

Complaint

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IN THE MATTER OF

## CADET DISTRIBUTING COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT*Docket 8037. Complaint, July 11, 1960—Decision, Oct. 4, 1960*

Consent order requiring distributors of phonograph records in Detroit, Mich., to cease giving concealed payola to disc jockeys or other personnel of radio and television programs to induce frequent playing of their records in order to increase sales.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cadet Distributing Company, Inc., a corporation, and Harry Levin, Hyme Levin and Isadore Levin, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cadet Distributing Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 3766 Woodward Avenue, in the City of Detroit, State of Michigan.

Respondents Harry Levin, Hyme Levin and Isadore Levin are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale and sale of phonograph records to various retail outlets and jukebox operators.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said records, when sold, to be shipped from Michigan to purchasers thereof located in northwestern Ohio, and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in

commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abet-

ted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Arthur Wolter, Jr.*, for the Commission.

*Mr. Nathan E. Shur*, of Detroit, Mich., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale and sale of phonograph records to various retail outlets and jukebox operators, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola", i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Acting Associate Director and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Cadet Distributing Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 3766 Woodward Avenue, Detroit, Michigan, and that respondents Harry Levin, Hyme Levin and Isadore Levin are officers of the corporate respondent and formulate, direct and control the acts and practices of the corporate respondent, their address being the same as that of the corporate respondent.

The agreement provides, among other things, that 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; 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 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 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 in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

*It is ordered,* That respondents Cadet Distributing Company, Inc., a corporation, and its officers, and Harry Levin, Hyme Levin, and Isadore Levin, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or

through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature:

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

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 4th day of October, 1960, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Cadet Distributing Company, Inc., a corporation, and Harry Levin, Hyme Levin, and Isadore Levin, 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.

## Complaint

## IN THE MATTER OF

## IPSWICH HOSIERY COMPANY, INC.

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

*Docket 7715. Complaint, Jan. 5, 1960—Decision, Oct. 12, 1960*

Consent order requiring a distributor of women's hosiery in Manchester, N.H., to cease violating Sec. 2(d) of the Clayton Act by paying certain of its jobber customers for advertising but not their competitors, such as payments of \$450, \$500, and \$900 made in the years 1957, 1958, and 1959 to one Houston, Tex., purchaser.

## COMPLAINT

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

PARAGRAPH 1. Respondent, Ipswich Hosiery Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at 540 North Commercial Street, Manchester, New Hampshire.

PAR. 2. Respondent is now and has been engaged in the sale and distribution of women's hosiery which it sells directly to retailer customers and to wholesalers and jobbers located throughout the United States. Respondent's total sales for the year 1958 were in excess of two million dollars.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent causes the products which it sells to be transported from the State of New Hampshire to customers located in other states throughout the United States and in the District of Columbia.

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

customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, respondent contracted to pay and did pay to J. Weingarten, Inc., of Houston, Texas, during the year 1957, \$450; during the year 1958, \$500; during the year 1959, \$900, as compensation or as allowances for advertising or other service or facility furnished by or through J. Weingarten, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of respondent's products.

PAR. 6. The acts and practices of respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

*Mr. Fredric T. Suss* and *Mr. Timothy J. Cronin, Jr.*, for the Commission.

*Mr. Coleman T. Bahn*, of Boston, Mass., and *Steptoe & Johnson*, by *Mr. I. Martin Leavitt*, of Washington, D.C., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated January 5, 1960, the respondent is charged with violating the provisions of subsection (d) of section 2 of the Clayton Act, as amended.

On August 2, 1960, the respondent and its attorneys entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition

of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the 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 following jurisdictional findings are made and the following order issued.

1. Respondent Ipswich Hosiery Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Hampshire, with its principal office and place of business located at 540 North Commercial Street, Manchester, New Hampshire.

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

ORDER

*It is ordered*, That Ipswich Hosiery Company, Inc., a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of hosiery products, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's hosiery products, unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

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 12th day of October, 1960, 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  
CONTACT LENS SPECIALISTS, INC., ET AL.

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

*Docket 7948. Complaint, June 16, 1960—Decision, Oct. 12, 1960*

Consent order requiring Boston sellers to cease representing falsely in advertising that all persons could wear their contact lenses and without discomfort; that eyeglasses could be discarded; that the lenses would correct all defects in vision; and that they differed from other lenses.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Contact Lens Specialists, Inc., a corporation, and Leonard G. Wolfson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Contact Lens Specialists, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 77 Summer Street, Boston, Massachusetts. Individual respondent Leonard G. Wolfson is an officer of said corporation. He formulates, directs and controls the policies of the corporate respondent. His address is the same as that of the corporate respondent.

PAR. 2. The respondents are now, and for some years last past have been, engaged in the advertising, offering for sale, and sale of corneal contact lenses. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are devices as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning the said devices by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of general circulation and by means of circulars and pamphlets, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of

said devices; and have disseminated, and caused the dissemination of, advertisements concerning their said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in advertisements disseminated and caused to be disseminated, as aforesaid, are the following:

"I wish I could see without glasses." She *can* see without glasses—and see *better*! So can you—and you—and you! Thousands of contact lens wearers enjoy better vision—without glasses—thanks to the amazing Ever-Flo Process.

EVER-FLO PROCESS—makes contacts "as comfortable as all outdoors."

EVER-FLO PROCESS—A must for eye comfort and health.

Hey! you with the eyeglasses! See better with complete comfort—and safety—without glasses!

EVER-FLO PROCESS makes all day wearing of Contact Lenses the usual thing. Not a contact lens but an exclusive registered process for fitting our vented—circle grooved—contoured—all types of contact lenses.

The EVER-FLO PROCESS modifies and individualizes the contact lens \* \* \* eliminates all interference by the lens with normal eye functions. Eyelid and Tear action continue normally as nature intended. The only way to be sure is to have us fit you with vented, \* \* \* or circle-grooved—or contoured contact lenses by the EVER-FLO PROCESS.

PAR. 4. By and through the statements made in said advertisements, disseminated and caused to be disseminated as aforesaid, respondents represented, directly or by implication, that:

1. All persons in need of visual correction can successfully wear respondents' contact lenses.
2. There is no discomfort from wearing respondents' contact lenses.
3. Eyeglasses can be discarded upon the purchase of respondents' contact lenses.
4. Respondents' contact lenses will correct all defects in vision.
5. Respondents' contact lenses are different than other contact lenses in that they permit tears to bathe the cornea of the eye.

PAR. 5. The advertisements containing the aforesaid statements were, and are, misleading in material respects and constituted, and now constitute, "false advertisements", as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. A significant number of persons cannot successfully wear respondents' contact lenses.
2. Practically all persons will experience some discomfort after starting to wear respondents' contact lenses. In a significant num-

ber of cases discomfort will be prolonged and in some cases will never be overcome.

3. Eyeglasses cannot always be discarded upon the purchase of respondents' contact lenses.

4. Respondents' contact lenses will not correct all defects in vision.

5. Contact lenses other than respondents' permit tears to bathe the cornea of the eye.

PAR. 6. Respondents state in their advertising matter, as aforesaid, that there is no discomfort in wearing their contact lenses. In addition, they state—"EVER-FLO PROCESS makes all day wearing of Contact Lenses the usual thing." Said advertisements are misleading in a material respect in that they fail to reveal facts material in the light of such representations, that is, that no person can wear their said lenses all day without discomfort until he or she has become fully adjusted thereto.

PAR. 7. The dissemination by the respondents of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Garland S. Ferguson* supporting the complaint.

*Miller & Miller*, of Boston, Mass., for respondents.

#### INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on June 16, 1960, charging them with the use of unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act, by falsely advertising certain contact lenses manufactured and sold by them. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated August 12, 1960, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by respondents, by counsel for said respondents and by counsel supporting the complaint, and approved by the Director, Acting Associate Director and Acting Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. Said agreement

further provides that respondents 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 in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and 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.

The order which has been agreed upon provides that the complaint shall be dismissed as to respondent Leonard G. Wolfson as an officer of the corporate respondent. The basis for such a disposition as to said respondent is set forth in an affidavit by him which has been submitted together with, and as part of, the above-mentioned agreement containing consent order. Said affidavit, which was subscribed and sworn to on August 2, 1960, recites that respondent Leonard G. Wolfson severed all connection as an officer and director of the corporate respondent on January 19, 1960, and has completely divorced himself from the direct or indirect control of the business and advertising of said respondent, to the extent he ever had any connection therewith.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, together with the affidavit of Leonard G. Wolfson which has been made a part of said agreement, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Section 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Corporate respondent Contact Lens Specialists, Inc., is a corporation existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 77 Summer Street, Boston, Massachusetts. Leonard G. Wolfson, an individual, was formerly an officer of the corporate respondent, and was so named in the com-

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plaint. His address is now 54 Amherst Road, Newton, Massachusetts.

2. 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, and this proceeding is in the interest of the public.

## ORDER

*It is ordered,* That respondents Contact Lens Specialists, Inc., a corporation, and its officers, and Leonard G. Wolfson, individually and as a former officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their contact lenses, do forthwith cease and desist, directly or indirectly, from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that:

(a) All persons in need of visual correction can successfully wear respondents' contact lenses.

(b) There is no discomfort from wearing respondents' contact lenses.

(c) A person can wear said contact lenses all day without discomfort unless it is clearly revealed that this is possible only after such person has become fully adjusted thereto.

(d) Eyeglasses can always be discarded upon the purchase of respondents' contact lenses.

(e) Respondents' contact lenses will correct all defects in vision.

(f) Respondents' contact lenses are different than other contact lenses in that they permit tears to bathe the cornea of the eye of the wearer; or are different in any other respect, unless such is the fact.

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1, above, or which fails to reveal the facts set out in paragraph 1(c) above.

*It is further ordered,* That the complaint be, and the same hereby is, dismissed as to Leonard G. Wolfson as an officer of said corporation.

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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 12th day of October, 1960, become the decision of the Commission; and, accordingly:

*It is ordered,* That respondent Contact Lens Specialists, Inc., a corporation and Leonard G. Wolfson, individually, 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

ELLIOTT KAPCHAN DOING BUSINESS AS  
DR. E. KAPCHAN & ASSOCIATES, OPTOMETRISTS, ETC.

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

*Docket 7953. Complaint, June 16, 1960—Decision, Oct. 12, 1960*

Consent order requiring sellers of corneal contact lenses in Alameda, Calif., to cease representing falsely in advertising that their lenses could be worn successfully by all persons, and worn all day without discomfort; that the lenses would stay in place under all conditions; and that upon purchase thereof, eyeglasses could be discarded.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Elliott Kapchan, individually and trading and doing business as Dr. E. Kapchan and Dr. J. Jackson, Optometrists, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Elliott Kapchan is an individual trading and doing business under the name of Dr. E. Kapchan and Dr. J. Jackson, Optometrists, with his office and principal place of business located at 2331 Santa Clara Avenue, Alameda, California.

PAR. 2. Respondent is now and for some time last past has been engaged in, the advertising, offering for sale and sale of corneal contact lenses. Corneal contact lenses are devices designed to correct

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errors and deficiencies in the vision of the wearer, and are devices as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his aforesaid business respondent has disseminated and has caused the dissemination of advertisements concerning the said devices by the United States mails and by various other means in commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of general circulation and by means of circulars and pamphlets, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices; and has disseminated, and caused the dissemination of advertisements concerning his said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices, in commerce as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in advertisements disseminated and caused to be disseminated, as aforesaid, are the following:

Now enjoy all-day wear with Comfort Improved Vision Invisibility. You'll get so much more out of life without glasses! The safety The comfort, the new freedom you enjoy with Contacts—will convince you never to wear glasses again.

\* \* \* \* \*  
Our Guaranteed Trial Wearing Program Insures: Comfort, Improved vision, Invisibility through All-Day WEAR. \* \* \*

\* \* \* \* \*  
Now all day comfort!

\* \* \* \* \*  
No tiring weight, no glass to break, no falling off.  
Contact lenses small as a cigarette tip—wear them all day. Now available in single lens or bifocals. Everything's better WITHOUT GLASSES! Reading, Sports, Dancing, Working.

PAR. 4. By and through the statements made in said advertisements disseminated and caused to be disseminated as aforesaid, respondent represented, directly or by implication that:

1. All persons in need of visual correction can successfully wear respondent's contact lenses.
2. There is no discomfort in wearing respondent's contact lenses.
3. Respondent's contact lenses can be worn all day with complete comfort.
4. Eye glasses can be discarded upon the purchase of respondent's contact lenses.
5. That respondent's contact lenses will stay in place under all conditions.

PAR. 5. The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. A significant number of persons cannot successfully wear respondent's contact lenses.
2. Practically all persons will experience some discomfort when first wearing respondent's contact lenses. In a significant number of cases such discomfort will be prolonged and in some cases will never be overcome.
3. Many persons cannot wear respondent's contact lenses all day with complete comfort until he or she has become fully adjusted thereto.
4. Eyeglasses can not always be discarded upon the purchase of respondent's contact lenses.
5. Respondent's contact lenses will not stay in place under certain conditions.

PAR. 6. The dissemination by respondent of the aforesaid false advertisements constitutes unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Garland S. Ferguson* for the Commission.

*Mr. Albert E. Levy*, of San Francisco, Calif., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, on June 16, 1960, charging the above-named respondent with having violated the provisions of the Federal Trade Commission Act in certain procedures.

On August 12, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent and counsel supporting the complaint, under date of August 7, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:



1. Elliott Kapchan is an individual presently trading and doing business as Dr. E. Kapchan & Associates, Optometrists, and as E. Kapchan, O. D. & Associates. He has also traded and done business as Dr. E. Kapchan and Dr. J. Jackson, Optometrists, and was so named in the complaint. His office and principal place of business is located at 2331 Santa Clara Avenue, Alameda, California.

2. 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.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. 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.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

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

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the parties hereto; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, both generally

and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

*It is ordered,* That respondent Elliott Kapchan, an individual trading and doing business as Dr. E. Kapchan & Associates, Optometrists, and as E. Kapchan, O. D. & Associates, or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of contact lenses do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or by implication that:

(a) All persons in need of visual correction can successfully wear respondent's contact lenses;

(b) There is no discomfort in wearing respondent's contact lenses;

(c) All persons can wear respondent's contact lenses all day without discomfort; or that any person can wear respondent's contact lenses all day without discomfort except after that person has become fully adjusted thereto;

(d) Eyeglasses can always be discarded upon the purchase of respondent's contact lenses;

(e) That respondent's contact lenses will stay in place under all conditions.

