, and distributed by respondents Keystone Companies.

PAR. 10. The acts and practices of respondents Keystone Companies, as alleged in paragraph 9 above, are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Count II

PAR. 11. Paragraphs 1 through 10 of Count I hereof are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted here verbatim.

PAR. 12. In the course and conduct of their business as aforesaid, and more specifically during the years 1955, 1956, and 1957, respondents Associated Barr Stores, Inc., and Myer B. Barr knowingly induced and received, and knowingly contracted for

the payment of money, goods, or other things of value to the said respondents and to the affiliated corporations of respondent Associated Barr Stores, Inc., and for the benefit of said respondents and said affiliated corporations from respondents Keystone Companies as compensation or in consideration for services or facilities furnished by or through said respondent Associated Barr Stores, Inc., and affiliated corporations in connection with the offering for sale or sale by said respondent and affiliated corporations of the home movie equipment, slide projectors, and related items manufactured, sold, and distributed by respondents Keystone Companies in the course of interstate commerce, which payments or considerations respondents Associated Barr Stores, Inc., and Myer B. Barr knew or should have known were not made available on proportionally equal terms to all other customers of respondents Keystone Companies competing with said respondent Associated Barr Stores, Inc., and affiliated corporations in the retail sale of respondents Keystone Companies' home movie equipment, slide projectors, and related items.

PAR. 13. As illustrative of the acts and practices alleged in paragraph 12 herein, although respondents Associated Barr Stores, Inc., and Myer B. Barr, knew or should have known that during the years 1955, 1956, and 1957 all other corporations, partnerships, firms, or individuals competing with said respondents in the sale or offering for sale of the home movie equipment, slide projectors, and related items of the respondents Keystone Companies were limited by said respondents Keystone Companies with regard to the extent to which they would be reimbursed or compensated for newspaper advertising undertaken in connection with said respondents Keystone Companies in the advertising of said respondents Keystone Companies' products, to an amount of money or other things of value not in excess of 5% of the amount of their purchases from respondents Keystone Companies for a given period of time, and also not in excess of 50% of the cost of any given advertisement; nevertheless respondents Associated Barr Stores, Inc., and Myer B. Barr knowingly induced respondents Keystone Companies to grant reimbursement or compensation to them in amounts in excess of both the above stated limits with regard to newspaper advertising undertaken by them in connection with the sale or offering for sale of the products of respondents Keystone Companies on numerous occasions during the years 1955, 1956, and 1957.

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PAR. 14. On numerous occasions during the years 1955, 1956, and 1957 respondents Associated Barr Stores, Inc., and Myer B. Barr placed advertisements, including certain of those referred to in paragraph 13 herein, in newspapers the circulations of which were not limited to the state or states of the United States in which such newspapers were published but had in addition thereto substantial circulation in one or more states outside the state of publication.

PAR. 15. The acts and practices of respondents Associated Barr Stores, Inc., and Myer B. Barr as herein alleged are part of an extensive advertising program undertaken by said respondents in conjunction with a large number of suppliers. As a result of this program said respondents have achieved and continue to maintain a dominant position with regard to advertising on the part of retailers in the market areas in which said respondents are engaged. Such acts and practices enabled said respondents in 1954 to place more advertising space in the three leading newspapers circulated in Philadelphia, Pa., than all other jewelers competing with said respondents combined.

PAR. 16. The methods, acts, and practices of respondents Associated Barr Stores, Inc., and Myer B. Barr, including the inducing and receiving of payments for advertising of the products of respondents Keystone Companies and the advertising in interstate media of such products offered for sale and sold in the stores of respondent Associated Barr Stores, Inc., and affiliated corporations, knowing that such payments were not made available on proportionally equal terms to all other customers competing with respondent Associated Barr Stores, Inc., and affiliated corporations, as hereinbefore alleged, are methods, acts, and practices in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 17. The acts and practices of respondents Associated Barr Stores, Inc., and Myer B. Barr, as alleged in Count II hereof, of knowingly inducing and receiving payments or allowances from respondents Keystone Companies that respondents Associated Barr Stores, Inc., and Myer B. Barr knew or should have known were made by respondents Keystone Companies in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as alleged in Count I hereof, are all to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent

and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. William H. Smith and Mr. James R. Fruchterman for the Commission.