2. Disseminating or causing to be disseminated any advertisement, 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 contact lenses, which advertisement contains any of the 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 12th day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered.* That respondent Elliott Kapchan, an individual trading and doing business as Dr. E. Kapchan & Associates, Optometrists, and as E. Kapchan, O. D. & Associates, shall, within

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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.

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IN THE MATTER OF

MAXINE'S, INC., ET AL.

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

*Docket 7989. Complaint, June 24, 1960—Decision, Oct. 12, 1960*

Consent order requiring Pittsburgh furriers to cease violating the Fur Products Labeling Act by labeling which falsely identified the animals producing certain furs and failed to set forth the term "Dyed Broadtail Lamb" where required; by advertising which failed to disclose the names of animals producing the fur in certain products or the country of origin of imported furs; and by failing in other respects to comply with labeling and invoicing requirements.

COMPLAINT

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

PARAGRAPH 1. Maxine's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at 514 Wood Street, Pittsburgh, Pennsylvania. Louis J. Azen is president and Alan Azen is secretary and treasurer of the said corporate respondent. These individuals formulate, control and direct the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce and in the sale, ad-

vertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

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

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

(a) The term Dyed Broadtail Lamb was not set forth in the manner required where an election was made to use that term instead of Dyed Lamb in violation of Rule 8 of the said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

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

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

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

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required

by 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. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to 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, but not limited thereto, were advertisements of respondents which appeared in issues of the Pittsburgh Sun Telegraph, Pittsburgh Press and Pittsburgh Post Gazette, newspapers published in the City of Pittsburgh, State of Pennsylvania, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

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

(b) Failed to disclose the name of the country of origin of the imported furs contained in the fur product, in violation of Section 5(a)(6) of the Fur Products Labeling Act.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

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

No appearance for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued June 24, 1960, charges respondents Maxine's, Inc., a Pennsylvania corporation, located at 514 Wood Street, Pittsburgh, Pennsylvania, and Louis J. Azen and Alan Azen, individually and as officers of said corporate respondent and located at the same address as said corporation, with the use of unfair and deceptive acts and practices, in commerce in violation of

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## Order

the provisions of the Federal Trade Commission Act, and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of said complaint, respondents entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues as to all parties in this proceeding.

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

By the terms of said agreement, the respondents 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 parties 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 they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondents 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 respondents named herein, that this proceeding is in the interest of the public, and issues the following order:

## ORDER

*It is ordered*, That Maxine's, Inc., a corporation, and its officers, and Louis J. Azen and Alan Azen, 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 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 sale, advertising, offering for sale, transportation, or distribution of fur products which are 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 or deceptively 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. Failing to affix labels to fur products showing in words and figures plainly legible, all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

3. Failing to set forth the term "Dyed Broadtail Lamb" where an election is made to use that term instead of dyed Lamb.

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

(a) Mingled with non-required information.

(b) In handwriting.

5. Failing to set forth separately on labels affixed to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

6. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish to purchasers of fur products an invoice showing all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

1. 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;
2. The name of the country of origin of any imported furs contained in a fur product.

## 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 12th day of October 1960, become the decision of the Commission; and, accordingly:

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

## IN THE MATTER OF

## THETA ELECTRONICS, INC., ET AL.

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

*Docket 7916. Complaint, June 3, 1960—Decision, Oct. 13, 1960*

Consent order requiring a manufacturer in Greensburg, Pa., to cease selling television picture tubes with no notice on the tubes or on containers or invoices to show that they were reconditioned or rebuilt and contained previously used parts.

## COMPLAINT

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

PARAGRAPH 1. Respondent Theta Electronics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 123 Stark Avenue, Greensburg, Pennsylvania.



Respondent Hymen Berkowitz is an individual and officer of said corporation. He formulates, controls and directs the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of television picture tubes, some which are reconditioned and some of which are rebuilt containing used parts, to wholesalers, distributors and retailers, for resale to the public.

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

PAR. 4. Respondents do not disclose on the tubes or on the cartons in which they are packed or on invoices or in any other manner that said television picture tubes are reconditioned or rebuilt containing previously used parts.

PAR. 5. When television tubes are reconditioned or rebuilt containing previously used parts, in the absence of a disclosure to the contrary, such tubes are understood to be and are readily accepted by the public as new tubes.

PAR. 6. By failing to disclose the facts as set out in Paragraph Four, respondents place in the hands of uninformed or unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature of their said television picture tubes.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of television picture tubes.

PAR. 8. The failure of respondents to disclose on their television picture tubes, on the cartons in which they are packed, on invoices or in any other manner, that they are reconditioned or rebuilt containing used parts, has had and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that their said picture tubes are new in their entirety, and into the purchase of substantial quantities of respondents' said tubes by reason of such erroneous and mistaken belief.

As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being done to competition in commerce.

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

*Mr. Michael J. Vitale* for the Commission.

*Mr. Joseph Martin Gelman*, of Pittsburgh, Pa., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

On June 3, 1960, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the manufacture, offering for sale, sale and distribution of television picture tubes, some of which are rebuilt containing used parts. On August 9, 1960, the respondents and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint and agree among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The hearing examiner finds that the content of the said agreement meets all the requirements of Section 3.25(b) of the Rules of Practice.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming

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part of the Commission's decision in accordance with Section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Theta Electronics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 123 Stark Avenue, Greensburg, Pennsylvania.

Respondent Hymen Berkowitz is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of said corporate respondent. His address is the same as the corporate respondent.

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

ORDER

*It is ordered*, That respondents, Theta Electronics, Inc., a corporation, and its officers, and Hymen Berkowitz, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of television picture tubes which have been reactivated or reconditioned, or which contain used parts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly disclose on the tubes, on the cartons in which they are packed, on invoices and in advertising, that said tubes are reactivated or reconditioned, or contain used parts, as the case may be.

2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the nature and condition of their television picture tubes.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on August 23, 1960, having filed an initial decision in this proceeding, wherein he accepted an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint, and issued an order in conformity with the agreement; and

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Pursuant to the provisions of § 3.21 of the Commission's Rules of Practice, said initial decision, on October 13, 1960, having become the decision of the Commission:

*It is ordered*, That the respondents, Theta Electronics, Inc., a corporation, and Hymen Berkowitz, individually and as an officer 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 contained in the afore-said initial decision.

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IN THE MATTER OF

JOSEPH SCHNEIDERMAN ET AL. TRADING AS  
S. SCHNEIDERMAN & SONS

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

*Docket 7983. Complaint, June 24, 1960—Decision, Oct. 13, 1960*

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by listing fictitious prices on consignment invoices of fur products, intended to promote the sale of the products, and by failing to maintain adequate records as a basis for such pricing.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joseph Schneiderman, Harry Schneiderman, and Louis Schneiderman, individually and as copartners, trading as S. Schneiderman & Sons, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Joseph Schneiderman, Harry Schneiderman and Louis Schneiderman are individuals and copartners trading as S. Schneiderman & Sons with their office and principal place of business located at 150 West 30th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are

now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products, and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced in that the respondents set out on invoices certain prices of fur products which were in fact fictitious, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were falsely and deceptively advertised in that the respondents on consignment invoices made representations and gave notices concerning said fur products, which representations and notices 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 representations and notices were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

By means of the said representations and notices contained in the consignment invoices to customers, and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised their fur products in that respondents thereby made representations as to the prices of fur products which prices were in fact fictitious, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 5. Respondents, in making pricing and savings claims and representations, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44(e) of the Rules and Regulations under the Fur Products Labeling Act.

PAR. 6. The aforesaid acts and practices by respondents, as herein alleged, were and are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

*Mr. Harry E. Middleton, Jr.*, for the Commission.

*Mr. Charles Goldberg*, of New York, N.Y., for respondents.

## INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on June 24, 1960, issued its complaint herein, charging the above-named respondents with having violated the provisions of both the Federal Trade Commission Act and the Fur Products Labeling Act, together with the Rules and Regulations promulgated thereunder, and the respondents were duly served with process.

On August 16, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondents and counsel supporting the complaint, under date of August 1, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondents Joseph Schneiderman, Harry Schneiderman and Louis Schneiderman are individuals and copartners trading as S. Schneiderman & Sons with their office and principal place of business located at 150 West 30th Street, New York, N.Y.

2. 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.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. 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.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This 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.

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

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated by the Commission under the latter Act, against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

*It is ordered*, That Joseph Schneiderman, Harry Schneiderman and Louis Schneiderman, individually and as copartners trading as S. Schneiderman & Sons, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution, in commerce, of fur products; or in connection with the sale, manufacture for 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. Falsely or deceptively invoicing fur products by representing, directly or by implication, on invoices that the former, regular or usual price of any fur product is any amount which is in excess of

the price at which respondents have formerly, usually or customarily sold such products in the recent regular course of business;

B. Falsely or deceptively advertising fur products through the use of any advertisement, representations, public announcement 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 represents, directly or by implication that the former, regular or usual price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of business;

C. Misrepresenting in any manner the savings available to purchasers of respondents' fur products;

D. Making pricing claims or representations respecting prices or values of fur products unless respondents maintain full and adequate records disclosing the facts upon which such claims and representations are based.

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 13th day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered,* That the above-named respondents 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

TONEMASTER MANUFACTURING COMPANY ET AL.

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

*Docket 7301. Complaint, Nov. 14, 1958—Decision, Oct. 14, 1960*

Order dismissing false advertising charges against two former officials of respondent corporation, seller of hearing aids, as to which the same charges were settled by a consent order dated May 9, 1959, 55 F.T.C. 1750.

Before *Mr. John B. Poindexter*, hearing examiner.

*Mr. William A. Somers* for the Commission.

No appearance for respondents.



## INITIAL DECISION DISMISSING COMPLAINT AS TO CERTAIN RESPONDENTS

On March 20, 1959, the undersigned hearing examiner issued an Initial Decision in this proceeding as to the respondents Tonemaster Manufacturing Company, a corporation, Paul B. H. Smith, and Margaret H. Smith, individually and as officers of said corporation, based upon a consent agreement executed by said corporation, Paul B. H. Smith, and Margaret H. Smith, individually and as officers of said corporation, and counsel supporting the complaint. It was contemplated that the proceeding with respect to the remaining respondents Harold A. Lyons and John L. Lyons would be disposed of by a separate Initial Decision.

Counsel supporting the complaint has now filed a motion requesting that the complaint be dismissed as to the respondents Harold A. Lyons and John L. Lyons, individually and as officers of the corporate respondent. As grounds for the motion counsel states, among other things, that neither respondent Harold A. Lyons nor John L. Lyons was served with a copy of the complaint and, although counsel has made diligent inquiry as to the whereabouts, activities, and present addresses of said remaining respondents Harold A. Lyons and John L. Lyons, he has been unable to ascertain the same; that neither Harold A. Lyons nor John L. Lyons had any interest in, was not an officer of, was not employed in any capacity by, nor had office space in or with the corporate respondent Tonemaster Manufacturing Company eight months prior to the issuance of the complaint herein, as shown by the affidavit of Paul B. H. Smith, one of the respondents herein and President of said corporate respondent. This affidavit was attached to the motion to dismiss.

Upon consideration of said motion and the affidavit attached thereto, the hearing examiner is of the opinion that it will be in the public interest to dismiss the complaint with respect to the above-named remaining respondents. Accordingly,

*It is ordered,* That the complaint in this proceeding be, and the same hereby is, dismissed as to the respondents Harold A. Lyons and John L. Lyons, individually and as officers of respondent Tonemaster Manufacturing Company, a corporation, without prejudice to any action the Commission may take in the future as the facts and circumstances may warrant.

## DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner as to respondents Harold A. Lyons and John L. Lyons did, on the 14th day of October 1960, become the decision of the Commission.

## Complaint

## IN THE MATTER OF

## SCEPTER MUSIC, INC., ET AL.

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

*Docket 7896. Complaint, May 20, 1960—Decision, Oct. 15, 1960*

Consent order requiring New York City manufacturers of phonograph records to cease paying concealed payola to disk jockeys and other personnel of television and radio stations to induce frequent playing of their records in order to increase sales.

## COMPLAINT

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

PARAGRAPH 1. Respondent Scepter Music, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1650 Broadway, in the City of New York, State of New York.

Respondent Florence Greenberg is an officer of the corporate respondent. She formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Her address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture and distribution, offering for sale, and sale, of phonograph records to distributors.

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

## Complaint

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PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and substantial injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Harold A. Kennedy* and *Mr. Arthur Wolter, Jr.*, for the Commission.

No appearance for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued May 20, 1960, charges respondents Scepter Music, Inc., a New York corporation, with its principal office and place of business located at 1650 Broadway, New York, New York; and Florence Greenberg, individually and as an officer of said corporation, located at the same address as the corporate respondent, with violation of the provisions of the Federal Trade Commission Act in the sale and distribution of phonograph records by negotiating for and disbursing "payola" (money and other valuable consideration) to disk jockeys broadcasting musical programs, and causing such fact to be withheld from the public.

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After the issuance of the complaint, respondents entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues as to all parties in this proceeding.

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

By the terms of said agreement, the respondents 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 parties 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 they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondents 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 respondents named herein, that this proceeding is in the interest of the public, and issues the following order:

## ORDER

*It is ordered,* That respondents Scepter Music, Inc., a corporation, and its officers, and Florence Greenberg, individually and as an officer of said corporation, and respondents' agents, representa-

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Decision

tives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 15th day of October, 1960, become the decision of the Commission; and, accordingly:

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

Complaint

57 F.T.C.

IN THE MATTER OF

## OLD TOWN RECORD CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT*Docket 7900. Complaint, May 20, 1960—Decision, Oct. 15, 1960*

Consent order requiring New York City distributors of phonograph records to cease paying concealed payola to disk jockeys and other personnel of television and radio stations to induce frequent playing of their records in order to increase sales.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Old Town Record Corporation, a corporation, and Hy Weiss, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Old Town Record Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1697 Broadway, in the City of New York, State of New York.

Respondent Hy Weiss is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to distributors.

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

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in

commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other



personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Harold A. Kennedy* and *Mr. Arthur Wolter, Jr.*, for the Commission.

*Mr. Joseph Klotz*, of New York, N.Y., for respondents.

#### INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to distributors, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by

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the Director, Associate Director, and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Old Town Record Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1697 Broadway, New York, New York, and that respondent Hy Weiss is an officer of the corporate respondent and formulates, directs and controls the acts and practices of the corporate respondent, his address being the same as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdiction 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 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 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 in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

*It is ordered,* That respondents Old Town Record Corporation, a corporation, and its officers, and Hy Weiss, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

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 15th day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Old Town Record Corporation, a corporation, and Hy Weiss, individually and as an officer 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

ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.

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

*Docket 6490. Modified order, Oct. 18, 1960*

Order, following remand by the Court of Appeals for the Fourth Circuit, clarifying the desist order of Feb. 14, 1958, 54 F.T.C. 1043—requiring the Ashe-

ville Tobacco Board of Trade to discontinue unlawful restraints on new tobacco auction warehouses in the Asheville, N.C., area—by modifying paragraphs "1" and "2".

MODIFIED ORDER TO CEASE AND DESIST

The Commission having issued its tentative modified order to cease and desist in this matter on March 19, 1959, and respondents having filed objections to such tentative action and having requested that the matter be reopened for the receipt of evidence concerning developments on the Asheville tobacco market subsequent to the closing of the record herein, and the Commission, by order dated July 20, 1959, having reopened the proceeding and remanded it to the hearing examiner for the purpose of receiving such evidence; and

The hearing examiner having held hearings pursuant to said order of July 20, 1959, and having filed his report upon the evidence; and

The Commission having considered said evidence and the aforesaid objections filed by respondents and, for the reasons appearing in the accompanying opinion, having adopted the tentative modified order to cease and desist, issued on March 19, 1959, as the final order of the Commission:

*It is ordered*, That respondents, Asheville Tobacco Board of Trade, Inc., a corporation, and Max M. Roberts, President and director, J. Carlie Adams, Vice President and director, Fred D. Cockfield, Secretary-Treasurer and director, Jeter P. Ramsey, ex officio Assistant to the Secretary, Supervisor of Sales and General Director of the Asheville market, L. G. Hill, director, James W. Stewart, director, and James E. Walker, Jr., director, all individually and as officers and directors of Asheville Tobacco Board of Trade, Inc., and James E. Walker, Jr., and John B. Walker, part owners, co-managers and operators of Bernard-Walker Warehouses; J. Carlie Adams and Luther Hill, co-partners trading under the name and style of Adams & Hill Warehouses; Farmers Federation Cooperative, Inc., a corporation, leasing and operating Carolina Warehouse; Fred D. Cockfield, and James W. Stewart, co-partners trading under the name and style of Planters Warehouses; Sherrod N. Landon, J. W. Moore, E. G. Anderson, J. E. Godwin, Beverly G. Connor, W. G. Maples, members of Asheville Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase, selling or offering for sale leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Com-

mission Act, do forthwith cease and desist from devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the size and capacity of a new entrant;

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to  $3\frac{1}{2}\%$ , or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse; or

3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis.

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

#### OPINION OF THE COMMISSION

By KERN, *Commissioner*:

An order to cease and desist was issued by the Commission in this matter on February 14, 1958. Thereafter, the order was reviewed by the United States Court of Appeals for the Fourth Circuit, and in an opinion, issued on January 20, 1959, the Court remanded the case to the Commission for the purpose of correcting an ambiguity in the Commission's order and to permit the Commission to "give further consideration to the questions which have arisen in this case and are discussed in this opinion \* \* \*."

In conformity with the views expressed in the Court's opinion, the Commission on March 19, 1959, issued a tentative modified order to cease and desist together with an opinion explaining its position with respect to various questions discussed by the Court. Also, by order issued March 19, 1959, the Commission granted respondents leave to file objections to its tentative action on the remand of the case from the Court of Appeals.

The modified order would require respondents, in connection with the movement of tobacco in interstate commerce, to cease and desist from—

\* \* \* devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the size and capacity of a new entrant;

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to  $3\frac{1}{2}\%$ , or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse; or

3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis.

On June 2, 1959, respondents filed objections to this order contending, *inter alia*, that it would have an adverse competitive effect on the Asheville tobacco market and further contending that developments in the market subsequent to the date on which the record in this matter was closed demonstrates the inappropriateness of the tentative action of the Commission. Respondents requested, therefore, that the case be reopened for receipt of evidence which they contended would show that there is an excessive amount of floor space in the Asheville market, that a building war is now in progress in that market, that one warehouse firm is going out of business and that another threatens to monopolize the market, and that the Commission's order has promoted overbuilding, a tendency to monopolize and the prospect of elimination of the smallest warehouse firm on the market.

By order dated July 20, 1959, the Commission reopened the proceeding and remanded the case to the hearing examiner for the purpose of receiving "such evidence as the respondents may offer tending to prove by facts subsequent to the closing of the record the current competitive situation on the Asheville tobacco market." Pursuant to this order, hearings were held in Asheville, North Carolina, and Washington, D.C., for the reception of evidence offered by respondents and for reception of rebuttal evidence, and after counsel had been given opportunity to submit proposed findings and conclusions, the hearing examiner made his report on the evidence.

We have reviewed the entire record on remand, including the proposed findings and the hearing examiner's report, and are of the opinion that the evidence does not support respondents' contentions with respect to the current competitive situation on the Asheville market, nor does it indicate that the tentative action of the Commission may have an adverse effect on competition in this market. We will discuss briefly the evidence relating to the major points covered in respondents' offer of proof.

To support their contention that the Asheville tobacco market is overbuilt, respondents rely primarily on the testimony of several warehousemen, some of whom are named individually as respondents in this case. These witnesses testified generally to the effect that they had more space than they needed for the sale of tobacco and that they kept or acquired this extra space solely for the purpose of retaining their selling time. The evidence offered in rebuttal, however, reveals that every warehouse operating in the Asheville market during the 1959-1960 auction was utilized for the sale of tobacco and that at the beginning of the sale all warehouses, with possibly one exception, were full of tobacco. It also appears that at least one warehouse was in such poor condition as to be unfit for the sale of tobacco but was, nevertheless, used for this purpose during the 1959-1960 selling season. The testimony of respondent warehousemen is also contradicted by other evidence. Mr. Robert S. Witherington, sales supervisor for the Asheville tobacco market, testified to the effect that there was no overexpansion of the Asheville market and that the congested condition which existed in the warehouses during the first part of the 1959-1960 selling season could occur again next season.

Other evidence upon which respondents rely to support their position that there is too much floor space on the Asheville market relates to the evils of overbuilding. According to the testimony of two experts, Mr. Stephen E. Wrather, Director of the Tobacco Division of the Agricultural Marketing Service, United States Department of Agriculture, and Mr. Albert G. Clay, President of the Burley Auction Warehouse Association, overbuilding of warehouses on a tobacco market leads to speculation by warehousemen, increase in the warehousemen's commission rates, and various sharp practices detrimental to the producer. There is no direct evidence in the record, however, that these conditions exist in the Asheville market. As a matter of fact, there is ample evidence in the record to support the conclusion that insofar as the producers and buyers are concerned, conditions in the Asheville market have improved considerably within the past few years.

Respondents have also failed to show that a building war is in progress in the Asheville market or that there is any likelihood of one in the future. Although several warehousemen gave notice of their intention to build at the April meeting of the Board of Trade in 1958 and 1959, no new warehouses were built and no notices of this kind were filed in 1960. Mr. Witherington testified that he had been sales supervisor for the Asheville market since 1957 and that during that time there had been no building war and

no actual threat of one. The record also discloses that only two new tobacco warehouses have been built in Asheville within the last five years, one by Mr. C. T. Day and the other by the warehouse firm of Adams & Hill Warehouses. It also shows that in 1954 there were twelve tobacco warehouses in the Asheville market with total floor space of 611,326 square feet and that this year there are nine warehouses with total floor space of 517,701 square feet.

Since the record fails to indicate that there has been a building war on the Asheville market, we find no substance to respondents' contention that the Carolina warehouse was withdrawn from the market because its owner, Farmers Federation Cooperative, did not have the financial resources to compete in a building war. The hearing examiner concluded from his review of the evidence that this warehouse had been withdrawn from the market by the Farmers Federation Cooperative because it had added little and sometimes no profit to that organization's business for many years. We agree with this conclusion.

Respondents also stated prior to the reopening of this proceeding that warehouseman Day is threatening to monopolize the Asheville market. They do not urge this point in their proposed findings, however, and the only evidence cited in support thereof relates to the amount of floor space owned by Day. It is our opinion that there is nothing in the record to support respondents' offer of proof concerning the possibility of a single firm monopolizing the Asheville market.

Respondents have also contended throughout the proceeding that because of the Commission's proposed order various warehouse firms have allowed entire warehouses to remain unused year after year solely for the purpose of retaining selling time. We do not understand this argument since there is nothing in our modified order which could be construed as a requirement that selling time be based in any manner upon the amount of floor space in an established warehouse as distinguished from a new entrant on the market. We think that the condition complained of by respondents, insofar as it exists, has been brought about, not by the Commission's tentative action, but by the rule of the Board of Trade which arbitrarily limits the loss of selling time allotted to a warehouse to 3½% of the selling time allotted to the warehouse for the preceding season. In other words, by reason of this limitation on loss of selling time, a warehouse that has received a time allotment can remain unused for a long period of time without losing an appreciable amount of such selling time. For example, a warehouse can remain unused for ten years and still retain about 70% of its original allotted time. The



Commission's order would prohibit this unreasonable limitation and thereby tend to discourage the practice of holding unused space solely for the purpose of retaining selling time.

In the aforementioned objections filed by respondents to the tentative action of the Commission, the argument is made that the Commission failed to give due weight to the views expressed by the Court of Appeals by adopting an inhibition which would require the Asheville Board of Trade in allotting selling time to a new warehouse, to "take into account and give reasonable credit for the size and capacity of a new entrant." One of the principal reasons for adopting this inhibition is set forth in the opinion accompanying our Tentative Modified Order. On page 4 of that opinion we state:

This [the conclusion that a provision in respondents' regulations which excludes size and capacity as a factor in allotting selling time to a new warehouse for the first year of its operation is unduly restrictive of competition], we think, is true even though, as the Court states, the competitive position of a new warehouse may be improved in subsequent years under the performance system by the utilization of free time, no matter what the initial allotment to the warehouse may be. There is no certainty, however, that an appreciable amount of free time will be available to a new warehouse. The record shows that new competition on the Asheville market in 1954 enlivened the market and resulted in improved and more efficient services by the established warehouses to the farmers. More vigorous competition for the farmers' business by all warehousemen may result in the utilization of all, or nearly all, their allotted selling time, thus practically freezing the allotted time of a new warehouse to its allotted time the first year of its operation.

Our prediction appears to be borne out by the showing in the record [Respondents' Exhibit 20] of the difference between the ratio of allotted time to actual sales of individual warehouse firms for the 1954-1955 selling season and the ratio of allotted time to actual sales of these firms for the 1958-1959 season. The earlier ratio shows a great disparity between the percentage of allotted time and the percentage of total sales for certain firms, thus indicating that free time was readily available. The ratio of allotted time to actual sales was considerably lower for the 1958-1959 season, thus indicating that the individual warehouse firms utilized all or nearly all of their allotted time.

Respondents have made one other objection to the Tentative Modified Order which should be mentioned. The second paragraph of this order reads as follows:

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to  $3\frac{1}{2}\%$ , or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse.

Respondents claim that the underlined portion of this inhibition is so indefinite that it would require them to operate at their peril and under a cloud of uncertainty and that the Commission must confine its order to the 3½% limit only.

This argument must also be rejected. Respondents have violated the law and the order imposes upon them the burden of establishing that any gain or loss limitation rule which they adopt is reasonable. The order requires in this connection that respondents file with the Commission a report setting forth in detail the manner and form in which they have complied with such order. Thus, a showing of the reasonableness of any gain or loss limitation rule which they propose to adopt should be made by respondents when the compliance report is filed and the Commission will determine at that time whether such rule complies with the order. This procedure will eliminate any uncertainty as to the propriety of respondents' future operations insofar as this inhibition is concerned.

The tentative modified order to cease and desist, issued by the Commission on March 19, 1959, is hereby adopted as the final order of the Commission. The Commission, having considered the various questions discussed by the Court and having modified the first two paragraphs of the order to cease and desist in conformity with the views expressed in the Court's opinion, has fully complied with the direction of the Court of Appeals on the remand of this case.

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IN THE MATTER OF  
ORSI, INC., ET AL.

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

*Docket 7958. Complaint, June 17, 1960—Decision, Oct. 18, 1960*

Consent order requiring a New York City distributor to cease violating the Wool Products Labeling Act by labeling as "100% Re-used wool", fabrics which contained substantially less than 100% woolen fibers, and by failing to label certain fabrics as required.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Orsi, Inc., a corporation, and Domenico Orsi and Richard F. C. Bemporad, individually and as officers of

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

PARAGRAPH 1. Respondent Orsi, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 11 East 33d Street, New York, New York.

Individual respondents Domenico Orsi and Richard F. C. Bemporad are president and secretary-treasurer, respectively, of said corporate respondent. These individuals control the acts, practices and policies of the corporate respondent. The office and principal place of business of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1959, respondents introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool products" are defined therein.

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

Among such misbranded products were fabrics labeled or tagged by respondents as "100% Re-used wool", whereas, in truth and in fact, said fabrics contained substantially less than 100% woolen fibers.

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

PAR. 5. Respondents in the course and conduct of their business, as aforesaid, were and are in substantial competition with corporations, firms and individuals likewise engaged in the sale of wool products, including woolen fabrics.

PAR. 6. The acts and practices of the respondents as set forth above are in violation of the Wool Products Labeling Act and the

Rules and Regulations thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents in the course and conduct of their business of selling woolen fabrics, in commerce, have invoiced such fabrics, for example, as "100% Re-Used Wool", whereas, in truth and in fact, said fabrics contained substantially less than 100% woolen fibers.

PAR. 8. The practice of respondents as set out in Paragraph Seven of falsely identifying the constituent fibers of their wool fabrics has had, and now has, the tendency and capacity to mislead and deceive purchasers of said products as to the true fiber content thereof and to misbrand products manufactured by them in which said fabrics were used.

PAR. 9. The acts and practices of the respondents set out in Paragraph Seven were all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Harry E. Middleton, Jr.*, supporting the complaint.

*Mr. Alfred R. McCauley*, and *Mr. James R. Sharp*, of *Sharp & Bogan*, of Washington, D.C., for respondents.

#### INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

On June 17, 1960, pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, the Federal Trade Commission issued its complaint in this proceeding against the above-named respondents. A true copy of the complaint was served upon respondents as required by law. The complaint charges respondents with violating the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder by misbranding certain of their wool products, and by the use on invoices and shipping memoranda of false, misleading and deceptive statements and representations as to the fiber content of said wool products.