Mintz, Levin & Cohn, by Mr. Haskell Cohn, of Boston, Mass., for respondents.

INITIAL DECISION AS TO RESPONDENTS KEYSTONE
MFG. CO. AND KEYSTONE CAMERA COMPANY, INC.,
BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on April 10, 1958. Count I thereof alleges that respondent Keystone Mfg. Co. (erroneously referred to therein as Keystone Manufacturing Company, Inc.) and its wholly owned subsidiary, respondent Keystone Camera Company, Inc., hereinafter, together, referred to as respondents Keystone Companies, are engaged in the business of manufacturing, distributing, and selling home movie equipment, slide projectors, and related items; operating as one integrated business enterprise rather than as two distinct establishments, their sales during the year 1955 having been in excess of ten million dollars. Said respondents are charged with violating §2(d) of the Clayton Act as amended, by paying or contracting for the payment of money, goods or other things of value, during the years 1955, 1956 and 1957, to, or for the benefit of, respondent Associated Barr Stores, Inc., and its affiliated corporations, as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through respondent Associated Barr Stores, Inc., including newspaper advertising, in connection with the handling, sale, or offering for sale by respondent Associated Barr Stores, Inc., and its affiliated corporations of the home movie equipment, slide projectors, and related items manufactured, sold, and distributed by respondents Keystone Companies, which payments, allowances or considerations were not made available on proportionally equal terms to all of respondents Keystone Companies' other customers competing with respondent Associated Barr Stores, Inc.

Count II of the complaint, charging unfair methods of competition and unfair acts and practices in commerce in violation of §5 of the Federal Trade Commission Act against respondents Associated Barr Stores, Inc., and Myer B. Barr, relates only to these respondents, with whom this decision is not concerned.

On December 12, 1958, respondents Keystone Companies, their counsel, and counsel supporting the complaint herein entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the acting director of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies respondents Keystone Companies as corporations existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with their office and principal place of business located at Hallet Square, Boston, Mass.

Respondents signatory to the agreement admit all of the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties signatory to the agreement agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and said agreement; that the order to cease and desist, as contained in the agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order, and that the agreement is for settlement purposes only, and does not constitute an admission by respondents signatory thereto that they have violated the law as alleged in the complaint.

After consideration of the allegations of the complaint, the provisions of the agreement, and the proposed order, the hearing examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding as to respondents Keystone Companies. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order to Cease and Desist; finds that the Commission has jurisdiction over the said respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That respondents Keystone Mfg. Co. and Keystone Camera Company, Inc., their officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the sale of home movie equipment, slide projectors, and related items in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of Associated Barr Stores, Inc., or any other customer, as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale, or distribution of respondents' products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision as to respondents, Keystone Mfg. Co. and Keystone Camera Company, Inc., filed January 19, 1959, wherein the hearing examiner accepted an agreement containing a consent order, theretofore executed by said respondents and counsel in support of the complaint, and entered his order to cease and desist in conformity with the agreement; and

It appearing that said initial decision is appropriate in all respects to dispose of this proceeding as to the respondents named therein:

It is ordered, That the hearing examiner's initial decision as to respondents, Keystone Mfg. Co. and Keystone Camera Company, Inc., filed October 31, 1958, be, and it hereby is, vacated and set aside.

It is further ordered, That the initial decision as to said respondents, filed January 19, 1959, shall, on the 5th day of March 1959, become the decision of the Commission.

It is further ordered, That the respondents, Keystone Mfg. Co. and Keystone Camera Company, Inc., 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 contained in the aforesaid initial decision.

IN THE MATTER OF
CRAWFORD CLOTHES, INC.

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

Docket 7169. Complaint, June 6, 1958—Decision, Mar. 6, 1959

Consent order requiring a large men's and boys' clothing chain with main office in Long Island City, N.Y., to cease advertising falsely that fictitiously high amounts were its regular prices for clothing offered and that purchasers would save the difference between the higher and lower prices.

Mr. Charles W. O'Connell for the Commission.