After being served with the complaint respondents appeared by counsel. Thereafter respondents entered into an agreement dated July 28, 1960, which purports to dispose of all of this proceeding as to all parties without the necessity of conducting a hearing. The agreement has been signed by the respondents, their counsel, and by counsel supporting the complaint, and has been approved by the

Director, Acting Associate Director, and Assistant Director of the Commission's Bureau of Litigation. Said agreement contains the form of a consent cease and desist order which the parties have agreed may be entered by the Hearing Examiner and which has been represented to be dispositive of the issues involved in this proceeding. On August 11, 1960, the said agreement was submitted to the undersigned Hearing Examiner for his consideration in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to said agreement have admitted all the jurisdictional facts alleged in the complaint, and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the Hearing Examiner and the Federal Trade Commission; the makings of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The parties to the agreement have, inter alia, by such agreement agreed:

(1) The order to cease and desist issued in accordance with said agreement will be entered in this proceeding by the Commission without further notice to the respondents, and, when so entered, such cease and desist order shall have the same force and effect as if entered after a full hearing; (2) the complaint may be used in construing the terms of said order; (3) the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and (4) 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.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement of July 28, 1960, containing consent order, and it appearing that the order, provided for in said agreement covers all of the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties; the agreement of July 28, 1960, is hereby accepted and ordered filed at the same time that this decision becomes the decision of the Federal Trade Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings; and

The undersigned Hearing Examiner having considered the agreement and proposed order and being of the opinion that the accept-

ance thereof will be in the public interest, makes the following jurisdictional findings, and issues the following order:

#### JURISDICTIONAL FINDINGS

1. That the Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent Orsi, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 11 East 33rd Street, New York, New York.

Respondents Domenico Orsi and Richard F. C. Bemporad are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

3. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act;

4. The complaint herein states a cause of action against said respondents under the Federal Trade Commission Act, and the Wool Products Labeling Act, and this proceeding is in the public interest.

#### ORDER

*It is ordered,* That respondents Orsi, Inc., a corporation, and its officers, and Domenico Orsi and Richard F. C. Bemporad, 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 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 wool fabrics or other wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

*It is further ordered,* That respondents Orsi, Inc. a corporation, and its officers, and Domenico Orsi and Richard F. C. Bemporad, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any cor-

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porate or other device, in connection with the offering for sale, sale or distribution of their products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers of which their products are composed or the percentage or amount thereof in sales invoices, shipping memorandum or any other manner.

## 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 18th day of October 1960, become the decision of the Commission; and, accordingly:

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

## IN THE MATTER OF

## NU-VISION OPTICAL STUDIOS, INC., ET AL.

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

*Docket 7949. Complaint, June 16, 1960—Decision, Oct. 19, 1960*

Consent order requiring sellers of contact lenses in Flint, Mich., to cease advertising falsely that their contact lenses could be worn all day and without discomfort by all persons, would correct all eye defects and protect the eye, were unbreakable, eliminated need of eyeglasses, and were manufactured by respondents.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nu-Vision Optical Studios, Inc., a corporation, and Eli Shapiro and Arthur Shapiro, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nu-Vision Optical Studios, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal

office and place of business located at 118 Kearsley Street, Flint, Michigan. Said corporation trades as Nu-Vision Optical Studios.

Individual respondents Eli Shapiro and Arthur Shapiro are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of contact lenses to the consuming public. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are devices as the term "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, advertisements concerning their said devices, by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers, for the purpose of inducing, and which were and are likely to induce, directly or indirectly, the purchase of said devices; and respondents have also disseminated and caused the dissemination of advertisements concerning their said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of their said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements, disseminated and caused to be disseminated as aforesaid, are the following:

Take off your glasses and See Better. Look Better.

No vision correction is too great or too small for the wearer of contact lenses.

So comfortable to wear.

The miracle of contact lenses is now here for you to enjoy—no matter what your vision correction may be. These tiny invisible lenses may be worn with complete comfort by children, men and women in every occupation and activity \* \* \* a new life without glasses.

You'll be able to wear them in complete comfort all day-long, no matter what you are doing.

Thick heavy spectacles are eliminated and the contact lens wearer is restored to full normal field of vision.

The unbreakable lenses eliminate the hazards and inconvenience of ordinary glasses.

Protection. Contact lenses provide complete protection at work or play. These small lens eliminate the hazards and inconvenience of ordinary glasses.



The finest product of years of research and facilities—right in our own modern Nu-Vision laboratory.

PAR. 4. By and through the statements made in said advertisements, and others of similar import not specifically set out herein, respondents represent and have represented, directly and by implication, that:

1. All persons in need of visual correction can successfully wear their contact lenses.
2. There is no discomfort in wearing their contact lenses.
3. Said contact lenses can be worn all day with complete comfort.
4. Eyeglasses can be discarded upon the purchase of their contact lenses.
5. Their contact lenses will correct all defects in vision.
6. Said lenses protect the eye.
7. Said lenses are unbreakable.
8. Respondents manufacture the lenses sold by them.

PAR. 5. The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act.

In truth and in fact:

1. A significant number of persons in need of visual correction cannot successfully wear respondents' contact lenses.
2. Practically all persons will experience some discomfort when first wearing respondents' lenses. In a significant number of cases discomfort will be prolonged and in some cases will never be overcome.
3. Many persons cannot wear respondents' contact lenses all day without discomfort and no person can wear said lenses all day in complete comfort until he or she has become fully adjusted thereto.
4. Eyeglasses cannot always be discarded upon the purchase of respondents' lenses.
5. Respondents' lenses will not correct all defects in vision.
6. Said lenses will protect only the small portion of the eye that is covered by them.
7. Said lenses are breakable.
8. Respondents do not manufacture the lenses sold by them.

PAR. 6. The dissemination by the respondents of the aforesaid false advertisements constitutes unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Frederick McManus* for the Commission.

*Hoffman & Rubenstein*, by *Mr. Gilbert Y. Rubenstein*, of Flint, Mich., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on June 16, 1960, charging Respondents with violation of the Federal Trade Commission Act, by the dissemination, by various means in commerce, of false advertisements concerning contact lenses which they sell to the consuming public, which contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are devices as the term "device" is defined in the Federal Trade Commission Act.

Thereafter, on August 19, 1960, Respondents, their counsel, and counsel supporting the complaint herein entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director, Associate Director, and Acting Assistant Director of the Commission's Bureau of Litigation, and, on August 30, 1960, submitted to the Hearing Examiner for consideration.

The agreement identifies Respondent Nu-Vision Optical Studios, Inc., as a Michigan corporation, with its office and principal place of business located at 118 Kearsley Street, Flint, Michigan, and individual Respondents Eli Shapiro and Arthur Shapiro as officers of said corporation, who formulate, direct and control the acts and practices of the corporate Respondent, their address being the same as that of the corporate Respondent.

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 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 the 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

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Respondents that they have violated the law as alleged in the complaint.

After consideration of the allegations of the complaint, and 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. 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 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 Nu-Vision Optical Studios, Inc., a corporation, and its officers, and Eli Shapiro and Arthur Shapiro, 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 offering for sale, sale and distribution of contact lenses, do forthwith cease and desist from, directly or indirectly:

A. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that:

1. All persons in need of visual correction can successfully wear their contact lenses;
2. There is no discomfort in wearing their lenses;
3. All persons can wear Respondents' lenses all day without discomfort; or that any person can wear Respondents' lenses all day without discomfort except after that person has become fully adjusted thereto;
4. Eyeglasses can always be discarded upon purchase of Respondents' lenses;
5. Respondents' contact lenses will correct all defects in vision;
6. Said lenses will protect the eye unless limited to the small portion covered thereby;
7. Said lenses are unbreakable;
8. Respondents manufacture the contact lenses sold by them;

B. Disseminating, or causing to be disseminated, any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph A, above.

## 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 19th day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered,* That respondents Nu-Vision Optical Studios, Inc., a corporation, and Eli Shapiro and Arthur Shapiro, 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  
LEO BIGLAISER

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

*Docket 7951. Complaint, June 16, 1960—Decision, Oct. 19, 1960*

Consent order requiring a seller of corneal contact lenses in Phoenix, Ariz., to cease advertising falsely that all persons could successfully wear his contact lenses and without discomfort, that the lenses corrected all defects in vision, protected the eye, and could be worn a lifetime without change of prescription.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Leo Biglaiser, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Leo Biglaiser is an individual with his place of business located at 146 West Adams Street, Phoenix, Arizona.

PAR. 2. Respondent is now and for some time last past has been engaged in the sale of corneal contact lenses to the purchasing public. Corneal contact lenses are devices designed to correct errors and deficiencies in the vision of the wearer and are devices, as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his business, respondent has

disseminated, and caused the dissemination of, advertisements concerning his said contact lenses by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements circulated in newspapers and by means of circulars and pamphlets, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and respondent has also disseminated and caused the dissemination of advertisements concerning his said devices by various means including, but not limited to, the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of his said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical, but not all inclusive, of the statements contained in advertisements disseminated and caused to be disseminated, as aforesaid, are the following:

You too, can wear the New Fluidless Contact Lenses.

Practical for all men and women.

It's a joy to see clearly and comfortably without the weight of having glasses on my nose.

I wear my invisible contact lenses all day long.

They are comfortable to wear and provide a protective covering to the eye.

\* \* \* need no changing.

PAR. 5. By and through the statements made in said advertisements disseminated, and caused to be disseminated as aforesaid, and others of similar import not specifically set out herein, respondent represented, directly and by implication that:

1. All persons in need of visual correction can successfully wear respondent's contact lenses.
2. There is no discomfort from wearing said lenses.
3. Said lenses will correct all defects in vision.
4. Persons purchasing said lenses can discard their eyeglasses.
5. Said lenses protect the eye.
6. Said lenses may be worn a life time without change of prescription.

PAR. 6. The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

In truth and in fact:

1. A significant number of persons cannot successfully wear respondent's contact lenses.
2. Practically all persons will experience some discomfort after starting to wear said lenses. In a significant number of cases dis-

comfort will be prolonged and in some cases will never be overcome.

3. Said lenses will not correct all defects in vision.

4. Eyeglasses cannot always be discarded upon the purchase of respondent's lenses.

5. Said lenses will protect only a small portion of the eye.

6. In the case of some individuals, prescriptions for contact lenses must be changed during their life-time.

PAR. 7. Respondent's aforesaid advertising matter contains such statements as "I wear my invisible contact lenses all day long" and "They are comfortable to wear," and other statements of the same import. Said advertisements are misleading in material respects and constitute false advertisements in that they fail to reveal facts material in the light of such representations, that is, that a person can wear respondent's lenses all day long without discomfort only after he or she has become fully adjusted thereto.

PAR. 8. The dissemination by respondent of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Frederick McManus* for the Commission.

*Riggs, Moore & Jacobowitz*, by *Mr. Henry Jacobowitz*, of Phoenix, Ariz., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, on June 16, 1960, charging the above-named respondent with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On August 30, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent and the attorneys for both parties, under date of August 29, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent, Leo Biglaiser, is an individual with his office and principal place of business located at 146 West Adams Street, in the City of Phoenix, State of Arizona.

2. 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.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) 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.

5. 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.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

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

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the parties hereto; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition

of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

*It is ordered*, That respondent Leo Biglaiser, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of contact lenses, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisements represent, directly or by implication, that:

- a. All persons can successfully wear his contact lenses;
- b. There is no discomfort in wearing his contact lenses;
- c. His contact lenses will correct all defects of vision;
- d. Eyeglasses can always be discarded upon the purchase of his contact lenses;
- e. Said contact lenses protect the eye unless limited to the small portion of the eye that is covered thereby;
- f. Said contact lenses may be worn a lifetime without change of prescription; or misrepresent the time that they may be worn;
- g. Said contact lenses can be worn all day without discomfort unless it is clearly revealed that this is possible only after the wearer has become fully adjusted thereto.

2. Disseminating, or causing to be disseminated, any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1, above or which fails to reveal the facts required by paragraph 1(g).

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 19th day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered*, That the respondent Leo Biglaiser 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.



Complaint

57 F.T.C.

IN THE MATTER OF

## ANNISTON FOUNDRY COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
SEC. 2(d) OF THE CLAYTON ACT*Docket 8031. Complaint, June 30, 1960—Decision, Oct. 19, 1960*

Consent order requiring a manufacturer of cast iron soil pipe and fittings in Anniston, Ala., to cease discriminating among its customers in violation of Sec. 2(d) of the Clayton Act by making payments to some customers for promoting its products but not to all their competitors on proportionally equal terms, such as sums amounting to \$3,300 paid to the American Radiator and Standard Sanitary Corp. for promoting the sale of its products through television programs sponsored by the company in the trading areas of New Orleans, Pittsburgh, and elsewhere.

## COMPLAINT

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

PARAGRAPH 1. Respondent Anniston Foundry Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at Anniston, Alabama.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of cast iron soil pipe and fittings.

Respondent sells its products of like grade and quality to a large number of customers located throughout the United States for use or resale therein. Respondent's sales of its products are substantial, exceeding \$10,000,000 annually.

PAR. 3. Respondent, in the course and conduct of its business, as aforesaid, has caused and now causes its said products to be shipped and transported from the state or states of location of its various manufacturing plants, warehouses and places of business, to purchasers thereof located in states other than the state or states wherein said shipment or transaction originated. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act as amended.

PAR. 4. In the course and conduct of its business in commerce since January 1, 1957, respondent has paid or contracted for the payment of something of value to or for the benefit of certain of

its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments have not been offered or otherwise made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, between May 1957 and August 1959 respondent contracted to pay, and periodically did pay, sums amounting to \$3,300.00 to the American Radiator and Standard Sanitary Corporation for services and facilities furnished it by American Radiator and Standard Sanitary Corporation in promoting the sale of respondent's products through television programs sponsored by American Radiator and Standard Sanitary Corporation in the trading areas of New Orleans, Louisiana; Pittsburgh, Pennsylvania; and elsewhere. Such payments were not offered or otherwise made available on proportionally equal terms to all other customers competing with American Radiator and Standard Sanitary Corporation in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

*Mr. Martin F. Connor* supporting the complaint.

*Knox, Jones, Woolf & Merrill*, by *Mr. Earle Jones*, of Anniston, Ala., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint in this proceeding was issued on June 30, 1960, by the Federal Trade Commission. It charges respondent with violating subsection 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. The complaint charges that respondent, in selling its pipe, pipe fittings, and related products, and offering them for sale and distribution in interstate commerce, paid or contracted for the payment of something of value to or for the benefit of certain of its customers as compensation or in consideration for services or facilities furnished by or through such customers, and that such payments have not been offered or otherwise made available on proportionally equal terms to all other customers of respondents competing in the sale and distribution of its products. A true and correct copy of the complaint was served upon respondent as required by law. Thereafter respondent appeared by counsel and entered into an agreement dated August 5, 1960, which purports to

dispose of this proceeding as to all the parties and issues without the necessity of a formal hearing.

The said agreement has been signed by the respondent, its counsel, and by counsel supporting the complaint. It has been approved by the Director, and the Associate Director of the Bureau of Litigation of the Federal Trade Commission. On August 10, 1960, the said agreement was submitted to the undersigned hearing examiner for his consideration in accordance with Section 3.25 of this Commission's Rules of Practice for Adjudicative Proceedings. The agreement contains the form of a consent cease and desist order which the parties have agreed may be entered by the hearing examiner in order to dispose of the issues involved in this proceeding.

In and by 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. In said agreement respondent waives (a) any further procedural steps before the hearing examiner and the Commission; (b) the making of findings of fact or conclusions of law; and (c) all of the rights respondent may have to challenge or contest the validity of the order entered in accordance with said agreement.

This agreement of August 5, 1960, provides further that it shall not become a part of the official record unless and until it becomes a part of the decision of the Federal Trade Commission; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that 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.

The agreement of August 5, 1960, provides further that the order to cease and desist provided for in said agreement may be entered in this proceeding by the Commission without further notice to respondent, and that, when so entered, such order shall have the same force and effect as if entered after a full hearing. The order may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement of August 5, 1960, containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, the agreement of August 5, 1960, is hereby accepted and ordered filed at the same time that this decision becomes the decision of the

Federal Trade Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings; and

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, makes the following jurisdictional findings, and issues the following order:

#### JURISDICTIONAL FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent Anniston Foundry Company is a corporation existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located in Anniston, Alabama;

3. Respondent is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Robinson-Patman Act;

4. The complaint herein states a cause of action against respondent under the Clayton Act, as amended by the Robinson-Patman Act; and this proceeding is in the public interest. Now, therefore,

*It is ordered,* That respondent, Anniston Foundry Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of pipe, pipe fittings, and related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customers of respondent as compensation or in consideration for any services or facilities furnished by or through such customers in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is affirmatively 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

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 19th day of October 1960, 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

57 F.T.C.

IN THE MATTER OF

## WILSON TRADING CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE  
COMMISSION AND THE WOOL PRODUCTS LABELING ACTS*Docket 6656. Complaint, Oct. 17, 1956—Decision, Oct. 20, 1960*

Order requiring distributors of yarn in New York City to cease violating the Wool Products Labeling Act by representing as 100% cashmere, on invoices and carton labels, cones of yarn which contained substantially less than 100% cashmere fibers; and by failing to label certain of said wool products to show the percentages of the total fiber weight, as required.

*Mr. Berryman Davis and Mr. H. D. Stringer for the Commission.  
Rubinton & Coleman, by Mr. Theodore D. Ostrow and Mr. Noel  
Rubinton, of Brooklyn 1, N.Y., for respondents.*

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint herein charges the respondents, Wilson Trading Corporation, a corporation, and Jacob Bleetstein and Norman Glauber, Jr., individually and as officers of the respondent corporation, (a) with violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, by misbranding certain wool products in a manner which constitutes unfair and deceptive acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act; and (b) with making false, misleading and deceptive representations on invoices of wool products (yarns), which had the capacity and tendency (1) to mislead and deceive a substantial portion of the purchasers of said products into the erroneous and mistaken belief that such statements were true; (2) to cause such purchasers to misbrand the fabrics manufactured with said yarn as to their fiber content; and (3) to place in the hands of such purchasers the means and instrumentalities whereby they might mislead and deceive members of the purchasing public as to the character and amount of the constituent fibers in said products, all of the latter practices being in violation of the Federal Trade Commission Act.

All respondents were duly served with the aforesaid complaint according to law and, within the required time, filed answer thereto denying the pertinent charges and violation. By amended answer filed May 16, 1957, respondents assert, without conceding any impropriety in their prior activity, that since May 7, 1956, they had not sold or delivered any of the yarn referred to in the complaint; that on June 20, 1956, the Commission was given written assurance

that respondents would sell their yarns as requested by "responsible officials of the Federal Trade Commission" with whom respondents had conferred; and that there was and is no reasonable likelihood that the activities alleged in the complaint will occur in the future.

On the issues thus joined the matter proceeded to trial during the course of which certain testimony was had and exhibits received in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

Subsequent thereto, both parties were accorded an opportunity, of which they availed, of filing with the Hearing Examiner their respective Proposed Findings of Fact and Conclusions of Law, those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

#### FINDINGS AS TO THE FACTS

1. Respondent Wilson Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 1440 Broadway, New York, New York. The individual respondents Jacob Bleetstein and Norman Glauber, Jr., are president and secretary-treasurer, respectively, of said corporation, and formulate, direct, and control the acts, policies, and practices of said corporate respondent. Their address is the same as that of the corporate respondent.

2. Wilson Trading Corporation is a contract spinner of yarn, spinning yarns composed of a wide variety of fibers. It does not sell any of the yarn at retail but sells to manufacturers and, in the course and conduct of its business, was and is in competition, in commerce, with other corporations, firms and individuals in the sale of wool products, including yarns.

3. Subsequent to January 1, 1954, respondents introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool products" are defined therein, consisting of cones of yarn.

4. The said cones of yarn were introduced into commerce, sold, transported, distributed, delivered for commerce and offered for sale in commerce, in containers on which there was set forth the label "imported cashmere yarn", which said phrase described the said yarn as containing 100% cashmere fibers.

5. In the course of conduct of their business, respondents stated on invoices in connection with their sales of said yarn "#5 run

## Findings

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imported cashmere yarn in oil on cones", which said phrase described the said yarn as containing 100% cashmere fibers.

6. Approximately 18,000 pounds of the cones of yarn particularly involved in this proceeding were purchased by respondents from an importer who had procured them from Japan, where the constituent fibers had been spun into yarn and wound into the cones, which carried no labels showing the fiber content of the yarn. The only labels were attached to the cartons or boxes in which the cones of yarn were shipped.

7. Invoices from the importer to respondents dated January 20, 1956; February 15, 1956; March 2, 1956; April 3, 1956; and April 25, 1956, and a letter of August 1, 1955, confirming the sale, describe the yarns as 90% Cashmere, 10% wool, including hair 0.3%; or in some instances the invoices show

Composition :	Percent
Cashmere -----	90
Wool -----	10

In some instances the included hair is shown as 0.5% average. In a letter to the importer dated October 18, 1955, respondents acknowledged confirmation of an order for 5,000 pounds of "90-10 Cashmere yarn". The respondents had knowledge of the less-than-100% cashmere content of the yarn which they were procuring, and which later they sold and caused to be transported in commerce.

8. Despite these facts, respondents assert that the yarns which they sold and invoiced as cashmere were actually cashmere and not a mixture of cashmere and wool. To justify their position respondents relied on reports of tests made by the United States Testing Company to the effect that the many tests made by them showed that respondents' yarns contained from 97% to 100% cashmere.

9. Tests conducted by experts called in support of the allegations of the complaint, on the contrary, showed cashmere content of respondents' yarns to vary from 88% to 97%, some of the intermediate percentages being 89.5, 89.6, 89.9, 90, 91, 92.4 and 93.5. Despite the testimony that although there is no chemical or mechanical process by which cashmere and wool fibers can be separated and that the separation must be made visually under magnification, the end result should not vary more than one or two percent.

10. The determination of the issue as to the content of respondents' yarns requires evaluation of the testing processes and the qualifications of those conducting the tests, who testified to their opinions as experts in this field. On the basis of all the evidence, after evaluating and weighing the qualifications and experience of the

expert witnesses, the manner in which they chose the samples to be tested, the care with which the tests were conducted and the apparent freedom of these witnesses from bias and prejudice, the conclusion is reached that the greater reliance must be placed upon the results of tests made by the experts called by the Commission, rather than on those tests conducted for respondents. Weight must also be given to the manner in which the yarns were labeled and invoiced by the manufacturer who sold to respondents; to the language used by respondents in placing orders; and the language used by the importer in confirmation of orders.

11. Among and as examples of said misbranded wool products are containers of yarn which were not stamped, tagged or labeled so as to show the percentages of the total fiber weight thereof as required by the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

12. By their statements on invoices representing that their yarns were "cashmere", respondents represented falsely that their products were 100% cashmere. Such statements had the capacity and tendency to mislead and deceive a substantial portion of the purchasers of their products into the erroneous and mistaken belief that such statement was true; to cause such purchasers to misbrand the fabrics manufactured with said yarn as to their fiber content; to place in the hands of such purchasers the means and instrumentalities whereby they may mislead and deceive members of the purchasing public as to the character and amount of the constituent fibers in said products; and, as a result thereof, unfairly to divert trade in commerce to respondents from their competitors.

#### CONCLUSIONS

1. The acts and practices engaged in by respondents in the mislabeling and non-labeling of their products, as hereinabove found, constituted misbranding of wool products and were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

2. The acts and practices of the respondents in making false representations on their invoices and elsewhere were and are to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.



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3. The Federal Trade Commission has jurisdiction of the subject-matter and persons named herein, and this proceeding is in the public interest.

## ORDER

*It is ordered*, That the respondents, Wilson Trading Corporation, a corporation, and its officers, Jacob Bleetstein and Norman Glauber, Jr., individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of yarns or any other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool", "reprocessed wool", or "reused wool", as those terms are defined in said Act, 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 included therein;

2. Failing securely to 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 products, exclusive of ornamentation not exceeding five percentum 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 percentages of the total weight of such wool products of any non-fibrous loading, filling or adulterating matter;

(c) the name or the registered identification number of the manufacturer of such wool products or of one or more persons engaged in introducing such wool products 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.

*It is further ordered*, That Wilson Trading Corporation, a corporation, and its officers, Jacob Bleetstein and Norman Glauber, Jr., 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 offering for sale, sale

or distribution of yarn or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Misrepresenting by statements or representations in contracts, orders, confirmations, invoices, or other documents, by correspondence, orally, or by any other means the character or amount of the constituent fiber content of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission on the respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel in support of the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondents' appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision, filed March 21, 1960, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That the respondents, Wilson Trading Corporation, a corporation, Jacob Bleetstein and Norman Glauber, Jr., 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

PREMIER KNITTING CO., INC., ET AL.

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

*Docket 7366. Complaint, Jan. 22, 1959—Decision, Oct. 20, 1960*

Order requiring New York City distributors to cease representing falsely on attached tags or labels that their orlon sweaters would not pill.

As to respondents Universal Dye Works, Inc., and Joseph Schmitz, Jr., the proceeding was disposed of by a consent order on July 4, 1959, 56 F.T.C. 15.

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

*Mr. Garland S. Ferguson* for the Commission.

*Rothstein & Korzenik*, by *Mr. Harold Korzenik*, of New York, N.Y., for respondents.

INITIAL DECISION AS TO RESPONDENTS PREMIER KNITTING CO., INC.,  
ARNOLD A. SALTZMAN, SANFORD FORSTER AND IRVING SALTZMAN

Universal Dye Works, Incorporated and Joseph Schmitz, Jr. (erroneously named in the complaint as Joseph B. Schmitz), individually and as an officer of said corporation, and counsel supporting the complaint, entered into an agreement containing a consent order which became the basis for an initial decision which was issued by the Hearing Examiner May 25, 1959, and adopted as the decision of the Commission June 9, 1959. In this decision a cease-and-desist order was issued as to Universal Dye Works, Incorporated and its officers, and Joseph Schmitz, Jr., individually and as an officer of said corporation. The complaint was dismissed as to Fred C. Oshell, Catherine C. Conver and Lily M. Schmitz individually and as officers of said corporation. This disposed of all the issues raised in the complaint as to this group of respondents.

The complaint charges that the remaining respondents, Premier Knitting Co., Inc. and Arnold A. Saltzman, Sanford Forster and Irving Saltzman, individually and as officers of said corporation, violated the Federal Trade Commission Act by falsely and deceptively representing that certain orlon sweaters which they sold and distributed in commerce would not pill. These charges were denied. Thereafter hearings were held and proposed findings of fact and conclusions were submitted by counsel. Upon the basis of the entire record as to these respondents the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Premier Knitting Co., Inc., hereinafter referred to as Premier, 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 1410 Broadway, New York, New York.

2. Respondent Arnold A. Saltzman is, and at all times mentioned in the complaint was president of Premier, and he alone has been and is responsible for the formulation, direction and control of the acts and practices of said corporation; respondents Irving Saltzman and Sanford Forster were and are officers of Premier, but did not and do not participate in the direction or control of the acts and practices of said corporation.

3. Premier is now and since 1916 has been engaged in the business of selling and distributing ladies' sweaters to retail stores throughout the United States for resale to the general public. In

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the course and conduct of its business, Premier ships its sweaters, when sold, to purchasers thereof located in states other than the state or states in which said shipments originate. The volume of its trade among the several states has been substantial.

4. During the period "from the end of 1957 to the summer of 1958" (the complaint was issued January 22, 1959), certain of Premier's orlon sweaters carried tags which contained the following:

On the front of the tag:

K O R L A N E —  
With UT      R E X\*  
FORMULA  
Newest Miracle Orlon  
Exclusive With  
P R E M I E R

THIS SWEATER WILL NOT PILL!

Wash it as often as you like, sweaters of KORLANE REX are permanently pill resistant with these added features.

- Will retain its shape indefinitely.
- It washes cleaner, dries faster.

\*U.S. Pat. Pend.

On the back of the tag:

FACTS ABOUT KORLANE REX\*

You can actually feel the difference in this sweater. It has the spring and bounce of a fine animal fibre. After months of wear it will remain soft and smooth. Shown here are close-up photos of the surfaces of two sweaters taken from the same stock.



Beginning in the summer of 1958, different tags were used which contained the following:

On the front of the tag:

K O R L A N E —  
With UT      R E X\*  
FORMULA  
Newest Miracle Orlon  
Exclusive With  
P R E M I E R

- You can "feel" the difference.
- It has "new" lofty hand of finest animal fibre.
- The "spring" and "bounce" of Shetland.

\*U.S. Pat. Pend.

On the back of the tag:

FACTS ABOUT KORLANE REX\*

- WILL RETAIN ITS SHAPE INDEFINITELY
- MOTH PROOF AND MILDEW PROOF
- COLOR-SET IN TRUE, GLOWING COLORS
- MANUFACTURER'S GUARANTEE WITH EACH SWEATER

Shown here are close-up photos of the surfaces of two sweaters taken from the same stock.



Washing Instructions  
 Sweaters of Korlane Rex are machine  
 or hand washable.

5. The statements "This sweater will not pill" and "No pilling" constitute a representation not only that the sweaters so tagged will not pill as the result of ordinary use and wear, but connote also that no pilling will result no matter how rough the usage or how hard the wear. The statements are unqualified.

6. One of the Commission's witnesses, the President of Universal Dye Works, Inc., stated that he had worn one of Premier's sweaters for 1,000 hours, that it had been laundered mechanically as well as by hand, and that there was no evidence of pilling—that it was completely free of pilling after such use.