Mr. Hyman Fried, of New York, N.Y., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 6, 1958, issued and subsequently served its complaint in this proceeding against respondent Crawford Clothes, Inc., a corporation existing and doing business under and by virtue of the laws of the State of New York.

After one hearing at which considerable evidence in support of the complaint was introduced in the record, there was submitted to the undersigned hearing examiner, on January 21, 1959, an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; waives the making of findings of fact and conclusions of law; and waives all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that

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the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Crawford Clothes, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 34-02 Queens Boulevard, Long Island City, State of New York.

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

ORDER

It is ordered, That respondent Crawford Clothes, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of wearing apparel or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That any amount is respondent's usual and regular price of merchandise when it is in excess of the price at which said merchandise is usually and regularly sold by respondent in the normal course of its business.

2. That any savings are afforded in the purchase of merchandise unless the prices at which it is offered constitute a reduction from the prices at which said merchandise is usually and customarily sold by respondent in the normal course of its business.

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B. Misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of said merchandise is reduced from the price at which it is usually and customarily sold by respondent in the normal course of its business.

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 shall, on the 6th day of March 1959, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF
MORRIS LEVINE AND HERMAN RABINS
TRADING AS LEVINE & RABINS

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

Docket 7255. Complaint, Sept. 12, 1958—Decision, Mar. 6, 1959

Consent order requiring New York City sellers to cease violating the Wool Products Labeling Act by tagging as "100% reprocessed wool," interlinings which contained a substantial quantity of fibers other than wool.

Mr. Alvin D. Edelson supporting the complaint.

Mr. Joseph L. Klein, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On September 12, 1958, the Federal Trade Commission issued a complaint charging that Morris Levine, and Herman Rabins, individually and as copartners trading as Levine & Rabins, hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated under said Wool Products Labeling Act by misbranding the wool products which they manufacture.

After issuance and service of the complaint, the respondents, their counsel and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the assistant director and the acting director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner pro-

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vided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order :

JURISDICTIONAL FINDINGS

1. Respondents Morris Levine and Herman Rabins are copartners trading under the firm name of Levin & Rabins. The business address of respondents is 307 West 38th Street, New York, N.Y.
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 the respondents, Morris Levine and Herman Rabins, individually, and as partners trading as Levine & Rabins, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate device, in connection with the introduction or manufacture for introduction, into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of woolen interlinings, or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

- (a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum

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of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool products, of any nonfibrous loading, filling, or adulterating matter;

(c) The name of the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939.

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 shall, on the 6th day of March 1959, 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.

Decision

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IN THE MATTER OF
LESTER C. CARR

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

Docket 7283. Complaint, Oct. 17, 1958—Decision, Mar. 6, 1959

Consent order requiring a Washington, D.C., dealer in used automobiles to cease representing falsely in newspaper advertising and otherwise that the used automobiles he sold were financed at bank rates and were unconditionally guaranteed, and that the United States Government certified his sales to military personnel.

Mr. John J. Mathias for the Commission.

Mr. Murray A. Kivitz, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 17, 1958, issued and subsequently served its complaint in this proceeding against respondent Lester C. Carr, an individual.

On January 15, 1959, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; waives the making of findings of fact and conclusions of law; and waives all of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as al-

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leged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Lester C. Carr is an individual whose place of residence is located at 907 Tracy Drive, Silver Spring, Md.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Lester C. Carr, an individual, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of automobiles or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That he offers or makes available bank rate financing, or misrepresenting in any manner the terms under which his automobiles or other products are sold.
2. That the automobiles or other products sold by him are guaranteed, unless the nature and extent of the guarantee and the manner in which he will perform thereunder are clearly and truthfully set forth.
3. That the Government of the United States, or any branch or agency thereof, certifies or has any part in sales to military personnel.

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 shall, on the

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6th day of March 1959, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF
THE GUMMED INDUSTRIES ASSOCIATION, INC., ET AL.

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

Docket 7079. Complaint, Mar. 3, 1958—Decision, Mar. 7, 1959

Order dismissing without prejudice as to respondent Minnesota Mining and Manufacturing Company, the complaint charging suppression of competition in the manufacture and distribution of flat gummed paper.

On Oct. 3, 1958, the Commission adopted a consent order disposing of the matter as to all other respondents, page 500 herein.