7. Two Premier sweaters which had been received in evidence as Commission's Exhibits 3 and 6 were submitted to A C H Fiber Service, Inc., of Boston, Massachusetts, with a request that "tests be made on these exhibits to determine if they will or will not pill". The A C H Test Report, dated October 9, 1959, was stipulated into the record, as was an addendum letter from A C H to the Commission's Bureau of Litigation, dated November 3, 1959. Four test samples, identified as No. A-1 to No. A-4, approximately four inches in diameter, were taken from Commission's Exhibit 3, and two similar samples, No. A-5 and No. A-6, from Commission's Exhibit 6. These were subjected to the testing method referred to in ASTM Standard D 1375-55 T, Method A, described in the test report as follows:

This is the Inflated Diaphragm method, and makes use of the Stoll-Quartermaster Tester illustrated in this Standard. Commercial cellulose sponges were used as the abradant, after preparation by thorough washing in tap water, rinsing in distilled water, and drying so that any finishes on the sponges

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would be removed. The purpose of this method, as quoted from the above Standard, is "for the determination of the pilling propensity and retention of appearance of woven and knitted fabrics composed of natural or synthetic fibers, or blends".

8. The test report shows the following results under use of Method 1:

Test piece No. A1 (Sample 1)—500 cycles:

<i>Visual Observation</i>	<i>Observation at 10X</i>
3 Major Pills	3 Major Pills
1 Minor Pill	2 Minor Pills
Several incipient pills	2 Incipient Pills

Test piece No. A2 (Sample 1)—1000 cycles:

<i>Visual Observation</i>	<i>Observation at 10X</i>
4 Major Pills	5 Major Pills
2 Minor Pills	2 Incipient Pills
Several incipient pills	

Test piece No. A3 (Sample 1)—3000 cycles:

<i>Visual Observation</i>	<i>Observation at 10X</i>
1 Major Pill	5 Major Pills
2 Minor Pills	1 Moderate Pill
Few incipient pills	2 Minor Pills
	3 Incipient Pills

Test piece No. A4 (Sample 1)—3000 cycles, new sponge:

<i>Visual Observation</i>	<i>Observation at 10X</i>
5 Major Pills	9 Major Pills
4 Minor Pills	3 Moderate Pills
Several incipient pills	3 Incipient Pills

Test piece No. A5 (Sample 2)—1250 cycles:

<i>Visual Observation</i>	<i>Observation at 10X</i>
1 Major Pill	1 Major Pill
1 Moderate Pill	2 Incipient Pills
Several minor or incipient pills	

Test piece No. A6 (Sample 2)—500 cycles, new sponge:

<i>Visual Observation</i>	<i>Observation at 10X</i>
1 Very Major Pill	1 Major Pill
Few incipient pills	2 Incipient Pills

9. As stated in the test report, "A test was additionally performed, modelled after Method B of the same ASTM standard. In this method, the testing apparatus imposes a reciprocating random motion during abrasion, rather than the limited directional movements imposed by the Stoll apparatus. For this test, a Schieffer Abrasion tester was set up with a disc of fabric from Sample 2 attached in a 4½" ring as the upper abradant, under a one-pound load. A disc of the same fabric was mounted in a P12 lightweight clamp to serve as the surface to be abraded. The area of the lower disc exposed to random motion abrasion was approximately ¾" in diameter."

The A C H letter of November 3, 1959 further describes the procedure as follows:

For method 2, a 5" diameter disc was cut by hand from the black sweater to serve as the upper (abradant) surface, and a 2½" diameter disc was die cut from the same sweater to serve as the test surface. Thus, in method 2, the fabric was tested by abrasion against itself.

Only one sample, taken from Commission's Exhibit 6 and identified as B1, was tested by this method, with the following result:

Test piece No. B1—500 cycles:

<i>Visual Observation</i>	<i>Observation at 10X</i>
2 Major Pills	1 Major Pill
Several incipient pills	1 Moderate Pill
	1 Minor Pill

10. The conclusions reached by Dr. Samuel J. Golub, Associate Director of A C H Fiber Service, Inc., are set forth in the report as follows:

1. As shown in the results already cited, the fabric produced pills by both methods tested—i.e. when abraded in a Stoll-Quartermaster machine, using a sponge as the abradant, and when abraded against itself in the Schieffer tester.

2. The propensity for pilling shown especially by Method 1 (Stoll tester) is consistent, in our opinion, with fabrics which pill.

11. The conclusions reached by the testing laboratory are accepted. Accordingly, it is found that the representations made by Premier as to pilling of orlon sweaters sold and distributed by it were and are false and misleading. Its officers and Arnold A. Saltzman, as an officer and individually, are responsible for such representations. The aforesaid misrepresentations, and the acts and practices of said respondents as herein set forth were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

12. No representations as to the pilling of any other orlon or other type garment or product have been shown to have been made by said respondents, and there is no evidence upon which any conclusion can be reached as to the pilling propensity of any products manufactured, sold or distributed by said respondents except the orlon sweaters; therefore the order will be limited to orlon sweaters and similar products, "similar products" being used as referring to other orlon products made of yarns or fabrics similar to those contained in the orlon sweaters hereinabove found to have been misrepresented. Accordingly,

*It is ordered,* That respondents Premier Knitting Co., Inc., a corporation, and its officers, and Arnold A. Saltzman individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of women's orlon sweaters or any other similar orlon product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that their orlon sweaters or any other similar orlon product will not pill.

*It is further ordered,* That the complaint herein, insofar as it relates to respondents Sanford Forster and Irving Saltzman individually, be, and it hereby is, dismissed.

## OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The complaint in this case alleges that respondents violated Section 5 of the Federal Trade Commission Act by representing that certain sweaters sold by Premier Knitting Co., Inc., will not pill and that such representation is false because these sweaters will pill. Pilling means a curling up of the ends of the staple used in spinning the yarn.

This proceeding was disposed of for two of the respondents, Universal Dye Works, Incorporated, and Joseph Schmitz, Jr., (erroneously named in the complaint as Joseph B. Schmitz) by an initial decision containing a consent order to cease and desist which became the decision of the Commission on July 4, 1959. The hearing examiner filed his initial decision as to the remaining respondents on February 29, 1960. He found Premier Knitting Co., Inc., and Arnold A. Saltzman had violated the Federal Trade Commission Act as charged and included in his decision an order prohibiting them from engaging in these practices. He ordered the complaint dismissed as to Sanford Forster and Irving Saltzman, individually.

Respondents Premier Knitting Co., Inc., and Arnold A. Saltzman have appealed from the initial decision of February 29, 1960.\* The questions raised in the appeal involve, among other things, the weight to be given to certain evidence and the scope of the order.

Respondents first assert that a reasonable construction of their statements is that their sweaters will not pill in the course of usage and wear. This they say is the standard which has been used in prior cases, and they insist that they have met such standard. The

\*Hereafter in this opinion any reference to respondents, unless otherwise indicated, will mean the appealing respondents.



cases cited are *Ladd Knitting Mills, Inc., et al.*, Docket 7216 (1958), and *Morrison Knitwear Co., Inc., et al.*, Docket 7680 (1960). These cases both involve a consent order to cease and desist. The complaints therein, as to representations that garments were non-pilling, alleged that the garments would pill "after wear and usage." No similar terminology appears in the instant complain. Respondents argue that this phrase in the other complaints creates a standard less exacting than that applied in this proceeding. They say that there is probably no textile fiber which cannot be made to pill by abuse and that to apply a standard other than conditions of "wear and usage" would be unrealistic.

The examiner found that respondents' statements "this sweater will not pill" and "no pilling" constitute a representation not only that the sweaters so tagged will not pill as a result of ordinary use and wear, but connote also that no pilling will result no matter how rough the usage or how hard the wear. The proof in this case extends only to the latter connotation. Under the order, respondents are prohibited from making unqualified statements as to pilling. Representations as to other non-pilling properties, such as under conditions of ordinary wear and usage, are not prohibited. Thus, respondents' objections on this point are entirely unwarranted.

Respondents next take exception to the weight given by the hearing examiner to the laboratory tests made of their sweaters for pilling. They assert that the test evidence should be disregarded because allegedly (a) it was made by an undisclosed person whose qualifications were undisclosed, (b) there is no showing that the test is standard or generally acceptable in the apparel industries, (c) it proves no facts related to reasonable usage and wear, and (d) it is at variance with the bill of particulars.

The laboratory test document here disputed was admitted in evidence by order of the examiner pursuant to a formal stipulation of the parties, dated December 18, 1959. There is no testimony concerning these tests or the laboratory test document. Respondents had full opportunity to present their defense and failed to make any showing against the qualifications of the person or persons making the tests or against the validity of the test evidence. They cannot now claim that this evidence is lacking in probative weight.

The test document discloses that it is a test report on "Pilling Tests of Orlon Sweaters" conducted by A C H Fiber Service, Inc., Boston, Massachusetts, for the Federal Trade Commission. It is dated October 9, 1959. The object of the test as stated therein was to determine as to the sweaters involved "if they will or will not pill." The two methods used in the testing are described in the

report. One test, referred to as the principal test method used, was identified as "ASTM Standard D 1375-55T, Method A." The other test was identified as a test "modelled after Method B of the same ASTM Standard." Detailed results of the two tests are set forth. The conclusions state, among other things, that "the fabric produced pills by both methods tested." We believe that the test report should be accepted for what it purports to be, namely, a report of tests run on respondents' sweaters in accordance with "ASTM Standard" procedures which show that the garments will pill. There is no clear indication on the test document that the tests were related to "reasonable usage and wear." This, however, will not prejudice the respondents as we indicated in our discussion above.

Respondents' contention with reference to the bill of particulars is rejected. We note that the respondents' motion for a bill of particulars was granted in part by the examiner with the express reservation that counsel supporting the complaint "will not be ineluctably bound to use all the material submitted to respondents, nor inhibited from offering other relevant evidence not herein required to be submitted."

Another point raised by respondents is their claim of a voluntary discontinuance of the practice prior to the issuance of the complaint or the investigation which led to the complaint. It appears, however, that at least one of the hang tags containing the objectionable representation was in use during the time of the hearing and subsequent to the complaint. Thus, there is no showing that respondents have actually discontinued the practice alleged, and this argument is rejected.

Finally, respondents assert that, since the complaint and proof dealt with orlon sweaters treated with Universal's "UT-Formula," the prohibition in the order should be likewise limited. The order against Universal Dye and its officers, the other respondents in this case, is phrased in terms of the use of the "UT-Formula." It need only be pointed out that the "UT-Formula" is the preparation distributed by Universal Dye and that sweaters are the products distributed by Premier Knitting Co., Inc. The respective orders are worded so as to most appropriately ban the misrepresentation in terms of the businesses involved. In the case of the respondents, Premier Knitting Co., Inc., and its officers, this means the business of selling orlon products. The order would be unduly limited if it were confined only to the orlon products sold by these respondents treated with "UT-Formula." This argument is also rejected.

Respondents' appeal is denied and the initial decision is adopted

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as the decision of the Commission. It is directed that an appropriate order be entered.

Commissioner Tait did not participate in the decision of this matter.

## FINAL ORDER

This matter having been heard upon the appeal of respondents, Premier Knitting Co., Inc., and Arnold A. Saltzman, from the hearing examiner's initial decision, and upon briefs and oral arguments in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

*It is ordered*, That respondents, Premier Knitting Co., Inc., and Arnold A. Saltzman, 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 initial decision.

Commissioner Tait not participating.

## IN THE MATTER OF

## MIDWEST ELECTRONICS CORPORATION ET AL.

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

*Docket 7540. Complaint, July 14, 1959—Decision, Oct. 20, 1960*

Order dismissing, for the reason that respondents' business was no longer in operation, complaint charging St. Louis, Mo., distributors of electron tube testing devices, tubes, and related equipment, with making exaggerated and deceptive claims concerning possible earnings, sales assistance and affiliations with a large and well-known distributor, to induce purchase of their said testing devices.

*Mr. Terral A. Jordan* supporting the complaint.

No appearance for respondents.

INITIAL DECISION DISMISSING COMPLAINT BY EDWARD CREEL,  
HEARING EXAMINER

It is apparent that the business of respondents is no longer in operation and it does not appear likely that it will be resumed.

Therefore, upon motion to dismiss complaint herein filed by counsel supporting the complaint,

*It is ordered,* That the complaint be, and the same hereby is, dismissed as to all parties respondent but without prejudice to the right of the Commission to reissue this complaint in the event facts and circumstances appear to warrant such action.

## DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner as to the above-named respondents shall, on the 20th day of October 1960, become the decision of the Commission.

## IN THE MATTER OF

## BAAR &amp; BEARDS, INC., ET AL.

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

*Docket 6400. Complaint, Aug. 23, 1955—Decision, Oct. 21, 1960*

Order requiring importers in New York City to cease violating the Flammable Fabrics Act by transporting and selling in commerce silk scarves manufactured in Japan which were so highly flammable as to be dangerous when worn, and furnishing their customers with false guaranties representing that tests showed the scarves not to be dangerously flammable.

*Mr. Brockman Horne* representing the Commission.

*Halperin, Natanson, Shivitz, Scholer & Steingut*, by *Mr. Harry J. Halperin*, of New York, N.Y., for respondents.

## INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint herein charges the respondents, Baar & Beards, Inc., a corporation, and Sylvan M. Baar and Milton Beards, individually and as officers of said corporation, with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as also with violations of the Rules and Regulations promulgated under the last-named Act, in the sale of articles of wearing apparel so highly flammable as to be dangerous when worn by individuals. All respondents were duly served with the aforesaid complaint according to law and, within the required time, filed answer thereto denying the pertinent charges of violation, and thereafter a supplemental answer alleging, as a separate defense, that the Flammable Fabrics Act is unconstitutional.

On the issues thus joined the matter proceeded to trial, during the course of which certain testimony was had and exhibits received

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in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

Subsequent thereto, both parties were accorded an opportunity, of which they availed, of filing with the hearing examiner their respective Proposed Findings of Fact and Conclusions of Law, those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

## FINDINGS AS TO THE FACTS

1. As charged in the complaint, and formally admitted by the respondents' answer, respondent Baar & Beards, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York. Sylvan M. Baar and Milton Beards are individuals and, respectively, President and Secretary-Treasurer of respondent corporation and, as such, they formulate, direct and control its policies, acts and practices. The address of all respondents is 15 West 37th Street, New York 18, New York.