Mr. Andrew C. Goodhope and Mr. John Perechinsky for the Commission.

Connolly, Tucker, Post and Lyons, of St. Paul, Minn., by Mr. John L. Connolly, for Minnesota Mining and Manufacturing Company.

INITIAL DECISION DISMISSING COMPLAINT WITHOUT
PREJUDICE AS TO RESPONDENT MINNESOTA MINING
AND MANUFACTURING COMPANY BY
EARL J. KOLB, HEARING EXAMINER

This proceeding is now before the undersigned hearing examiner for final consideration upon the complaint, answer of respondent Minnesota Mining and Manufacturing Company thereto, stipulation as to the facts entered into upon the record between counsel supporting the complaint and said respondent Minnesota Mining and Manufacturing Company, and motion to dismiss and briefs in support thereof filed by said respondent Minnesota Mining and Manufacturing Company, answer to said motion filed by attorneys in support of the complaint, and reply brief filed by said respondent.

The hearing examiner has given consideration to said stipulation, motion to dismiss and briefs filed in support of and in operation thereto, and the record herein, and being now fully advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

1. Respondent Minnesota Mining and Manufacturing Company is a corporation organized and existing under and by virtue

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of the laws of the State of Delaware with its office and principal place of business located at 900 Bush Avenue, St. Paul, Minn.

2. Mid-States Gummed Paper Company, hereinafter referred to as "Mid-States," was a Delaware corporation with offices and factory in Chicago and Bedford Park, Ill. On September 20, 1944, respondent Minnesota Mining and Manufacturing Company acquired all the capital stock of said Mid-States, and from September 20, 1944, to November 30, 1957, said Mid-States was operated as a wholly owned subsidiary of respondent Minnesota Mining and Manufacturing Company. On November 30, 1957, said Mid-States was dissolved as a corporation, and the business previously operated by said Mid-States has since December 2, 1957, been operated by respondent Minnesota Mining and Manufacturing Company as the Mid-States Gummed Paper Division of Minnesota Mining and Manufacturing Company.

3. The complaint in this proceeding charges that the respondents named in the caption hereof, acting by and through and with the assistance of the respondent the Gummed Industries Association, Inc., have entered into and maintained a combination, conspiracy and planned common course of action to hinder, lessen, restrict, or suppress competition among and between themselves and others in the manufacture and distribution of flat gummed paper.

4. Subsequent to the issuance of the complaint in this proceeding, all of the respondents named in the caption hereof, except Minnesota Mining and Manufacturing Company, a corporation, entered into an agreement containing a consent order to cease and desist, which agreement was accepted by the hearing examiner and initial decision was issued by him as to the respondents other than Minnesota Mining and Manufacturing Company, which initial decision was adopted by the Commission by its order issued October 3, 1958.

5. The participation of the Mid-States Gummed Paper Company in the acts and practices charged in the complaint is admitted by the respondent Minnesota Mining and Manufacturing Company in its stipulation entered into on the record in this proceeding. The motion to dismiss raises two issues:

(1) Whether the extent of control which the respondent Minnesota Mining and Manufacturing Company maintained over Mid-States was sufficient to hold it responsible for the acts and practices of Mid-States as charged in the complaint; and

(2) Whether or not there has been such a discontinuance of the practices alleged to warrant a dismissal in the public interest.

6. At the time of the acquisition of the capital stock of Mid-States Gummed Paper Company by the Minnesota Mining and Manufacturing Company, it was arranged that the operation of the Mid-States Gummed Paper Company continue as an independent company under the direction and supervision of the officers and personnel originally with the company. Certain directors of Minnesota Mining and Manufacturing Company were also directors of Mid-States at various times, but none of the officers or employees of Minnesota became officers of Mid-States, except that in the latter part of 1956 Waldo G. Bretson, Minnesota's plant manager at Bedford Park, Ill., also acted as manufacturing manager of Mid-States, and later, during the period May 29, 1957, up to November 30, 1957, was vice president and general manager of Mid-States.

7. It further appears from the stipulation and the exhibits made a part thereof that Minnesota Mining and Manufacturing Company at the time it dissolved Mid-States and made it a division of Minnesota did not adopt or maintain the prices and pricing practices of Mid-States, and that the Mid-States' prices and pricing systems were discontinued on November 30, 1957, several months prior to the issuance of the complaint in this proceeding.

CONCLUSIONS

1. Respondent Minnesota Mining and Manufacturing Company did not directly participate in, or commit, the unlawful acts charged in the complaint. All of the evidence in the record regarding the alleged unlawful acts pertains to Minnesota's former wholly owned subsidiary, Mid-States. When Minnesota dissolved Mid-States on November 30, 1957, and made it a division of Minnesota, it did not ratify the alleged unlawful acts and practices of Mid-States, but instead immediately discontinued the prices and pricing system previously followed by Mid-States.

2. The evidence in the record is not sufficient to support a finding that Minnesota Mining and Manufacturing Company, by reason of its relationship with its subsidiary, Mid-States, has violated the Federal Trade Commission Act as charged in the complaint. The record in this proceeding does not establish, by substantial evidence, that Minnesota maintained such complete

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control of its subsidiary, Mid-States, as to render Mid-States a mere tool of Minnesota and to compel the conclusion that the corporate entity of the subsidiary is a mere fiction. *National Lead Company v. Federal Trade Commission* (C.C.A. 7, 1955) 227 F. 2d 825, 829.

ORDER

It is therefore ordered, That the complaint be dismissed without prejudice as to respondent Minnesota Mining and Manufacturing Company.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of March 1959, become the decision of the Commission.

Decision

IN THE MATTER OF
HARRY KRAUSS, ET AL., DOING BUSINESS AS
JOB LOT TRADING COMPANY

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

Docket 7300. Complaint, Nov. 14, 1958—Decision, Mar. 7, 1959

Consent order requiring New York City sellers to cease fictitious pricing in newspaper advertisements which represented that exaggerated prices set forth therein as "Reg." and "List" were the prices at which they customarily sold their merchandise.

Mr. Garland S. Ferguson supporting the complaint.

Mr. Irving Jay Greenspan, of New York, N.Y., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

On November 14, 1958, the Federal Trade Commission issued a complaint charging that Harry Krauss and Sam Osman, individually and trading and doing business as Job Lot Trading Company, hereinafter referred to as respondents, had violated the provisions of the Federal Trade Commission Act by making false, misleading and deceptive statements and representations in the sale of their merchandise.

After issuance and service of the complaint, the respondents, their counsel and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance

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with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

Respondents Harry Krauss and Sam Osman are individuals trading as Job Lot Trading Company with their principal place of business located at 53 Vesey Street, New York, N.Y.

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act. This proceeding is in the public interest.

ORDER

It is ordered, That respondents Harry Krauss and Sam Osman, individually and trading and doing business as Job Lot Trading Company, or trading under any other name, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that any specific amount is respondents' regular retail price of merchandise when such amount is in excess of the price at which such merchandise is

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customarily and usually sold at retail by the respondents in the normal course of their business.

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 shall, on the 7th day of March 1959, 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.

Complaint

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IN THE MATTER OF
FRITO COMPANY, ET AL.

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

Docket 7239. Complaint, Aug. 28, 1958—Decision, Mar. 10, 1959

Consent order requiring a Texas distributor of Mexican-style food products and its subsidiary to cease violating Sec. 2(c) of the Clayton Act by paying the customary brokerage of 5% to a customer on direct purchases for its own account, and requiring said recipient, buying the products mainly for its own supermarkets and other outlets in Latin America and elsewhere, to cease accepting such illegal payments.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Frito Company, hereinafter referred to as Frito, is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 2600 Cedar Springs Avenue, Dallas, Tex. Frito, since 1956, has owned approximately 51% of the voting stock of Texas Tavern Canning Company, controlling its sales and operational policies, and is charged with the acts and practices of Texas Tavern Canning Company as hereinafter described. Frito's net sales for 1957 were approximately \$33,379,500, with net profits of approximately \$1,049,295.