2. The Flammable Fabrics Act states, "The term 'article of wearing apparel' means any costume or article of clothing worn or intended to be worn by individuals except hats, gloves, and footwear." A scarf is, therefore, an article of wearing apparel. Subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, respondents did import from Japan, under entry No. 957817 dated October 5, 1954, a quantity of scarfs which were described as "4 momme Habutae printed silk scarfs" entered under Paragraph No. 1210 and as such subject to the provisions of the Flammable Fabrics Act. Respondents on November 9, 1954, at the request of the Collector's office, submitted samples for testing, and on December 22, 1954, were notified by the Collector that the test showed that the samples did not meet the requirements of the Act. Subsequently respondents had an independent test made which confirmed the Collector's findings that the merchandise did not meet the Flammable Fabrics Act requirements as to flammability, and further showed that the scarfs did not weigh 4 momme but only 3.53 momme.

3. In August, 1954, class tests had been conducted on behalf of the National Women's Neckwear and Scarf Association, Inc., which showed that 4-momme silk scarfs have a burning time of 3.5 seconds or more, which is within the requirement of the Act and the Rules and Regulations thereunder. Respondents state that the purchase of the aforementioned merchandise "was made only after" these tests were made. No tests were made by respondents of the actual merchandise received, nor of scarfs weighing only 3.53 momme. But in

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“order to accommodate one particular mail-order house,” respondents took an order for one lot of 200 dozen 4 momme habutae printed scarfs, and actually delivered on this order 164 dozen scarfs from this importation, and “which of course were quickly turned over to the mail-order house in question” (RX 1A).

4. Also subsequent to the effective date of the Act, respondents made purchases of silk scarfs subject to the Flammable Fabrics Act from the following suppliers within the United States of America:

Supplier	Date	Merchandise purchased <sup>1</sup>
Ch. Chraime.....	Nov. 5, 1954	2,320 dozen 4 MM 32" x 35" Printed, Silk Scarves Made in Japan (CX 3).
S. Shamash & Sons, Inc.....	Oct. 28, 1954	2,363 dozen Japanese Silk Prints, 8 designs, 3 momme Habutae Scarfs flameproofed, handrolled hems, 400 dz. 33" x 33", 1,963 dz. 32" x 32" (CX 1).
Wieder Scarfs.....	Nov. 11, 1954	900 dozen—described in the Salesnote Confirming Order, dated 10/25/54 (CX 4) as #3 m/m prints flame retarded—merchandise must pass requirements of Flammable Fabrics Act: 32" x 35" (CX 5b). <sup>2</sup>
do.....	Nov. 15, 1954	900 dozen—same as above (CX 6-B).
Brochers Trading Corp.....	Nov. 3, 1954	3,950 dozen Japanese Silk Scarfs 32" x 35" printed on 4 M/M Habutae (CX 19-A).
do.....	Nov. 15, 1954	250 "yds." (believe it means doz.) Japanese Silk Scarfs 32" x 35" printed on 4 M/M Habutae (CX 20).
Ch. Chraime.....	Nov. 15, 1954	5,000 4 MM Solid Silk Scarves, 32" x 35" Made in Japan (RX 6).

<sup>1</sup> Actually purchased and received by respondents, 15,683 dozen.

<sup>2</sup> NOTE: Salesnote (CX 4) shows 2,500 doz.; invoice and remittance statement (CXs 5a and 5b) show 00 doz.

5. The merchandise purchased from Shamash & Sons, Inc. was invoiced as “flameproofed” (CX 1); the Salesnote Confirming Order (CX 4) of Wieder Import Co., Inc. scarfs show they were to be “flame retarded—merchandise must pass requirements of Flammable Fabrics Act”; with reference to the two Chraime purchases, there were two separate letters (RXs 8 and 5) addressed by Chraime to respondents, dated respectively 11/5/54 and 11/23/54, stating:

\* \* \* the undersigned hereby guarantees that reasonable and representative tests, made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act, show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said act, covered by and in the form delivered under this document, are not, under the provisions of such act, so highly flammable as to be dangerous when worn by individual. (RX 8);

the stipulation of record (Tr. 369, 370) is that “all of the goods” purchased by respondents as shown in Paragraph 4 were purchased “upon the representation \* \* \* that all \* \* \* had either been flameproofed or tested” and would thus meet the requirements of the Flammable Fabrics Act.

6. From merchandise procured from the sources shown in Paragraph 4, above, the record shows respondents made sales as follows:

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20 dozen scarfs to Ohrbachs of Los Angeles, 11/4/54 (CX 29-A); 3 dozen scarfs to Broadway Dept. Store, Los Angeles, 11/11/54 (CX 27); 250 dozen scarfs to Specialty House, New York City, 11/18/54 (CX 8) (These had been purchased by respondents from Ch. Chraime); 2 dozen scarfs to Broadway Dept. Store, Los Angeles, 11/30/54 (CX 25); 25 dozen scarfs to Lit Bros., Philadelphia, 12/31/54 (CX 22).

The invoices on all these sales, except one (the invoice for the 11/30/54 transaction with Broadway appears to be incomplete, as it cannot be established that it is an exception), carry a guarantee by respondents in the following language:

Inssofar as the items covered by this invoice are subject to the provisions of the Flammable Fabrics Act, the undersigned guarantees that, upon the basis of a Guaranty received, or, in its own behalf, reasonable and representative tests made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act, show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said Act, covered by and in the form delivered under this document, are not, under the provisions of said Act, so highly flammable as to be dangerous when worn by individuals.

7. Six of the respondents' scarfs which were received in evidence were subjected to flammability tests in accordance with the standards in Commercial Standard 191-53 (Revised), a publication of the United States Department of Commerce titled "Flammability of Clothing Textiles," as expressly authorized and provided by § 4(a) of the Flammable Fabrics Act. The tests were conducted by Frank J. Feeny, a chemist, who from June, 1954, to June, 1956, was engaged in the testing of textiles for the Federal Trade Commission, and whose qualifications as an expert to conduct flammability tests were proved to the satisfaction of the Hearing Examiner. The samples tested and the results of the tests are as follows:

(a) From Commission's Exhibit 28-A, which is a scarf procured February 23, 1955, by a Federal Trade Commission representative from Ohrbach's in Los Angeles, 10 samples were tested and the average flame-spread time was determined to be 2.60 seconds (CX 31 b).

(b) Likewise, from Commission's Exhibit 28-E, a scarf procured February 23, 1955, also from Ohrbach's, 10 samples were tested and the average flame-spread time was determined to be 2.82 seconds (CX 31 b).

(c) Likewise, from Commission's Exhibit 26-A, a scarf procured February 21, 1955, from the lot sold 11/11/54 by respondents to the Broadway Dept. Store, Los Angeles, samples were taken and tested, showing the average flame-spread time as 2.86 seconds (CX 32-B).

(d) Similar test procedures were followed with respect to scarfs identified as Commission's Exhibits 11, 12 and 13, which are silk scarfs or parts of silk scarfs which had been sold by respondents in-

directly to Specialty House through Headline Accessories by an invoice bearing respondents' guarantee. The tests show the average flame-spread time to be 3.28 seconds, 3.28 seconds and 3.46 seconds, respectively (Tr. 256; CXs 32-A and -B, 33-A and -B, and 34-A and -B).

The minimum flame-spread time prescribed for "normal flammability" by the Flammable Fabrics Act as amended is 3.5 seconds; when the flame-spread time is less than 3.5 seconds, the textile or fabric is classified as "Class 3, rapid and intense burning," and under the Act, "shall be deemed so highly flammable \* \* \* as to be dangerous when worn by individuals." § 3(a) of the Act, *inter alia*, provides:

The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any article of wearing apparel which \* \* \* is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

8. The respondents were notified by the Collector of Customs on December 22, 1954, that the sample which they had submitted from their importation of 10/5/54 did not meet the requirements of the Flammable Fabrics Act. This evidence was not controverted. The results of the tests demonstrate the failure of other of the scarfs imported and sold by respondents to pass the prescribed tests, and thus to be entitled to enter the channels of commerce; they demonstrate further that the guarantee which respondents placed on some of their invoices was false. Respondents have not made such reasonable and representative tests, and the tests which were made did not show that the scarfs were not so highly flammable as to be dangerous when worn by individuals.

9. With respect to guaranty, the Flammable Fabrics Act provides:

Sec. 8. (b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

The guaranty which respondents endorsed on certain of their invoices was, as hereinbefore found, false. It has been urged that



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respondents are exempt under § 8(a) from liability under § 8(b) because they relied upon representations made to them and received in good faith, by the person or persons who manufactured the scarfs or from whom they were received. § 8(a) provides that under certain conditions "No person shall be subject to prosecution under § 7 of this Act for a violation of § 3 of this Act". Respondents' acts and practices constitute a violation of § 3, but the prosecution prescribed by § 7 is for a misdemeanor for wilful violation of § 3 or § 8(b) of the Act, conviction of which subjects the violator to a fine of not more than \$5,000 and/or imprisonment for not more than one year. It is not applicable to a proceeding of a civil or preventive nature where the only possible sanction is the issuance of a cease-and-desist order.

10. Respondents in the course and conduct of their business are in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the provisions of the Flammable Fabrics Act.

11. The use by the respondents of the acts, practices and policies as herein found has resulted in substantial trade in commerce being unfairly diverted to them from their competitors and substantial injury has been done to competition in commerce.

#### THE DEFENSE

In their defense to the action, respondents contended that the Commission's flammability tests were not conducted according to the specifications of Commercial Standard 191-53 in that they were not conducted in a draft-free room with the apparatus at room temperature. The tests were conducted in a windowless room approximately 10' X 6' in size, with a door into the hallway usually open. There was no evidence of the presence of drafts, nor was there any evidence that the apparatus, at the time of the tests, was not at room temperature. No weight is accorded this attempted defense.

Respondents assert that the Flammable Fabrics Act is unconstitutional. This attempted defense is not within the power of the Hearing Examiner to decide.

#### CONCLUSION

The acts and practices of respondents as hereinabove found were and are in violation of the Flammable Fabrics Act and of the Rules and Regulations promulgated thereunder, and constitute un-

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fair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondent Baar & Beards, Inc., a corporation, and its officers, and respondents Sylvan M. Baar and Milton Beards, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or  
(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or  
(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce, any article of wearing apparel, which, under the provisions of § 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals;
2. Selling or offering for sale any article of wearing apparel made of fabric which, under the provisions of § 4 of said Act, as amended, is so highly flammable as to be dangerous when worn by individuals and which has been shipped or received in commerce, as "commerce" is defined in said Act;
3. Furnishing to any person a guaranty with respect to any article of wearing apparel which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in § 4 of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, show and will show that the article of wearing apparel, or the fabrics used or contained therein, covered by the guaranty, are not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the wearing apparel was manufactured or from whom it was received.

## OPINION OF THE COMMISSION

By TAIT, *Commissioner*:

The complaint in this matter charges respondents with violating the Flammable Fabrics Act, as amended, by importing and selling articles of wearing apparel which, under the provisions of Section 4 of said Act, were so highly flammable as to be dangerous when worn by individuals, and by furnishing a false guaranty with respect to such wearing apparel. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

The first argument made on this appeal is that the entire proceeding has been invalidated by reason of the failure of the hearing examiner to file his initial decision within the time prescribed by § 3.21 of the Commission's Rules of Practice. Section 3.21 provides, *inter alia*, that within thirty days after the date of an order closing a proceeding before the hearing examiner, the hearing examiner shall make and file an initial decision which shall become the decision of the Commission thirty days after service thereof upon the parties unless prior thereto an appeal is filed, the Commission stays the effective date of the decision, or the Commission places the case on its own docket for review.

It appears that on January 20, 1958, the hearing examiner issued an order closing the case for the taking of testimony and reception of evidence and fixing February 17, 1958, as the time for the filing of proposed findings, conclusions and order. On February 6, 1958, the hearing examiner, at the request of respondents' counsel, issued an order extending the time for filing proposed findings to March 10, 1958. His initial decision was not filed until March 17, 1960.

The hearing examiner's order dated January 20, 1958, closing the record for the taking of testimony and the reception of evidence was not an order closing the proceeding contemplated by § 3.21. This must have been apparent to respondents since the hearing examiner, at respondents' request, fixed the time for filing proposed findings well beyond the date on which the initial decision should have been filed had the order of January 20, 1958, been made pursuant to § 3.21. While the order issued by the hearing examiner on January 20, 1958, is not one which is required under the Rules of Practice, it is not unusual in a Commission proceeding for a hearing examiner to formalize the closing of a record for the reception of evidence by means of such an order and thereafter to issue an order closing the proceeding.

As we stated in *Directory Publishing Corporation*, Docket 5920 (1953), § 3.21 is designed to expedite the disposition of the Commission's formal docket, and the primary purpose of the first paragraph of the rule is to provide a procedural method whereby initial decisions may become decisions of the Commission thirty days after service thereof in the event certain contingencies do not occur. Although the hearing examiner did not violate the letter of the rule in the manner contended by respondents, he did violate the intention of the rule by his failure to file his initial decision within a reasonable time. Certainly there is nothing in the record or in the nature of the case itself which would justify or excuse this inordinate delay. Nor can there be any doubt that this delay, if prejudicial to respondents, would invalidate the proceeding. There is no evidence that respondents have been prejudiced, however, and, as a matter of fact, they have made no attempt in their brief to show that they were injured in any manner by the lapse of time between the filing of the proposed findings and the issuance of the initial decision. Although they contended in oral argument that they would be injured by the publicity of an adverse decision at this time, they have failed to show how such publicity would be more damaging to them now than it would have been had it occurred in 1958. The argument on this point is, therefore, rejected.

Respondents' appeal also questions the adequacy of the evidence relied upon by the hearing examiner in finding that certain scarves sold by respondents did not meet the flammability standards of Section 4 of the Act. They argue first of all that evidence was introduced of tests performed on only six scarves and that there is no proof that these scarves were representative samples of the merchandise sold by them. The hearing examiner, however, did not find that the six scarves were representative of respondents' merchandise, nor was it necessary for him to do so. Section 3 of the Act prohibits transactions involving "any article of wearing apparel" or "any fabric" which under the provisions of Section 4 is so highly flammable as to be dangerous when worn by individuals. The showing that six scarves sold by respondents had failed to pass the flammability test is sufficient to establish a violation of the Act.

Respondents also argue that flammability tests performed by the expert who testified in support of the complaint had not been conducted in accordance with the requirements of the Commercial Standard (CS 191-53) promulgated by the Secretary of Commerce and designated by the Flammable Fabrics Act as the standard setting forth the procedure for making such tests. This same argument was raised before the hearing examiner and rejected by him

and we find nothing in the record or in the respondents' brief to indicate that the hearing examiner's ruling on this point should be disturbed.