PAR. 2. Texas Tavern Canning Company, hereinafter referred to as Texas Tavern, is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at Fair Park, Sequin, Tex. Texas Tavern is now, and for the past several years has been, engaged in the business of manufacturing, selling and distributing beef and pork tamales, chicken tamales, menudo, enchiladas, fried beans, Spanish rice and other food products which it advertises as "Real Mexican Foods," and which

are referred to hereinafter as Mexican-style food products. During its fiscal year 1957, Texas Tavern had net profits on the aforementioned Mexican-style food products of approximately \$295,000 and sales of approximately \$750,000.

PAR. 3. Respondent International Basic Economy Corporation, hereinafter referred to as IBEC, is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 30 Rockefeller Plaza, New York, N.Y. IBEC, among other activities, purchases foodstuffs which it distributes and sells through wholesale and export operations. IBEC also distributes and sells such foodstuffs at retail to supermarkets located in Latin America and elsewhere. The major percentage of such sales are to supermarkets or other outlets owned or controlled by IBEC.

During 1957 IBEC had net sales of foodstuffs and related products through its Merchandising Division which were valued at \$6,072,510, with net profits on such sales of approximately \$126,000. IBEC's consolidated sales for 1957 amounted to \$70,635,455.

PAR. 4. Respondent Texas Tavern sells and distributes its Mexican-style food products, hereinbefore mentioned, to customers located in the several States of the United States in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act. Texas Tavern sells and distributes the major portion of its Mexican-style food products to its customers through brokers located in the various States of the United States. Sales of Mexican-style food products are made direct to IBEC by Texas Tavern.

Respondent IBEC, among other activities, purchases foodstuffs from various sources including respondent Texas Tavern. These foodstuffs are subsequently sold to purchasers in the United States, Puerto Rico and Latin American countries. IBEC also sells such foodstuffs to supermarkets including IBEC controlled supermarkets in Latin America and Puerto Rico and to PESCA, an IBEC controlled wholesale and retail food outlet in Venezuela.

PAR. 5. Respondents Texas Tavern when selling its Mexican-style food products through brokers, pays such brokers a commission or brokerage fee for their services amounting to 5% of the gross dollar volume of orders through such brokers.

During and since 1956 Texas Tavern has granted a commission or brokerage fee, or other compensation or allowance, or

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discount in lieu thereof, of 5% of the gross dollar volume of sales made to respondent IBEC, which purchases Texas Tavern's Mexican-style food products for its own account.

PAR. 6. The acts and practices of respondent Frito or respondent Texas Tavern in promoting the sale of Mexican-style food products by rebating to respondent IBEC commissions, brokerage, or other compensation or allowances or discounts in lieu thereof, as set forth above, and the acts and practices of respondent IBEC of receiving and accepting from respondent Frito or respondent Texas Tavern rebates, commissions, brokerage, or other compensation or allowances, or discounts in lieu thereof as set forth above, in connection with the purchase of Mexican-style food products as aforesaid, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

Mr. Daniel A. Austin, Jr. for the Commission.

Mr. Jack Johannes, of Dallas, Tex., for Frito Company and Texas Tavern Canning Company.

Curtis, Mallet-Prevost, Colt & Mosle, by *Mr. John French*, of New York, N.Y., for International Basic Economy Corporation.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on August 28, 1958, charging respondent Frito Company (hereinafter referred to as respondent Frito) with the acts and practices of its subsidiary, respondent Texas Tavern Canning Company (hereinafter referred to as respondent Texas Tavern) in the manufacture, sale and distribution of beef and pork tamales, chicken tamales, menudo, enchiladas, fried beans and Spanish rice, which it advertises as "Real Mexican Foods" (hereinafter referred to as "Mexican-style food products"); respondent Frito's net sales for 1957 having been approximately \$33,379,500, with net profits of approximately \$1,049,295, and respondent Texas Tavern's sales for that year having been approximately \$750,000, with net profits on the aforementioned Mexican-style food products of approximately \$38,768.10. The complaint alleges that respondent International Basic Economy Corporation (hereinafter referred to as respondent IBEC) purchases direct from respondent Texas Tavern said Mexican-style food products, which it sells to purchasers in the United States, Puerto Rico and Latin America, including IBEC-controlled supermarkets in Latin America and Puerto Rico, and to PESCA, an IBEC-controlled wholesale and retail food outlet

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in Venezuela; IBEC's net sales of foodstuffs and related products in 1957 being valued at \$6,072,510, with net profits thereon of approximately \$126,000, and its consolidated sales for that year amounting to \$70,635,455. The complaint further alleges that respondent Texas Tavern has, during and since 1956, granted to respondent IBEC a commission or brokerage fee, or other compensation or discount in lieu thereof, of 5% of the gross dollar volume of sales made to respondent IBEC, which purchases respondent Texas Tavern's Mexican-style food products for its own account. The complaint charges respondents Frito and Texas Tavern with paying, and respondent IBEC with receiving, such discount in lieu of a commission, brokerage fee, or other compensation or allowance, in violation of §2(c) of the Clayton Act (U.S.C., Title 15, §13) as amended by the Robinson-Patman Act, approved June 19, 1936.

On November 10, 1958, respondent IBEC, its counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the director and an assistant director of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration. On December 31, 1958, respondents Frito and Texas Tavern, with their counsel, each entered into a similar agreement with counsel supporting the complaint. Both of these agreements were approved by the acting director of the Commission's Bureau of Litigation, and thereafter were likewise submitted to the hearing examiner for consideration.

The first agreement identifies respondent International Basic Economy Corporation as a New York corporation, with its office and principal place of business located at 30 Rockefeller Plaza, New York, N.Y. The second agreement identifies respondent Frito Company as a Texas corporation, with its office and principal place of business located at Exchange Bank Building, Dallas, Tex. The third agreement identifies respondent Texas Tavern Canning Company as a Texas corporation, with its office and principal place of business located at Fair Park, Seguin, Tex.

In all three agreements, respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and conclusions of law; and all of the rights they may have

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to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and each agreement as to the parties signatory thereto; that the order to cease and desist, as contained in each agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order; and that the agreement is for settlement purposes only, and does not constitute an admission by respondent signatory thereto that it has violated the law as alleged in the complaint.

After consideration of the allegations of the complaint, the provisions of the three agreements, each as to the parties signatory thereto, and the proposed orders, the hearing examiner is of the opinion that such orders constitute a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreements, the hearing examiner accepts the three Agreements Containing Consent Order to Cease and Desist; finds that the Commission has jurisdiction over the respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That respondent Frito Company, a corporation, and respondent Texas Tavern Canning Company, a corporation, its officers, agents, representatives and employees, in connection with the sale of food products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or granting, directly or through any corporate or other device, to respondent International Basic Economy Corporation, a corporation, its respective successors or assigns, officers, representatives, agents or employees, or to any other buyer, anything of value as a rebate, commission, brokerage fee, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of food products to such buyer for its own account.

It is further ordered, That respondent International Basic Economy Corporation, a corporation, its officers, agents, representatives and employees, in connection with the purchase of food

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products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from respondent Texas Tavern Canning Company, a corporation, or from respondent Frito Company, a corporation, or from any other intermediary or seller, directly or through any corporate device or by any other means, anything of value as brokerage, or any rebate, allowance or discount in lieu thereof, in connection with the purchase of food products made for respondent International Basic Economy Corporation's own account.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The hearing examiner, on January 27, 1959, having filed his initial decision wherein he accepted agreements containing consent orders, theretofore executed by the respondents and counsel in support of the complaint, and entered an order to cease and desist in conformity with said agreements, service of which was completed on February 5, 1959; and

Counsel for the respondents and counsel in support of the complaint, on February 25, 1959, having filed a joint motion requesting the correction of certain errors in the initial decision; and

The Commission having determined that the corrections referred to should be made and that thereafter the initial decision will be adequate and appropriate to dispose of this proceeding:

It is ordered, That the first paragraph of the initial decision be, and it hereby is, modified in the following respects: (1) by striking the phrase "wholly owned" from the third line; (2) by inserting the word "net" before the word "profits" in the twelfth line; and (3) by striking "\$295,000" from the thirteenth line and inserting in lieu thereof "\$38,768.10."

It is further ordered, That the initial decision, as so modified, shall, on the 10th day of March 1959, become the decision of the Commission.

It is further ordered, That the respondents, Frito Company, Texas Tavern Canning Company, and International Basic Economy Corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission reports, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the aforesaid initial decision.