Respondents also contend that the public interest does not require the issuance of an order to cease and desist in this matter, pointing out that the number of sales of lightweight scarves shown to have been made by them constituted a very small percentage of their total sales of scarves and further stating that there has been no showing of injury to competition. This argument must also be rejected. The existence of public interest in a matter arising under the Flammable Fabrics Act rests not on injury to competition but on the injury which may be inflicted on the ultimate consumer. Moreover, by the express language of the Act, a single violation constitutes an unfair method of competition and an unfair and deceptive act or practice. Under such a statute, the showing of only one violation is ground for the issuance of an order to cease and desist. *The Fair v. Federal Trade Commission*, 272 F. 2d 609 (7th Cir. 1959).

Respondents also contend that there has been a good faith discontinuance of the practices alleged in the complaint and that a cease and desist order is, therefore, unnecessary at this time. They argue in this connection that the alleged violations were minimal in nature and resulted from the unfamiliarity of their employees with a newly enacted law, that they voluntarily discontinued the practices, and that there is no likelihood that such practices will be resumed.

In order to show that they attempted in good faith to comply with the requirements of the Flammable Fabrics Act, respondents state that they disposed of existing stocks of lightweight scarves prior to the effective date of the Act, July 1, 1954. The record discloses, however, that although respondents knew in January 1954 that scarves weighing 4 momme (a Japanese measure of weight) might violate the Act, they, nevertheless, imported 16,000 dozen of such lightweight scarves during the first six months of 1954.

Respondents also state that their importation of 164 dozen lightweight silk scarves (shown to be dangerously flammable under the Act) was made in reliance upon a so-called "class" test conducted on behalf of the National Women's Neckware and Scarf Association, Inc., which showed that silk scarves weighing 4 momme would comply with the requirements of the Act. The test referred to by respondents was not a class test as provided for in the rules and regulations promulgated under the Act. Moreover, it appears that respondents' secretary-treasurer, Milton Beards, who saw the test report and who was a director of the Association, knew or should

have known that this test did not prove or even indicate that all silk scarves weighing 4 momme would not be dangerously flammable under the Act. According to the report of the test, it was conducted for the purpose of determining whether three scarves, identified as 4 momme habutae (plain-woven Japanese silk), would meet the requirements of the Flammable Fabrics Act. Respondents should have known that the results of this test would not indicate the flammability characteristics of other scarves of the same weight but of different weave and construction. Mr. Beards testified in this connection that silk is not a uniform fiber and that it is, therefore, "very difficult to be sure when you start off with a borderline product to know whether they will pass or not."

Respondents also purchased over 15,000 dozen lightweight scarves from four domestic suppliers after the Act became effective. Only one of these suppliers furnished a written guaranty that tests had been made showing that the fabric used in the wearing apparel was not dangerously flammable under the Act, and respondents made no tests of their own. They nevertheless sold scarves received from these suppliers with the guaranty that reasonable and representative tests had been made. Respondents also ignored the requirement in the rules and regulations concerning the maintenance of records by persons furnishing guarantees. Consequently, they could not determine from which supplier they had purchased scarves which they had guaranteed to some of their own customers.

Respondents also argue that one of their officials would have testified that no transaction with respect to questionable merchandise had ever occurred after December 31, 1954, but was prevented from doing so. In view of respondents' failure to keep adequate records concerning the sale of such goods, we would not have been greatly impressed by this testimony had it been admitted. Moreover, even if respondents did not sell any of the lightweight scarves after December 31, 1954, we could not infer from that fact that they had discontinued the practice on an entirely voluntary basis. Although the Commission's investigation did not begin until the early part of 1955, the Bureau of Customs had obtained samples of scarves imported by respondents and, by letter of December 22, 1954, had notified respondents that the goods were dangerously flammable. In view of this notification, we think that any action taken by respondents to stop the sale of questionable merchandise was in anticipation of a proceeding against them under the Flammable Fabrics Act.

Under these circumstances, we cannot say that there has been a good faith discontinuance of the practices charged in the complaint. Furthermore, the showing of respondents' indifference to the require-

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ments of the Act and the rules and regulations promulgated thereunder and their willingness to gamble with potentially dangerous merchandise militates against a finding that there is no likelihood that these practices will be resumed. We are of the opinion, therefore, that despite the delay in the trial of this case and in the filing of the hearing examiner's initial decision, the proceeding is not moot and an order to cease and desist should be issued.

Respondents' appeal is denied and the initial decision will be adopted as the decision of the Commission.

## FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

*It is ordered*, That respondents 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

## MONARCH SEWING CENTERS, INC., ET AL.

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

*Docket 7237. Complaint, Aug. 21, 1958—Decision, Oct. 21, 1960*

Consent order requiring retailers of sewing machines in Atlanta, Ga., also operating branch stores in other States, to cease using bait advertising and deceptive contests to obtain leads to prospective purchasers, representing usual prices as special and reduced, and making fictitious guarantee claims; and to reveal clearly and conspicuously on machines imported from Japan, the fact of foreign origin.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Monarch Sewing Centers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 329 Peachtree Street, Atlanta, Georgia. This corporation was organized in April, 1957, when it purchased all the rights, interests and assets of an Alabama corporation which had the same name, officers, and stockholders.

Individual respondents Max M. Silberman, Jerome Shulman, Daniel Eberstein and Stanley Spiegel are president, vice-president, secretary and treasurer, respectively, and owners of all of the stock, of the respondent corporation. At all times mentioned herein said individual respondents formulated and put into effect the policies and activities of said corporation. Max M. Silberman's address is 49 West 24th St., New York, New York. Jerome Shulman's address is 44 E. 53rd St., New York, New York. Daniel Eberstein's address is 2493 William's Lane, Decatur, Georgia, and Stanley Spiegel's address is 630 Broadlane Road, N.W., Atlanta, Georgia.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the sale of sewing machines to the purchasing public. In the course and conduct of their business, said respondents cause and have caused their products when sold to be transported from their place of business in the State of Georgia to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents also have branch stores located in various states other than the State of Georgia and maintain, and at all times mentioned herein, have maintained a course of trade in said products in commerce among and between the various states of the United States and the District of Columbia. Their volume of trade in said commerce has been and is substantial.

PAR. 3. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents made statements and representations, in advertisements inserted in newspapers and circulars of general circulation, by means of radio and television broadcasts and other advertising media. Among and typical, but not all inclusive, of the statements and representations so made are the following:

Brand new 1957  
 Portable electric sewing machine  
 Guaranteed for five years  
 Now you'll be able to zig-zag, button hole, darn and mend  
 \$24.50 only \$1.00 weekly

\* \* \* \* \*



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Win this brand new Morse portable sewing machine—Over 200 valuable other prizes. Nothing to buy; its easy, its simple. Unscramble these Georgia cities and win . . . Plus hundreds of dollars worth of prize certificates.

\* \* \* \* \*  
Special for three days only Monarch reconditioned Singer portable electric. Five year guarantee. Save \$35 regular \$59.50—\$24.50 cash price. Only \$1.25 per week.

PAR 4. By and through the use of the aforementioned statements and representations, and others of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, (1) that they were making a bona fide offer to sell new portable electric sewing machines or used reconditioned Singer sewing machines for \$24.50; (2) that the advertised price was a special or reduced price; (3) that such machines were guaranteed unconditionally for five years; and (4) that they were conducting a bona fide contest the winners of which were to receive a sewing machine and other valuable gifts including cash certificates.

PAR 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact: (1) The offers to sell new and reconditioned sewing machines for \$24.50 were not genuine or bona fide offers but were made for the purpose of obtaining leads to persons interested in purchasing sewing machines. After obtaining such leads respondents or their salesmen called upon such persons at their homes or waited upon them at respondents' place of business. At such times and places respondents and their salesmen would disparage the advertised machine and would instead attempt to sell and did sell different and more expensive sewing machines. Sometimes this was done after selling, pro forma, the advertised machine and accepting a down-payment and sometimes this was done before such a sale was made. (2) The advertised sales price of these machines was not a reduced or special price but was, whenever sales of these machines were actually made, the usual and regular retail price of said machines. (3) Respondents' guarantee was not unconditional. It was limited in certain respects and this limitation was not disclosed in the advertisement or to the purchaser, except that in some cases such a disclosure was made after a sale had been consummated. (4) Respondents did not conduct a bona fide contest. Such contest was a scheme to obtain leads. Almost everyone entering the contest won a gift certificate entitling them to a discount on the purchase of a sewing machine. These certificates were valueless as the holders of such were charged the regular and usual price by the respondents for any sewing machine they may have purchased.

PAR. 6. Respondents sell certain of their sewing machines including those designated "Margaret", "Dynamic" and "Cinderella" which are imported from Japan without clearly and conspicuously disclosing on said machines that they are imported.

By failing to make such disclosure respondents have represented that said machines were manufactured in the United States.

There is a preference on the part of the purchasing public for sewing machines manufactured in the United States over those machines manufactured in Japan.

PAR. 7. Respondents in the course and conduct of their business were and are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of sewing machines.

PAR. 8. The use by respondents of the foregoing false, misleading and deceptive statements and representations and the failure of respondents to adequately disclose the foreign origin of certain of their sewing machines as alleged above has had and now has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations were and are true, and that those sewing machines manufactured in Japan had been manufactured in the United States; and to induce the purchase of substantial quantities of said sewing machines as a result of these erroneous and mistaken beliefs. As a consequence thereof substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

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

*Mr. John W. Brookfield, Jr.*, supporting the complaint.

*Teplin and Shulman* for respondents, New York, N.Y.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that the respondents named in the caption hereof violated the provisions of the Federal Trade Commission Act by making false and misleading statements and representations in advertisements inserted in newspapers and circulars of general circulation by means of radio and television

broadcasts and other advertising media. The complaint was issued on August 21, 1958.

After issuance and service of the complaint, the respondents, their counsel, and counsel supporting the complaint entered into an agreement for a consent order. Under the terms of the agreement the undersigned hearing examiner issued an initial decision on August 27, 1959 and the Commission, under authority of Section 3.21(a) of the Rules of Practice for Adjudicative Proceedings, ordered the case placed on its own docket for review. Thereafter on September 22, 1959 the Commission issued an order which vacated the Hearing Examiner's initial decision and remanded the case to the Hearing Examiner for further proceedings.

On August 1, 1960 the Monarch Sewing Centers, Inc., a corporation, its officers, Max M. Silberman, and Stanley Spiegel, individually and as officers of the said corporation, hereinafter referred to as respondents, their counsel, and counsel supporting the complaint entered into a second agreement for a consent order. Under this agreement in accordance with the two affidavits, annexed and made a part thereof, the complaint is dismissed as to Jerome Shulman and Daniel Eberstein. The agreement has been approved by the Director and the Assistant Director of the Bureau of Litigation and disposes of the matters complained about.

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 provided 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. Respondent Monarch Sewing Centers, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 329 Peachtree Street, Atlanta, Georgia.

2. The individual respondents, Stanley Spiegel, and Max M. Silberman, are the President-General Manager, and Chairman of the Board, respectively, of the corporate respondent. (Stanley Spiegel, Daniel Eberstein and Max M. Silberman are erroneously named in the complaint as Treasurer, Secretary and President, respectively, of the corporate respondent). Said individual respondents formulate and put into effect the policies and activities of said corporation. Max M. Silberman's address is 49 W. 24th Street, New York, New York. Stanley Spiegel's address is 630 Broadlane Road, N.W., Atlanta, Georgia.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondents Monarch Sewing Centers, Inc., a corporation, and its officers (except Jerome Shulman), and Max M. Silberman and Stanley Spiegel, individually and as officers of the said corporation, and respondents' agents, representatives and employees (except Daniel Eberstein), directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or other merchandise 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 said merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

2. That certain amounts are special or reduced retail prices of merchandise unless such amounts are less than the prices at which said merchandise is usually and regularly sold by respondents.

3. That respondents are conducting a "contest" in which the winners will receive prizes or gift certificates unless respondents are in fact conducting a bona fide "contest" in which the winners will receive prizes or gift certificates of actual value.

4. That certificates or other articles awarded the winners of a contest conducted by respondents are of a certain value or worth unless such certificates or other articles are in fact of the represented value or worth.

5. That any article of merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly set forth.

*It is further ordered*, That respondents Monarch Sewing Centers, Inc., a corporation, and its officers (except Jerome Shulman), and Max M. Silberman and Stanley Spiegel, individually and as officers of the above named corporation, and respondents' agents, representatives and employees (except Daniel Eberstein), directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from offering for sale, selling or distributing sewing machines or other merchandise manufactured in Japan, or in any other foreign country, without clearly disclosing the country of origin thereon in such a manner that it can not readily be hidden or obliterated.

*It is further ordered*, That the complaint be, and hereby is, dismissed as to Jerome Shulman and Daniel Eberstein.

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 21st day of October 1960 become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Monarch Sewing Centers, Inc., a corporation, Max M. Silberman and Stanley Spiegel, 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

JAMES HIGGINS ET AL. TRADING AS  
B & H DISTRIBUTING CO. ET AL.

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

*Docket 7940. Complaint, June 14, 1960—Decision, Oct. 21, 1960*

Consent order requiring Detroit, Mich., distributors of phonograph records to cease paying concealed payola to disc jockeys and other personnel of television and radio stations to induce frequent playing of their records in order to increase sales.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents James Higgins and Robert West are copartners trading and doing business as B & H Distributing Co. with their principal office and place of business located at 3959 Woodward Avenue, in the City of Detroit, State of Michigan.

Respondent Betty Alexander is General Manager of said business. Her address is the same as that of the other respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to various retail outlets.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said records, when sold, to be shipped from the State of Michigan to purchasers thereof located in another state and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disburs-

ing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

*Mr. Harold A. Kennedy* and *Mr. Arthur Wolter, Jr.*, for the Commission.

*Mr. Burton L. Borden*, of Detroit, Mich., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to various retail outlets, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Associate Director and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that individual respondents James Higgins and Robert West are copartners trading and doing business as B & H Distributing Co., with their principal office and place of business located at 3959 Woodward Avenue, Detroit, Michigan, and that respondents Betty Alexander is General Manager of said business, her address being the same as that of the other respondents.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that



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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 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 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 in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

*It is ordered,* That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., or under any other name, and Betty Alexander, General Manager, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the

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broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" with the meaning of this order, by any employee of a radio or television broadcasting station; or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed to the listening public at the time the record is played that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

## 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 21st day of October 1960, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, 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

## DANIEL D. WEINSTEIN ET AL.

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

*Docket 7956. Complaint, June 16, 1960—Decision, Oct. 21, 1960*

Consent order requiring sellers of corneal contact lenses in Oakland, Calif., to cease advertising falsely that their contact lenses could be worn successfully by all in need of visual correction and without discomfort, would correct all defects in vision and protect the eye, could be worn for a lifetime without change of prescription, etc.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading