manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Failing to set forth the item number or mark assigned to a fur product.

2. Furnishing false guaranties that fur products are not misbranded, falsely advertised or falsely invoiced under the provisions of the Fur Products Labeling Act, when there is reason to believe that the fur products falsely guaranteed may be introduced, sold, transported or distributed in commerce.

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

IN THE MATTER OF

BEA WRIGHT, INC., ET AL.

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

Docket C-79. Complaint, Feb. 16, 1962—Decision, Feb. 16, 1962

Consent order requiring New York City manufacturers to cease violating the Flammable Fabrics Act by selling ladies' dresses which were so highly flammable as to be dangerous when worn, and furnishing their customers with a guaranty that the required tests showed the dresses were not dangerously flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested

in it by said Acts, the Federal Trade Commission, having reason to believe that Bea Wright, Inc., a corporation, Bea Rite Frocks, Inc., a corporation, and Philip Silverman and Louis Levitan, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics 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 charge in that respect as follows:

PARAGRAPH 1. Respondents Bea Wright, Inc., and Bea Rite Frocks, Inc., are corporations duly organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondents Philip Silverman and Louis Levitan are respectively president and treasurer of both corporate respondents, and formulate, direct and control the acts, practices and policies of the corporate respondents. The principal place of business of the said corporate respondents is 463 Seventh Avenue, New York, N.Y. The address of the individual respondents is the same as the corporate respondents.

PAR. 2. Subsequent to the effective date of the Flammable Fabrics Act on July 1, 1954, respondents have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported or caused to be transported in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among such articles of wearing apparel mentioned above were ladies' dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, articles of wearing apparel made of fabric which was, under Section 4 of the Act, as amended, so highly flammable as to be dangerous when worn by individuals, and which fabric, as the term "fabric" is defined in the Flammable Fabrics Act, had been shipped and received in commerce.

Among such articles of wearing apparel mentioned above were ladies' dresses.

PAR. 4. Respondents subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the articles of wearing apparel, mentioned in paragraph 2 hereof, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that said articles of wearing apparel are not, in the form delivered by respondents, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was false in that with respect to some of said articles of wearing apparel, respondents have not made such reasonable and representative tests.

PAR. 5. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Bea Wright, Inc., and Bea Rite Frocks, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and

principal place of business located at 463 Seventh Avenue, in the city of New York, State of New York.

Respondents Philip Silverman and Louis Levitan are officers of said corporations and their address is the same as that of said corporations.

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

ORDER

It is ordered, That the respondents Bea Wright, Inc., and Bea Rite Frocks, Inc., corporations, and their officers, and Philip Silverman and Louis Levitan, individually and as officers of said corporations, 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) Manufacturing for sale, 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 Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric which has been shipped or received in commerce and which fabric, under Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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 Section 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 fabric used or contained therein, covered by the guaranty, is 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 article of wearing apparel or fabric was manufactured or from whom it was received.

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

IN THE MATTER OF

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

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

Docket 6490. Modified order, Feb. 19, 1962

Order modifying, in accordance with the decision of the Fourth Circuit Court of Appeals of Sept. 20, 1961, the Commission's modified order dated Oct. 18, 1960, 57 F.T.C. 896.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed a petition in the United States Court of Appeals for the Fourth Circuit to review the Commission's modified order to cease and desist issued on October 18, 1960, and the Court having on September 20, 1961, issued its opinion and entered its decree modifying the Commission's said modified order, affirming the order as so modified and remanding the cause to the Commission for further proceedings consistent with the said opinion, and having on October 10, 1961, entered its order amending its said decree of September 20, 1961, by requiring the respondents to comply with the Commission's order as modified by the Court, and the Commission being of the opinion that its order should be modified in accordance with the Court's decision:

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 M. 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 M. 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 Commission 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 refuses to give any credit to the size and capacity of a new entrant in excess of the average size and capacity of all the warehouses in the market;

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to 3½% of the selling time allotted to such warehouse for the preceding selling season; or

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

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.

IN THE MATTER OF

MODERN METHODS, INC., ET AL.

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

Docket 7568. Complaint, Aug 25, 1959—Decision, Feb. 19, 1962

Order dismissing, for procedural irregularities, initial complaint charging New York City sellers with advertising falsely that their correspondence courses could be relied on by women to make normally heavy or thin legs shapely

719-603—64——21

and alluring, and with sending out collection letters under other names which represented falsely that they turned over delinquent accounts to an independent organization to enforce collection, among other things.

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 Modern Methods, Inc., a corporation, and Harold Brooks, 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 Modern Methods, 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 296 Broadway, in the city of New York, State of New York.

Respondent Harold Brooks is president of the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. The address of the individual respondent 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 advertising, offering for sale, sale and distribution of correspondence courses of instruction, including cosmetic lotions and massagers for use in connection therewith. These courses are entitled "12 WEEK Scientific Home Course to add alluring curves to SKINNY LEGS" and "12 WEEK Scientific Home Course to slenderize HEAVY LEGS", hereinafter referred to as the "Skinny Legs" course and "Heavy Legs" course, respectively. Said courses purport to accomplish for the purchasers thereof the desired effects described in the captions set forth.

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 New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the

purpose of inducing the sale of their courses of instruction, respondents have made certain statements with respect to said courses in advertisements in magazines and periodicals of general circulation and in circulars, form letters and other literature sent to persons answering said magazine and periodical advertisements, of which the following are typical:

FAT LEGS

Try this new, amazing, scientific home method to Reduce, Ankles, Calves, Thighs, Knees, Hips for SLENDERIZED LEGS

FREE! "How To Slenderize Your Personal Heavy Leg Problems"

Book—also packed with actual before and after photos of women who obtained remarkable results! Beautifully firm, slenderized legs help the rest of your figure look slimmer, more appealing! Now at last, you too can try to help yourself to improve heavy legs due to normal causes, and reduce and reshape ANY PART of your legs you wish . . . or your legs all over . . . as many women have by following this new scientific method. Well-known authority on legs with years of experience offers you this tested and proven scientific course—only 15 minutes a day—in the privacy of your home!

Contains step-by-step illustrations of the easy scientific leg technique with simple instructions for slenderized, firmer, stronger legs; improving skin color and circulation of blood in legs, plus leg measurement chart.

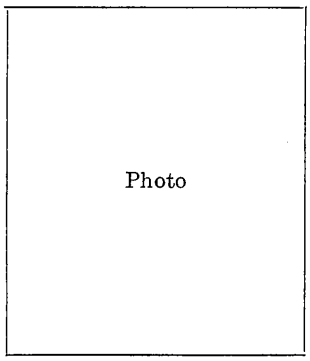
Limited Time FREE OFFER

For your Free book on the Home Method of Slenderizing Heavy Legs mailed in plain wrapper, without obligation, just send name and address.

* * *

FREE "How to Slenderize Your Personal Heavy Leg Problems" Book—also packed with actual before and after photos of women who obtained remarkable results! Mailed in Plain wrapper without obligation.

* * *



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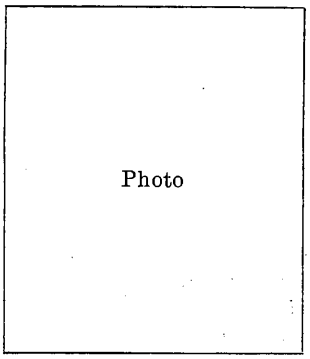

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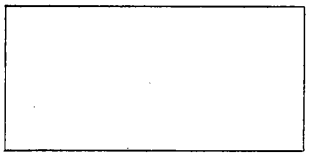

(Picture of book)

* * *

* * * Now . . . The COMPLETE All-Inclusive 12 Week Course for FAT LEGS * * *

So right now I want to ask you—do you really want alluringly graceful, feminine legs? Are you willing to devote fifteen enjoyable minutes a day faithfully carrying out the instructions I send you? * * *

Included with the course is a complete 3-piece HOME MASSAGE KIT to be used with the Heavy Legs Course, and it's yours ABSOLUTELY FREE if you enroll within ten days. (See enclosed description.) * * *

* * *

* * * how
the *complete,*
all-inclusive,
12 WEEK
HOME COURSE
helps you
to slenderize
HEAVY LEGS * * *

I KNOW that the ankles, calves, knees, thighs, and the hips of the feminine legs, if normal, have responded to the tested, scientific leg exercise techniques I have perfected. Moreover, the heavier and flabbier your legs, the BETTER I LIKE IT and the more interested I am in helping you.

* * * WOULD YOU TRADE ABOUT
FIFTEEN MINUTES A DAY
OF YOUR SPARE TIME
FOR A LIFETIME OF
BEAUTIFUL SHAPELY LEGS? * * *

* * * This Valuable Deluxe 3-Piece
HOME MASSAGE KIT TO BE USED WITH THE HEAVY LEGS COURSE!
If you mail the enclosed personal enrollment form *within the next TEN DAYS!*
GET THESE THREE FREE GIFTS FOR PROMPT ACTION!
They are worth almost as much as the price of the "Complete Shapely Legs Home Course." Just see what you are to receive at no extra cost under this remarkable offer * * *

* * * * * * *

THIN LEGS

Try this new amazing scientific home method to ADD SHAPELY CURVES at ankles, calves, thighs, knees, hips!

FREE! "How to Add Alluring Curves To Correct Your Personal Thin Leg Problems" Book—also packed with actual before and after photos of women who obtained remarkable results!

Skinny legs rob the rest of your figure of attractiveness! Now at last you too can try to help yourself improve underdeveloped legs, due to normal causes, and fill out any part of your legs you wish, or your legs all over as many women have by following this new scientific method.

Well known authority on legs with years of experience offers you this tested and proven scientific course—only 15 minutes a day—in the privacy of your home! Contains step-by-step illustrations of the easy SCIENTIFIC LEG technique with simple instructions: gaining shapely, stronger legs, improving skin color and circulation of legs.

Limited Time FREE OFFER!

For your free book on the Home Method of Developing Skinny Legs mailed in plain wrapper, without obligation, just send name and address.

* * *

FREE "How to Add Alluring Curves To Correct Your Personal Thin Leg Problems "Book—also packed with actual before and after photos of women who obtained remarkable results! Mailed in plain wrapper without obligation. * * *

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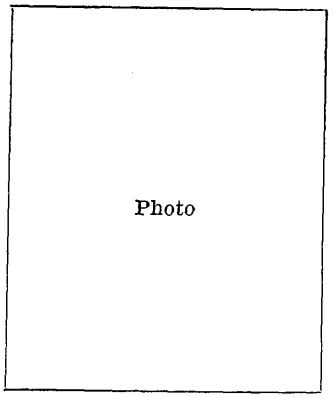

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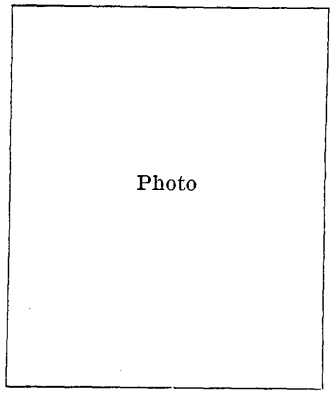

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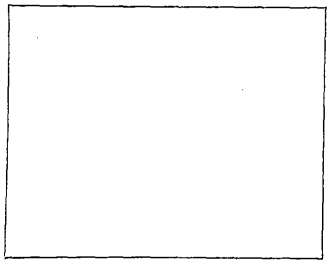

(Picture of Book)

* * * Now . . . The COMPLETE ALL-Inclusive 12 Week Course for Skinny LEGS * * *

In the course of my experience I have treated every kind of leg problem: straight hips, skinny thingh, bony knees, stringbean calves, toothpick ankles. And I can help you too! * * *

Included with the course is a complete 3 Piece DeLuxe HOME MASSAGE KIT for Skinny Legs, and It's yours ABSOLUTELY FREE if you enroll within ten days. (See enclosed description.) * * *

* * *

* * * how
the *complete*
all-inclusive
12 WEEK
HOME COURSE
helps you
add
alluring curves
to
SKINNY LEGS

* * * Yes, buy a pair of exquisite legs to have for your very own, alluring, enticing legs you would be proud to show in shorts, or a bathing suit; legs men would admire and other women envy. * * *

* * *

* * * This Valuable Deluxe 3-Piece HOME MASSAGE KIT TO BE USED WITH THE HEAVY LEGS Course!
If you mail the enclosed personal enrollment form *within the next TEN DAYS!*
GET THESE THREE FREE GIFTS FOR PROMPT ACTION!
They are worth almost as much as the price of the "Complete Shapely Legs Home Course." Just see what you are to receive at no extra cost under this remarkable offer * * *

PAR. 5. Through the use of certain of the statements set forth in Paragraph Four and others similar thereto, respondents have represented that their Heavy Legs course provides an effective and reliable means for women with fat or heavy legs, except those due to abnormal causes, to reduce and reshape all or any part of their legs and to make them shapely and alluring.

PAR. 6. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, said Heavy Legs course does not provide an effective or reliable means for women with fat or heavy legs, whether due to normal or abnormal causes, to reduce or reshape all or any part of their legs or to make them shapely or alluring.

PAR. 7. Through the use of certain of the statements set forth in Paragraph Four and others similar thereto, respondents have represented that their Skinny Legs course provides an effective and reliable means for women with thin or skinny legs, except those due to abnormal causes, to fill out all or any part of their legs and to make them shapely and alluring.

PAR. 8. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, said Skinny Legs course does not provide an effective or reliable means for women

with thin or skinny legs whether due to normal or abnormal causes, to fill out all or any part of their legs or to make them shapely or alluring.

PAR. 9. Through the use of certain of the statements set forth in paragraph 4 and others similar thereto, respondents have represented that a book on either how to slenderize fat legs or how to add shapely curves to thin legs containing specific information concerning the methods and techniques to be followed in achieving such results will be sent free to persons replying to respondents' magazine and periodical advertisements.

PAR. 10. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, respondents do not send any free book containing specific information concerning the methods or techniques to be employed in either slenderizing fat legs or adding shapely curves to thin legs. The only "books" respondents send to persons responding to their magazine and periodical advertisements are two pamphlets, one relating to the Heavy Legs course and the other relating to the Skinny Legs course. Each pamphlet is approximately twelve pages in length and consists primarily of advertising claims in the nature of testimonials, along with a general description of the course to which each relates.

PAR. 11. Through the use of certain of the statements set forth in paragraph 4 and others similar thereto, respondents have represented that a 3-piece massage kit consisting of an electric "Stim-U-Leg" massager, a "Limber Up" lotion and "Tone Up" formula, worth almost the price of either courses, will be given free to women who return a completed enrollment form for either the Skinny Legs course or the Heavy Legs course within ten days after receipt of such form.

PAR. 12. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, the 3-piece massage kit is not sent free to women returning in ten days either a completed enrollment form for the Skinny Legs course or for the Heavy Legs course. Nor is such kit worth almost the price of either course. The "Limber Up" lotion and the "Tone Up" formula are sent only after $3.00 or more is submitted with a completed enrollment form; said lotion and formula, moreover, must be returned, along with the "Stim-U-Leg" massager and all other materials furnished by respondents in the event a purchaser elects to avail herself of her rights under the money back provision, which becomes operative only after one of the courses has been completed and paid for. The "Stim-U-Leg" massager is not sent until the purchaser is ready for the sixth lesson of one of respondents' courses and only then if payments are current with not less than $15.00 having been paid.

PAR. 13. In collecting or attempting to collect delinquent accounts arising in connection with their business, respondents have sent out collection letters or notices under name or names other than their own, such as Legal Claims Department, which represent or imply that respondents have turned over such accounts to a separate and independent organization to enforce collection thereon. In truth and in fact said letters or notices are not sent out by a separate or independent organization but are sent out by respondents themselves for the purpose of collecting their own accounts.

PAR. 14. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Harold A. Kennedy supporting the complaint.

Mr. Horace Donnelly, Jr., of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

PRELIMINARY STATEMENT

Respondents advertise for sale and sell through the United States mails, from their office in New York City, in interstate commerce, correspondence courses designated

12 Week
Scientific Home Course
to slenderize
HEAVY LEGS
for bulging hips—flabby thighs—bulging knees—
heavy calves—heavy ankles—strengthening feet
and arches.
and
12 Week
Scientific Home Course
to add alluring curves to
SKINNY LEGS
for straight hips—scrawny thighs— bony knees—thin
calves— thin ankles— strengthening feet and arches.

On August 29, 1959, the Federal Trade Commission issued a complaint against the respondents charging them with violating the Federal Trade Commission Act by engaging in false, misleading and deceptive acts, practices and representations in advertising, offering for sale, selling and disseminating in interstate commerce the aforementioned "heavy legs" and "skinny legs" courses. The respondents answered the complaint, issue was joined, and full hearings have been completed. This initial decision is based upon the entire record including the testimony of witnesses and exhibits in evidence. Proposed findings and conclusions and suggested order have been filed by the parties and oral argument thereon was heard.

In 1952, a United States Post Office Department's Hearing Examiner, in a proceeding then pending there, recommended the revocation of mailing privileges of respondents pursuant to the provisions of 39 U.S. Code, § 259 and § 732 (Hearing Examiner's Docket 1–234).

On July 18, 1956, the Solicitor for the Post Office Department reversed the Hearing Examiner and dismissed the proceedings "without prejudice." Respondents' publications which are the subject matter of the Post Office proceedings are in evidence as CX 19 and CX 20. They sold for $1.98 each and are different from the courses which are the subject matter of this proceeding (CX 1 and CX 2) and which sell for $29.95 each.

Respondents pleaded the Post Office proceedings as res judicata, but such plea was denied by this hearing examiner. The Federal Trade Commission, on December 31, 1959, on interlocutory appeal affirmed the ruling of the hearing examiner.

On November 29, 1960, the examiner struck from the record respondents' exhibit 60 for reasons which are set forth in said ruling. Such reasons, inter alia, are the fact that respondents sought through such exhibit 60 to place in this record selected portions of the Post Office record without affording Commission's counsel an opportunity to cross-examine the witnesses whose testimony was reproduced in RX 60, and without tendering the Post Office record in its entirety.

Respondents also offered in evidence testimony of witnesses characterized as "satisfied customers." Over the strenuous objections of counsel supporting the complaint, the examiner permitted two such satisfied customers, Edith Amidore and Freda Garman, to testify. The examiner denied the motion of counsel supporting the complaint to strike the testimony of the witnesses Amidore and Garman, but in the same ruling also denied the request of respondents to intro-

duce any further testimony of "satisfied customers." [1] The examiner refused evidence proffered by counsel supporting the complaint for the purpose of establishing what is a "shapely and alluring" female leg. The first witness who testified on this issue stated in substance that what is a "shapely and alluring" female leg is an empirical judgment which could vary from person to person. It appeared to the examiner that further testimony of this character would not be of material assistance in deciding the principal issues framed by the pleadings.

Aside from the testimony of respondents' customers, Edith Amidore (Tr. 678) and Freda Garman (Tr. 719), of respondent Harold Brooks, and of Richard Stalvey, this record consists chiefly of the testimony of experts. These witnesses, who are either M.D.'s or physiotherapists, were called to give an expert professional opinion whether respondents' courses will, or will not, accomplish that which respondents represent they will accomplish.

All motions made by the parties which are not specifically ruled upon in this initial decision or have not previously been ruled upon hereby are overruled and denied.

On the basis of the entire record in this proceeding the examiner makes the findings of fact and conclusions hereinafter set forth. Findings requested by counsel which are not specifically adopted and incorporated in this initial decision are rejected. The fact that the examiner has not incorporated in this decision nor specifically rejected, nor stricken specifically, evidence which is in the record should not be construed as indicating that such evidence has not been fully considered by the examiner in preparing this decision. It indicates merely that the evidence which the examiner has specifically incorporated in his findings of fact is sufficiently preponderant, relevant, probative, and substantial for a proper adjudication of the issues involved in this proceeding.

On the basis of the entire record, including the testimony of all the witnesses and the exhibits, the examiner makes the following

FINDINGS OF FACT

Respondent Modern Methods, Inc., a New York corporation, organized in 1951, has its principal office and place of business at 296 Broadway, New York, N.Y. It is now, and for some time last past, has

[1] See *Erickson* v. *FTC*, 272 F. 2d 318; *Basic Books, Inc.* v. *FTC*, 276 F. 2d 718, 720; *Wybrant System Products Corp.*, 266 F. 2d 571, *Cert. den.* 361 U.S. 914; *Witkower Press, Inc.*, Docket 6583, *Aff'd* by Commission, July 19, 1960; *Evis Manufacturing Co.*, Docket 6168, Commission Decision of March 23, 1960, appeal pending; *United States* v. *Howsey*, 198 F. 2d 273 (C.A. 5 1952); and *Loesch Hair Experts*, 257 F. 2d 882. See Examiner's Ruling of October 17, 1960, which is hereby incorporated herein and by reference made a part hereof.

been engaged in advertising, offering for sale, selling and distributing correspondence courses which are characterized as follows:

12 Week
Scientific Home Course
to slenderize
HEAVY LEGS
for bulging hips—flabby thighs—bulging knees—heavy calves—heavy ankles—strengthening feet and arches.
and
12 Week
Scientific Home Course
to add alluring curves to
SKINNY LEGS
for straight hips—scrawny thighs—bony knees—thin calves—thin ankles—strengthening feet and arches.

These courses are in evidence as CX 1 (Heavy Legs) and CX 2 (Skinny Legs). Respondents sell approximately 400 such courses per month, at a price of $29.95. The courses, which consist of twelve consecutive weekly courses of exercises to be performed at home are sold chiefly through the United States mails to persons residing in many States of the Union, other than New York State. The corporate respondent's approximate annual business for 1960 was $200,000 per annum, of which 90 percent was done outside New York State. A small hand vibrator and skin lotions, CX 21, 22 and 23, are sent to customers who have paid in all the money due after the sixth lesson, for use as part of the course.

Respondent Harold Brooks, president of the corporate respondent, and owner of half of its issued stock, formulates, directs, and controls the acts and practices of said corporate respondents. The business address of the individual respondent is the same as that of the corporate respondent.

In the course and conduct of their business, and for the purpose of inducing the purchase of their Skinny Legs and Heavy Legs courses, respondents advertise in magazines and periodicals of general interstate circulation in the United States. The advertisements also appear in circulars, form letters, and other literature disseminated by respondents to persons answering said advertisements. CX 3, 4, 10, 11, 17 and 18, in evidence in this record, are typical and representative of the advertisements used by respondents in selling their courses. Respondents intend such advertisements to convey the impression, and said advertisements do represent, that respondents' Heavy Legs course provides an effective and reliable means for reducing and reshaping all or any part of the heavy or fat legs of women, except

such heavy or fat legs as may be due to "abnormal" causes. Similarly, respondents intend that their advertisements for their Skinny Legs course should convey the impression, and the advertisements for that course do represent that such Skinny Legs course provides an effective and reliable means for filling out all or any part of thin or skinny legs of women, except those whose condition is due to "abnormal" causes.

The following representations by respondents in their advertisements are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act: that the courses are by

"A well-known authority"; are "Tested and proven scientific course"; "Around the clock glamour legs help everything you do"; "Stronger shapely legs help you dance gracefully, work on feet with less fatigue; improve your favorite sport; swim, bowl, play tennis with more ease"; and *"In many cases, doctors advise use of this technique."* (Emphasis supplied.)

"This Progressive Scientific Method for slenderizing Heavy Legs *is based on the knowledge and experience of the medical profession,* physiotherapists, and famous body contour experts *throughout the world.*" (Emphasis supplied.) "All-around glamour legs help women in everything they do."

The above statements from respondents' advertisements are not true. Respondents have not proffered evidence to prove that they are true.

Respondents' advertisements are respondents' first contact with their prospective customers. Respondents use the name and facsimile signature of "Henry Milchstein, M.S., Ph.T." in a false, misleading and deceptive manner in the courses themselves. Although Milchstein compiled the courses for the respondents six or seven years ago, he was paid for his services in so doing and severed his business connection with the respondents thereafter. Since then Milchstein has had absolutely nothing to do with respondents in a business way, or with conducting respondents' courses. Milchstein has no business interest in respondents, nor association with them (Tr. 560, 561, 562). The last few years, when he was in the neighborhood, Mr. Brooks visited Mr. Milchstein's office. Approximately six times in the last six years Milchstein has suggested to the respondents how to reply to questions propounded to respondents by customers. Milchstein did not receive any payment for this advice.

Milchstein knew or should have known that the courses were being promulgated by respondents as though he, Milchstein, were still conducting them on a personal basis. Yet, Milchstein acquiesced in the misleading and deceptive use of his name and facsimile signature in the courses.

Respondent Brooks, who actually does conduct respondents' day-to-day operations is not licensed to practice physiotherapy in New York State, nor in any other State. Respondent Brooks does not have the professional education nor experience which qualifies him to advise women how to improve the appearance of Heavy or Skinny Legs through the methods described in the courses he sells. Respondents' representation to the purchasers of their courses that they are being personally conducted on a week-by-week basis, by a licensed physiotherapist is false, misleading and deceptive. The record does not show that there is any licensed physiotherapist on respondents' staff, in their employ, or, by contrast, available for consultation by respondents.

Respondents intend to create the impression and did create the impression in CX 1–D and CX 2–D that they are constantly making awards to the students enrolled in their courses who show the greatest improvement. However, respondent Brooks testified that such awards had been made on a basis of two per year since respondents commenced making such representations in their advertisements (Tr. 794). It is significant that one of the eight awards allegedly made by respondents to their pupils was a hundred dollar "award" which was paid to respondents' witness, Edith Amidore, just "a week or two" before she took the witness stand in their behalf (Tr. 702).

The methods used by the respondents to collect delinquent accounts is also false, misleading and deceptive. CX 24, entitled "Legal Claims Department", does not issue from any such legal claims department. Respondents have agreed in the record to cease and desist from their currently false, misleading and deceptive collection practices.

The greater part of the record consists of the opinion testimony of "experts" called by both parties. These experts gave their professionl opinion as to whether the courses would or would not do that which respondents in their advertising, and in the courses themselves, represent they will do. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He was able to and did form an opinion as to their reliability, credibility and knowledge of respondents' courses, their background, education, and professional experience, and their qualifications to express an opinion about respondents' courses. The hearing examiner was able to and did form a judgment as to the bias or lack of bias of these witnesses and their personal interest or lack of interest in the outcome of this litigation. The examiner was further able and

did form a judgment as to the weight and probative value of the testimony of each of the experts. Based upon all of the above factors and any and all requisite factors, the hearing examiner finds that respondents' courses here under attack, and in evidence as CX 1 and CX 2, are falsely, misleadingly, and deceptively advertised and represented to the public. Respondents' courses will not do that which respondents represent they will do. They are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

The witnesses who testified to this conclusion on behalf of the Federal Trade Commission are:

Dr. Charles S. Wise, Professor of Physical Medicine and Rehabilitation at George Washington University School of Medicine, Washington, D.C., and Director, Department of Physical Medicine and Rehabilitation, George Washington Hospital.

Peter V. Karpovich, Research Professor of Physiology at Springfield College, Springfield, Massachusetts.

Dr. Nadine Coyne, Associate Professor and Director of Education at the Institute of Physical Medicine and Rehabilitation, New York University—Bellevue Medical Center. Dr. Coyne graduated from a well-recognized college in a course of physical therapy and had been an instructor in physical therapy, prior to entering the practice of medicine.

Dr. Arthur S. Abramson, Professor and Chairman of the Department of Rehabilitation Medicine, Albert Einstein College of Medicine, Yshevia University—Medical Director Ithaca College.

Dr. Alfred Abel, Chief of Physical Medicine and Rehabilitation Service, Bronx Veterans Rehabilitation Hospital, and a member of the staff of Albert Einstein College of Medicine and Ithaca College.

The curricula vitae of these witnesses are in the record (CX 25A–E; 26; 27A–F; 30A–C; 31A–G; 38A–F). All of the Commission's expert witnesses were graduates of medical schools, although Mr. Karpovich, who received his medical education in Europe, had never been licensed to practice medicine generally in the United States. All of the Commission's expert witnesses are certified as full Diplomates by the American Board of Physical Medicine and Rehabilitation to practice the speciality of physical medicine. Dr. Abramson, in addition to being a Diplomate of the above Board, also acts as a member of the Certifying Committee of the Board (Tr. 1134).

All of these witnesses appeared to be professional people of the highest type, without any bias, prejudice, or personal interest in the outcome of this litigation. They are qualified by professional edu-

cation and experience to express an authoritative professional opinion about respondents' courses—and did so. They all demonstrated a thorough knowledge of, and acquaintance with, the course. Several of them had tested some of the exercises prescribed by the courses. The consensus of their opinion testimony is that the courses are "worthless" to accomplish that which respondents represent they will accomplish. Dr. Coyne pointed out actual anatomical inaccuracies in the courses. Implicit in the testimony of these witnesses also, but not articulated by any of them, is the potential capacity for harm in permitting persons who are not graduate M.D.'s to practice in a field which should be under the direct supervision and control of graduate M.D's. Respondents' small print admonition in their courses to "consult your physician about following these food suggestions" (CX 1–R and CX 2–R) does not substantially alleviate this danger.

Dr. Coyne's testimony was particularly impressive. In hours of grueling cross-examination by respondents' counsel, Dr. Coyne convinced this examiner that she knows these courses and that her opinion is to be given great weight. Moreover, Dr. Coyne had actually practiced physiotherapy before she became a practicing M.D.

Similarly, Doctors Wise, Abramson, and Abel were equally as impressive, objective, and knowledgeable in their answers and opinions about the courses.

Mr. Karpovich was characterized by respondents' witnesses as an outstanding authority in his field. One of the respondents' witnesses, Dr. Wassenberg, sought Mr. Karpovich's collaboration in a research project but Karpovich declined to become associated with him in the project.

Arrayed against the imposing panel of Commission expert witnesses were the following witnesses for the respondents:

Henry Milchstein, who compiled the courses which respondents sell, is a registered physiotherapist at 121 West 46th Street, New York, New York, and is assistant professor in Physical Podiatry at the M. J. Levi College of Podiatry in New York City; chief physiotherapist of the Home and Hospital of the Daughters of Jacob, 167th Street and Finley Avenue, the Bronx, New York City. Henry Milchstein, as the author of respondents' courses and who had been paid originally for writing them, would hardly be expected to disown his own brainchild. His bias and prejudice in favor of respondents was obvious and his interest in preventing his courses from being discredited is self-evident. Although Milchstein expressed mild surprise that his name and facsimile signature were being used in the manner respond-

ents presently use it—as though Milchstein was and is personally conducting each course with each of respondents' customers on a personal week by week basis—the examiner received the impression that Milchstein had no objection to the deception which use of his name and facsimile signature made possible.

Milchstein's personal interest in the outcome of this litigation makes his opinion of doubtful value. He certainly is not objective, and he is not as well qualified as any of the Commission witnesses to express an objective professional opinion about the courses.

Harry Boysen runs what he calls a "rehabilitation center" from his residence, 162 West 54th Street, New York, N.Y. He testified on direct examination that his educational background consists of the following: "A Bachelor of Science, a degree in physical therapy, a Master of Arts in Rehabilitation, a Master of Science in Basic Medical Science, a Doctor in Psychology, and a degree or rather a certification as a physical director." Counsel supporting the complaint was able to prove in this record that most of these claims by Boysen as to his "educational background" are subject to grave doubt and serious question.

Boysen has been completely discredited as a witness in this proceeding, and his testimony should be largely disregarded. Whether Boysen violated his oath "to tell the truth, the whole truth, and nothing but the truth" is in some province other than this opinion. Boysen's involvement in "diploma mills" in California, rehabilitation centers in New York City, and conspiracies to obtain false medical licenses in the State of Maryland are sufficiently spelled out in this record to cast serious doubt on any opinion he may have expressed concerning respondents' courses. His refusal to identify pictures (CX 33, CX 34) of a house in which he had previously testified he had lived in California (which house was also called "Fremont College" and "Sequoia College") speaks for itself. The court proceedings in the Circuit Court of Baltimore City, Maryland, in "*State of Maryland ex rel. vs. Simon Virkutis, M. D., et al.*," adjudicated one aspect of the Maryland false certification caper and are in evidence as CX 36. That court opinion names Boysen as one of several persons involved in false certification of persons to practice a form of medicine in Maryland. Boysen did not deny this fact on the witness stand. As a matter of fact, his rationalization of his participation in the conspiracy to obtain fraudulent medical licenses in the State of Maryland convinced the hearing examiner that Boysen's testimony should be completely disregarded. Boysen's testimony added nothing to respondent's case. His appearance on the witness stand added noth-

ing to the professional stature of respondents' panel of witnesses. In view of Boysen's involvement in false certification of applicants for medical licenses in the State of Maryland, his endorsement of respondents' courses detracts from such virtues, if any, ascribed by the other experts to the courses. The hearing examiner finds that Boysen's opinion had limited probative value in determining whether respondents' courses will, or will not, do what respondents represent they will do.

Marthann Doolittle (Tr. 956, *et seq.*) conducts a "Relaxation Guidance Center" from her home, 4 East 95th St., New York, N.Y.; has a B.A. Degree from Albertus Magnus College in New Haven, took a year of physical medicine at New Haven College of Physical Medicine, and "took a year of physical therapy training at Columbia Medical and Columbia Teachers College combined. It was a joint course given by the the two institutions." She obtained a doctorate of education from Teachers College, Columbia University. Miss Doolittle's Relaxation Guidance Center as described by Miss Doolittle (Tr. 989, *et seq.*) does not appear to be the place at which the witness would have had very much experience in testing the efficacy of respondents' Heavy Legs and Skinny Legs courses so that she could evaluate them professionally and definitively. She demonstrated limited knowledge of, and acquaintance with, respondents' courses. Her testimony was not unequivocally that respondents' courses *will* do what respondents represent they will do. The witness had "used the modalities course of physiotherapy. I have a sinusoidal, galvanic and Farradac machine . . . and I have an ultraviolet and an infrared." (Tr. 991)

Dr. Doolittle, in response to a question what the Heavy Legs course and the Skinny Legs course purports to offer to the people who buy it, replied, "I think it offers a service through planned therapeutic exercises to help a person achieve better muscle tone." (Tr. 999) Respondents represent that the courses will do a great deal more than "Help a person achieve muscle tone." Such misconception by Dr. Doolittle of respondents' claims for their courses entitles the Doctor's testimony to very little weight in deciding the basic issues posed by the opposing panels of experts.

Dr. Isadore Turner (Tr. 869, *et seq.*) of Flushing, New York, was one of two M.D.'s who testified for respondents. He was not certified by the American Board of Physical Medicine. He could not remember the last time he had treated a woman to improve cosmetically her heavy legs or skinny legs nor the names of such patients (Tr. 896). Dr. Turner's testimony indicated that the few women he had treated

for heavy or skinny legs had other medical problems which were pathological rather than cosmetic. He did not testify that respondents' course would do absolutely what they represent it would do; but opined that diet and exercise combined *might*, under proper conditions, be used to reduce or build up the measurements of certain portions of the human body. Dr. Turner testified in substance that diet and exercise are the most effective method for reducing heavy legs (Tr. 920, 925, 926). His testimony was of limited value in proving that for which it was elicited. He did not testify that respondents' courses absolutely will do that which they represent they will do.

Dr. Eugene H. Weissenberg (Tr. 360, *et seq.*) is a physician specializing in physical medicine and rehabilitation. He lives at 1201 Rio Piedras, Puerto Rico. He demonstrated a sympathetic attitude toward the respondents which the examiner finds prevented him from giving an unbiased and objective appraisal of respondents' courses.

He obtained his medical education in Vienna, Austria, received his M.D. in 1918 from the University School of Medicine of Vienna, and is licensed to practice in New York and Puerto Rico. In 1944, he migrated to the United States and for the next six years thereafter was connected with Columbia University and then for five years with the Veterans Administration. In 1955 Dr. Weissenberg moved to Puerto Rico where he was Chief of Physical Medicine and Rehabilitation at the State Insurance Farm, a governmental agency of Puerto Rico (Tr. 361, *et seq.*). In 1959, Dr. Weissenberg left the service but maintained his affiliation with the University School of Medicine in Puerto Rico where he had the position of Clinical Professor of Physical Medicine and Rehabilitation. The testimony of Dr. Weissenberg, even as that of Dr. Turner, was not unequivocally to the effect that respondents' courses will do that which respondents represent they will do. It is not clear in this record whether Dr. Weissenberg came all the way from his practice in Puerto Rico to New York City for the sole purpose of testifying on behalf of respondents. However, Dr. Weissenberg acknowledged in his testimony the eminence of Peter Karpovich (one of the Commission's witnesses) in this field (Tr. 395). Dr. Weissenberg's attempt to collaborate with Dr. Karpovich on a research project, because of the high esteem in which Weissenberg held Karpovich's professional qualifications and scientific opinion, was refused by Karpovich (Tr. 391). Dr. Weissenberg's demeanor on the stand convinced the examiner that he was not giving an unbiased opinion nor was he being objective. He did not display the familiarity with respondents' courses that Commission experts had. His opinion was neither as impressive as, nor as knowledgeable as, the opinions

of any or all of the Commission's expert witnesses. Moreover, Dr. Weissenberg's opinion, even as that of Dr. Turner, was not unequivocally to the effect that respondents' courses will do that which respondents represent they will do. Dr. Weissenberg's testimony on cross-examination (Tr. 408), demonstrated his very limited knowledge of the courses. His opinion, if it were the only opinion in the record, would not prove respondents' contentions.

The examiner finds that the opinion testimony adduced on behalf of the Federal Trade Commission is more trustworthy, dependable, reliable and credible than the opinion testimony adduced on behalf of the respondents. Based upon the professional opinion testimony of the experts who testified on behalf of the Commission, the examiner finds as a fact that respondents' courses will not do that which respondents represent they will do, and that respondents' representations to prospective customers in advertisements and in the courses that the courses will make heavy legs and skinny legs more shapely and alluring were and are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act.

In their advertisements and in the courses themselves, respondents falsely and deceptively represent the terms and conditions under which their hand vibrator (CX 23), the Tone-up Lotion (CX 21), and Limber-up Lotion (CX 22) are dispensed. These are not furnished "free" to respondents' customers as represented by respondents; they are sent to customers who have paid in a designated minimum sum of money. Their monetary value is overstated by respondents in both the advertisements and in the courses themselves. The use of these devices will not reduce heavy legs nor build up skinny legs. However, by making these contrivances a part of their courses, respondents deceive their customers concerning the amount of beneficial results, if any, to be obtained from using them.

DISCUSSION

Respondents' position may be stated by quoting from the brief accompanying their proposed findings:

> In the instant case there is no proof that there is a trade which has been affected by the acts or practices of respondents [Br. p. 19] . . . [Therefore,] the proceeding is not in the public interest [Br. p. 20] when evidence shows that no one was deceived, there is a lack of public interest . . . [Br. p. 21]. In other words, before there can be an act or practice, there must be someone who is capable of being taken in by the act or practice to their detriment."

Throughout this proceeding, respondents' counsel has erroneously urged the above common law concept of fraud and deceit as the yard-

stick for determining whether there has been a violation of Section 5 of the Federal Trade Commission Act. Respondents' counsel argues that in the absence of a showing that there has been a specific injury to a specific member or segment of the public, there can be no public injury, and therefore, no public interest in this proceeding.

Respondents' counsel further argues that, because a large part of the testimony in this record is the opinion testimony of experts, this case involves a constitutional issue of denial of freedom of speech, or of the press. This argument demonstrates such misconception of the constitutional guarantees as to require no lengthy discussion. The constitutional provisions cited by respondents were placed in the Constitution for protection of the individual's rights. They were not intended to nor do they vouchsafe into the respondents, or anyone else, the right to bilk the public by deceptive trade practices.[2] Respondents further state (Br. p. 20), "Public interest must be specific and substantial, citing *Henry Broch & Co.* v. *Federal Trade Commission*, 261 F. 2d 725 (reversed on other grounds 636 U.S. 166)."

The answer to respondents' "no injury to competition" argument is in adjudicated cases which were decided after the Wheeler-Lea Amendment of 1938 broadened the concept of deception which the Federal Trade Commission is responsible for policing. Certain sentences culled from those decisions state what the examiner understands the present state of the law to be. It is in the public interest to prevent the sales of commodities by the use of false and misleading statements and representations.[3] Capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act.[4] To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.[5] "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation . . . The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be

[2] For discussions of the constitutionality of the Federal Trade Commission Act, see *Sears, Roebuck & Co.* v. *FTC*, 258 F. 307; *FTC* v. *F. A. Matocci*, 87 F. 561; *National Harness Mfrs. Assn.* v. *FTC*, 268 F. 705; *T. C. Hurst & Son* v. *FTC* 268 F. 874; *FTC* v. *A. McLean & Son*, 84 F. 2d 910. The Sears case has been cited with approval on the question of constitutionality in the following cases: *State of Oklahoma* v. *U.S.*, 153 F. 280 (C.C.A. 10th 1946); *Scientific Mfg. Co.* v. *FTC*, 124 F. 2d 640; *FTC* v. *Matocci, supra; FTC* v. *Balme*, 23 F. 2d 618; *Royal Baking Powder* case, 281 F. 745.

[3] *Parke, Austin & Lipscomb* v. *FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co.* v. *FTC*, 97 F. 2d 365, 367.

[4] *Goodman* v. *FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

[5] *P. Lorillard Co.* v. *FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).

created upon the prospective purchaser." [6] Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.[7]

If respondents' deceptive advertising were corrected so as to abide by the legal rules stated above, this would remove only *one* of the sources of respondents' deception. There is an even more significant and deeply rooted deception in the courses themselves. The deception in the courses themselves cannot be cured unless the courses are completely rewritten to conform with reliable, accepted, medical, professional opinion, and so as not to overstate, as they now do, what they will accomplish. Respondents should cease forthwith to represent that "Henry Milchstein, M.S. Ph. T." actually conducts the courses, as "your instructor," because this is not true.

It is unnecessary to make a finding whether proper diet and proper exercise would substantially reduce and reshape women's heavy legs and build up and make more shapely women's skinny legs. Qualified professional expert witnesses have stated as their opinion that the specific courses (CX 1 and CX 2), presently being sold by respondents, will not do that which respondents represent they will do. In order, therefore, for respondents to cure the deception presently in the courses, respondents must either eliminate the deceptive claims presently in the courses, or rewrite the courses so that they will accomplish what respondents claim they will do.

Respondents' great reliance upon *Evis Manufacturing Company, et al.* v. *FTC*, 287 F. 2d 831 (C.A. 9th 1961) is misplaced. The *Evis* issues do not coincide with the issues in this case. In *Evis* the court emphasized the facts that (a) the Commission's expert witnesses *ignored the manufacturer's instructions* when installing Evis water conditioners, and (b) Commission counsel apparently conceded that out of some 100,000 installations, possibly 3,000 or only 3 percent of the users would testify to unsatisfactory results. In view of the fact, therefore, that Commission counsel had indirectly conceded that the water conditioner did what it was represented as doing, in 97 percent of the cases, the Commission had erred in ignoring the expert testimony in the record to the effect that the conditioner would perform as represented. Respondents in this proceeding proffered the testimony of about forty hand-picked customers (which was refused—see footnote 1, *supra*) even though they had been selling approximately 5,000

[6] *Kalwajtys* v. *FTC*, 237 F. 2d 654, *cert. den.* 352 U.S. 1025.
[7] *Ward Laboratories, Inc., et al.* v. *FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).

courses per year for about six years. As the court said in *Erickson* (footnote 1, *supra*) :

> Further, it is sound to say that the fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices. . . .

The opinion testimony in this record has been evaluated by application of accepted criteria for judging opinion testimony (i.e., interest in the outcome, bias, prejudice, demeanor on the stand, professional training and experience, and other elements stated *supra*, page 321, *et seq.*).

Rather than equating the issues in this case with *Evis* the issues in this case should be equated with: *Aggressive Medical Company*, 31 F.T.C. 1111 (a germicidal destroyer, contraceptive tablets for preventing venereal disease) ; *Raladam Co.*, 316 U.S. 149, 24 F.T.C. 475 (Marmola reducing tablets) ; *Hollywood Magic Garment Company*, 36 F.T.C. 110 (a rubberized garment to reduce weight by inducing excessive perspiration) ; *David V. Bush*, 14 F.T.C. 90 (a weight reducing diet). In *Associated Laboratories, Inc.*, 37 F.T.C. 263, order aff'd 150 F. 2d 629, respondents made claims for their Kelp-a-Malt tablets similar to the claims made by the respondents in this proceeding, i.e., that the tablets would produce "a well-proportioned body," "shapeliness of form or figure"; a "shapely" figure; restoring health, strength and vigor to those who are "tired" and "run down"; therapeutic value in cases of "acid stomach," "gas," or "indigestion"; *Charles of the Ritz Distributing Corporation* v. *FTC* (C.A. 2d 1944), 143 F. 2d 676 (involved foundation cream for makeup) ; *Feil* v. *FTC*, 285 F. 2d 879 (C.A. 9th 1960) (involved a device to prevent bed wetting) ; *Erickson* v. *FTC*, 272 F. 2d 318 (1959) (hair and scalp preparations) ; *Bristol-Myers Co.* v. *FTC*, 185 F. 2d 58 (1950) (the use of Ipana toothpaste to prevent "pink tooth brush") ; *J. E. Todd, Inc.* v. *FTC*, 145 F. 2d 858 (1944) (a product which had value in the treatment of arthritis, neuritis, rheumatism and similar diseases) ; *Irwin* v. *FTC*, 143 F. 2d 316 (1944), involving the sale of "Gordon's Detoxifier" to cleanse the intestines.

The land-mark *Raladam* decisions involving the sale of a weight-reducing preparation "Marmola" were responsible for the Congress broadening the concept of deception prohibited by the Federal Trade Commission Act to "capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act." *Goodman* v. *FTC*, *supra*.

Respondents' counsel has made much of the fact that evidence adduced in later hearings on behalf of counsel supporting the complaint was not proper rebuttal evidence. Respondents, for instance, objected to Commission counsel being afforded an opportunity to

elicit, as rebuttal, the true facts concerning the training, background, experience, and activity of Harry Boysen. This Commission evidence (Tr. 1304–1399) constituted proper rebuttal testimony. Until respondents had put Boysen on the stand as one of their experts, Commission counsel could not know what Boysen's testimony would be. Commission counsel should be highly commended for placing in this record the true facts concerning Boysen. This he could not have done except on rebuttal.

The Federal Trade Commission Act and the Commission's practices and procedures do not require Commission counsel to anticipate through clairvoyance respondents' evidence, and incorporate rebutting evidence in the Commission's case in chief.

Respondents' technical position about the burden of proof confuses the legal distinction between the burden of proof and the burden of going forward. The burden of going forward will always devolve upon Commission counsel, but the burden of proof is upon the party who asserts a particular proposition. In this case respondents sought to prove Boysen a qualified expert. They failed in their burden of proof.

Moreover, Federal Trade Commission proceedings are not contests of wits nor technical legal exercises. The public interest must be served and protected. To that end the truth must be ascertained and made a part of the hearing record.[8] Due process of law is as much a right of those who represent the public interest as it is of the private litigant. Counsel supporting the complaint in this case had the initial obligation of going forward. Having once established the essential allegations of the complaint by reliable, probative and relevant evidence, the burden then shifted to these respondents.[9] After the close of respondents' evidence, Commission counsel were and are entitled to rebut evidence adduced on behalf of respondents, even as respondents were and are privileged to contradict as much of the Commission's evidence as the facts will establish.

Respondents' heavy reliance upon *Scientific Manufacturing Company*, *supra*, in their brief (p. 18, *et seq.*) and upon *Evis Manufacturing Company*, *supra*, in their oral argument is misplaced. The examiner's analysis of the *Evis* decision in this portion of this opinion has differentiated *Evis* in many respects from the instant proceeding. The examiner's finding that the expert opinion testimony preponder-

[8] The ideal toward which administrative practice is pointed is that its greater flexibility will make the ascertainment of the truth easier, surer, and speedier.

[9] See Hearing Examiner's Ruling of March 23, 1960, denying respondent's motion to dismiss at close of case-in-chief. See also *Consolidated Foods Corp.*, Docket No. 7000, Dec. of March 4, 1960.

ates heavily in favor of the Commission's witnesses in this case would be sufficient, standing alone, to make *Evis* inapplicable.

Scientific Manufacturing Company sold pamphlets in interstate commerce which postulated the theory that foods prepared, cooked, or stored in aluminum utensils became toxic or poisonous. The nub of this decision is in the last paragraph reading:

> . . . Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's *business of voicing opinion.* The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor. . . . (Emphasis supplied.)

The obvious distinction between *Scientific Manufacturing* and the instant case is the fact that respondents here are not in the "business of voicing opinion" but are selling home study courses at approximately $30 per course. Were respondents' interpretation of the phrase "business of voicing opinion" adopted by any responsible authority, Congress would lose all of its control over trade regulation in the anti-deceptive field because it would be very simple for any respondent charged with deceptive practices to claim, as respondents claim here, that they are merely in the "business of voicing opinion." Nothing could be further from the facts in this case. Respondents are in the business of making money.

In the matter of *Pioneers, Inc., et al.*, 52 F.T.C. 1351, in which a difficult problem was presented involving the weight to be given to so-called expert testimony, the complaint was dismissed by the hearing examiner, and this was affirmed by the Commission:

> . . . In view of the conflict in the scientific evidence, the hearing examiner deemed the user evidence attesting to product merit to be particularly significant, and he, accordingly, held the complaint's allegations to be unsustained by the greater weight of the evidence. Recognizing that the burden of proof is on the proponent of the complaint, we regard the hearing examiner's order of dismissal as sound and correct in the circumstances of this case. . . .

In the instant proceeding this hearing examiner has found that the "greater weight of the evidence" adduced as opinion testimony *does* sustain the allegations of the complaint.

Respondents' advertisements for the courses, as well as the courses themselves, are false, misleading and deceptive in many ways. The first contact that respondents have with their customers is by means of their deceptive advertisements. Where the first contact is secured by deception, it is not subsequently cured by making a full disclosure of the facts.[10]

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[10] *Carter Products, Inc.* v. *FTC*, 186 F. 2d 821, 824.

In this case, the deceptions in the advertisements are of a separate and distinct nature from those in the courses themselves. Without reference to the deceptions in the advertisements, the representations in the courses are deceptive, inter alia, in that they are *not* conducted on a personal week-by-week basis by "Henry Milchstein, M.S. Ph.T." as "your instructor"—nor by any other licensed physiotherapist. They will *not*, according to preponderant, creditable, probative, reliable, medical testimony, do what respondents claim they will do for

Heavy Legs
Bulging hips
Flabby thighs
bulging knees
heavy calves
heavy ankles
feet and arches

(See cover of CX 1). Nor will they do what respondents represent they will do for

Skinny legs
Straight hips
Scrawny thighs
bony knees
thin calves
and
thin ankles
feet and arches

(See cover of CX 2).

Respondents argue that Milchstein is the only expert witness, on either side, entitled to express a binding opinion about their courses because he had actually used them. The answer to this argument, in addition to the examiner's finding of Milchstein's bias, prejudice, interest in the outcome of the litigation, and acquiescence in the deceptive use of his name and facsimile signature, is in language from *Bristol-Myers Co.* v. *FTC*, 185 F. 2d 58, 62:

> . . . Opinion evidence based on the general medical and pharmacological knowledge of qualified experts has often been held to constitute substantial evidence, even if the experts have had no personal experience with the product. Goodwin v. U.S., 6 Cir., 2 F. 2d 200, 201; Dr. W. B. Caldwell, Inc., v. F.T.C., 7 Cir., 111 F. 2d 889, 891; and this has been done even where witnesses who had personally observed the effects of the product testified to the contrary. (Citing cases)

Respondents argue, finally, (a) even if the courses won't do any good, at least they won't do any harm; and (b) if their customers are not satisfied, they can get their money back at the end of the courses. Such pleas in the nature of "confession and avoidance"

again completely misconceives the congressional intent and purpose of the Federal Trade Commission Act and the Wheeler-Lea Amendment thereto.

This record shows that when respondents were challenged by the Post Office Department in 1952 for the manner in which they were then advertising and selling their courses which are in evidence (CX 19 and CX 20), respondents changed their operations from that typified by CX 19 and CX 20 to that now typified by CX 1 and CX 2, CX 21, CX 22, and CX23. The need, therefore, for a broad and all-inclusive cease and desist order is apparent from the record.

Based upon the findings of fact previously set forth and the law as applied to those facts, the hearing examiner makes the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and over the subject matter of this proceeding; and this proceeding is in the public interest. The complaint filed herein states a good cause of action against respondents, and counsel supporting the complaint has proven the essential and material allegations thereof by a preponderance of reliable, relevant, probative and substantial evidence in the record. Respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. In advertising, offering for sale, selling and disseminating in interstate commerce their 12 Week Scientific Home Course to slenderize heavy legs" and their 12 Week Scientific Home Course to add alluring curves to skinny legs," respondents engage in false, misleading and deceptive acts, practices and representations which are in contravention of and constitute a violation of the Federal Trade Commission Act, as amended.

3. The aforementioned false, misleading and deceptive acts, practices and representations of respondents in selling their courses for Heavy Legs and Skinny Legs should, in the public interest, be forthwith prohibited as provided in and by the Federal Trade Commission Act, and the decisions thereunder. Therefore,

It is ordered, That Modern Methods, Inc., a corporation, and its officers, and Harold Brooks, individually and as an officer of said corporation, and their agents, representatives and employees, directly or through any corporate or other device:

I. In connection with the offering for sale, sale or distribution of the courses of instruction entitled "12 WEEK Scientific Home Course to slenderize HEAVY LEGS" and "12 WEEK Scientific Home Course to add alluring curves to SKINNY LEGS," or any other courses of

instruction or writings having to do with reducing, building up, reshaping or otherwise changing the contour of women's legs, which contain the same or substantially the same subject matter, or approach to the problem, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that said courses and writings:

A. Provide an effective or reliable means to reduce, reshape, or fill out all or any part of the legs of women, or otherwise change the size, shape or contour of all or any part of women's legs;

B. Provide an effective or reliable means to make all or any part of the legs of women substantially more shapely or alluring than they are before the courses or writings are used;

C. Are by a well-known authority;

D. Are tested and proven scientific courses;

E. Will provide around the clock glamour legs which help everything a woman does;

F. Will improve the ability of the purchasers thereof to swim, dance, play tennis or bowl;

G. Are predicated on techniques which are recommended by doctors;

H. Are based upon the knowledge and experience of the medical profession;

I. Are based upon the knowledge and experience of physiotherapists and body contour experts throughout the world;

J. Are being conducted by a licensed physiotherapist.

II. In connection with the offering for sale, sale or distribution of any course of instruction or other article of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing that any book containing any specific information will be furnished free or for any amount or consideration unless such book containing such information is in fact so furnished;

B. Representing that any specific article of merchandise will be furnished free or for any amount of consideration unless such specific article is in fact so furnished;

C. Using the word "free" or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any massager, lotion, formula, book or other article of merchandise when all of the conditions, obligations or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth in immediate conjunction with such representation;

D. Representing, directly or by implication, that the regular or usual price of any of their products is any amount in excess of the price at which the respondents have usually and customarily sold such products in the recent and regular course of their business;

E. Representing, through the use of a trade name or otherwise, that respondents, or either of them, are a separate or independent organization or person to whom accounts have been turned over by respondents, or either of them, for collection;

F. Representing that any courses or writings sold by respondents will accomplish results for the user of said courses or writings which in fact they will not accomplish.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in the initial decision held that the allegations of the complaint were supported by the record and ordered respondents to cease and desist from the practices found to be unlawful. Respondents and counsel supporting the complaint have appealed from the initial decision.

The main thrust of the complaint is that respondents have misrepresented their correspondence courses as providing an effective or reliable means for women with heavy legs and women with thin legs, except when due to abnormal causes, to reshape all or any part of their legs to make them more shapely and alluring. In addition, the complaint alleges that respondents have falsely represented that a free book is sent to persons responding to their advertisements and that a massage kit will be given free to women enrolling in the courses. Finally, the complaint attacks as deceptive the use of certain collection forms on the ground that such collection notices are not sent out by a separate or independent collection agency as the forms imply.

The argument which respondents advance on this appeal may be summarized as follows: namely, that there is no substantial evidence in the record to establish the allegations of the complaint, that the Commission lacks jurisdiction over the parties and subject matter and that respondents have been denied due process of law and the proceedings are not in accordance with the Administrative Procedure Act.

Respondents' contention that the Commission lacks jurisdiction over the parties and the subject matter of these proceedings obviously is without merit. Moreover, the subject matter here before us un-

doubtedly is clothed with substantial public interest. A commercial enterprise dedicated to remolding the contours of the female form, especially the lower appendages thereto, into shapely and alluring contours deserves governmental encouragement, not reprimand. But even in this worthy field of endeavor traditional rules of truth and veracity concerning the course of treatments offered by respondents must be maintained. Neither fat nor skinny customers should be hoodwinked into subscribing for respondents' courses on the basis of false representations; for failure of performance of respondents' courses as represented could only serve to increase the burden of the cross they bear.

Respondents, in effect, argue that there is no substantial evidence to support the order entered by the hearing examiner because the findings of the initial decision and order are based solely on the opinion evidence of the Commission experts, which is contradicted by the testimony of respondents' experts as well as that of two user witnesses.

Respondents' contention that expert medical opinion has no relevance to the issues presented by this case is without merit.[1] It suffices to say that there is ample support in the record for a holding that the efficacy of the exercises prescribed by respondents' courses involves medical and physiological questions and is not limited to a realm of corporal mechanics as respondents apparently argue. Obviously, the Commission, in order to resolve the issues before it in this case, must consider expert medical opinion as well as such other evidence which is relevant and probative.

Opinion evidence based on general medical and pharmacological knowledge constitutes substantial evidence. *Erickson Hair and Scalp Specialists* v. *Federal Trade Commission*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied* 362 U.S. 940 (1960). Conflicts between the opinion evidence of Commission experts, respondents' experts and the testimony of customers are questions of fact to be resolved by the Commission. *Maurice J. Feil, et al.* v. *Federal Trade Commission*, 285 F. 2d 879 (9th Cir. 1960). However, in view of the disposition of this case on procedural grounds discussed below, we do not reach the question of whether, in fact, counsel supporting the complaint has sustained the burden of proof by reliable probative and substantial evidence.

[1] "Actually, the issue is not within the realm of medical expertise, but is one of the application of function and motion against resistive forces to the female extremities insofar as the special exercises are concerned." Respondents' Appeal Brief, p. 24.

We now turn to respondents' argument that they were denied due process of law and that the proceedings below were not in accordance with the Administrative Procedure Act.

The allegations on this point requiring the most serious consideration were to the effect that respondents were denied the opportunity to present a full and complete defense to the charges made against them. In support of such contention, *inter alia*, the respondents claim substantial error or abuse of discretion in the refusal of the hearing examiner to reopen the case to permit respondents to present surrebuttal evidence to the rebuttal evidence offered by counsel supporting the complaint. Specifically, respondents requested that Commission experts, Doctors Coyne and Karpovich, be recalled for the purpose of cross-examination on prior statements with respect to the effect of exercise on the contours of muscles, allegedly contradicting their testimony in this proceeding. In the case of Dr. Karpovich, the subject of the cross-examination was to be statements in a book previously written by the witness. Doctor Coyne, on the other hand, was to be cross-examined on her testimony in another proceeding, *Damar Products, Inc.* (D. 7769), if the hearing examiner declined to take official notice of certain passages of the witness' testimony in that proceeding. Finally, respondents requested permission to recall their witness, Henry Milchstein, to rebut criticism by Dr. Coyne of the courses of which he was author.

The hearing examiner did not err by refusing to reopen the case to permit the recall of Doctors Coyne or Karpovich. The determination of whether a witness should be recalled for impeachment rests within the realm of the hearing examiner's sound discretion, and there is no showing under the circumstances that the hearing examiner abused that discretion in refusing to permit respondents to recall Doctors Coyne and Karpovich.[2] By the same token, respondents' claim that there was an abuse of discretion in permitting counsel supporting the complaint to recall respondents' witness Royson for further cross-examination is without merit.

The hearing examiner, however, did commit error in refusing to permit respondents to recall Mr. Milchstein for the purpose of surrebutting Dr. Coyne's criticism of respondents' courses. This offer of testimony, not opposed by counsel supporting the complaint, was

[2] On a review of respondents' motion to reopen the record of March 7, 1961, it is apparent that the statements of Dr. Coyne in *Damar Products, Inc.* (D. 7769), did not, in fact, contradict the witness' testimony in this proceeding. With respect to Dr. Karpovich's book, although there is a conflict between the parties on this point, the hearing examiner could have reasonably concluded that this book was available to the respondents at the time the witness was on the stand.

related, in some degree, to the merits of the case and should have been permitted. The hearing examiner had properly given counsel supporting the complaint some latitude in presenting rebuttal evidence and, in all fairness, should have afforded respondents the same opportunity on surrebuttal. Questions relating to the precise limits of rebuttal testimony are matters resting largely within the discretion of the Commission, which has ultimate responsibility for conducting the proceeding and determining its merits, and the hearing examiner's rulings in this area should not be unduly restrictive. *Foster-Milburn Co., et al.*, 51 F.T.C. 369, 371 (1954).

Respondents also argue that the proceedings were unfair on the ground that the hearing examiner indicated prejudgment of the case against respondents and that the hearings were conducted in a manner prejudicial to respondents' rights.

In his ruling of October 21, 1960, the hearing examiner gratuitously castigated certain of respondents' exhibits, at a time when this issue was moot, since he had already rejected the evidence in a previous hearing. He also issued this ruling before respondents' memorandum of authorities was due. These circumstances, irrespective of his actual state of mind at the time, indicate that the examiner, in issuing the ruling, did not preserve that appearance of impartiality requisite to a fair hearing.[3]

Respondents, in addition, allege, in effect, that the hearing examiner by his interruptions of counsel as well as frequent interventions in the examination and cross-examination of witnesses, abandoned the role of trier-of-fact and aided counsel supporting the complaint in presenting his case. We do not find that the hearing examiner aided, or intended to aid, counsel supporting the complaint by his participation in the examination of witnesses or by his comments during the proceeding. In fact, the record evidences instances of objections on the part of both sides to the hearing examiner's questions directed to witnesses, and on one occasion, both respondents' counsel and counsel supporting the complaint objected to the same question. The interjection of the hearing examiner in this proceeding was probably helpful to neither side. Nevertheless, while the hearing examiner may examine and cross-examine witnesses to insure that the facts are developed fully and with clarity, he should not pursue this course to the point where either or both sides are impeded in the presentation of their case by needless interruption and interference.

[3] The fact that respondents' attorney was subsequently permitted to file his memorandum and argue the matter does not cure the procedural defect when it is apparent that the hearing examiner had already finally determined the matter at the time he issued his written ruling.

Although we will ordinarily accept the hearing examiner's evaluation of the witnesses who have appeared before him, certain innuendoes and derogatory inferences in the initial decision reflecting on the credibility or bias of respondents' medical expert, Dr. Weissenberg, are not warranted by the record.

Further, the hearing examiner in the initial decision erroneously stated that all of the Commission experts were certified as full Diplomates of the American Board of Physical Medicine and Rehabilitation. He emphasized the significance he attached to this distinction with the comment that one of the Commission experts was also a member of the Certifying Committee of the Board. Subsequently, he takes pains to note that one of the two medical witnesses presented by respondents, a Dr. Turner, was not certified by the Board. In fact, the record does not show that Dr. Karpovich, one of the two Commission experts presented in the course of the case in chief, was so certified and counsel in support of the complaint expressly disclaims any such qualification of Dr. Karpovich in his proposed findings. Thus, the hearing examiner's insistence on the fact that all of the Commission experts were certified was not only at variance with the record but with the proposed findings of the attorney in support of the complaint. This gratuitous misstatement as to the qualification of one of the Commission expert witnesses on the part of the hearing examiner, unsupported by the record and disclaimed even by counsel supporting the complaint, raises a grave question as to the hearing examiner's impartiality.

The charitable inference is that this mistake in the initial decision may have resulted from a simple typographical error in incorporating the applicable proposed finding of counsel supporting the complaint on this point in the initial decision. Nevertheless, such carelessness involving a factor to which the hearing examiner evidently attached considerable importance in his evaluation of the witnesses lends support to the conclusion that the proceedings in this matter may not have been conducted with that degree of fairness and thoroughness which should be characteristic of all Federal Trade Commission proceedings.

On a review of the record as a whole we have determined that respondents were not afforded a fair hearing below. The hearing examiner erred in curtailing respondents' presentation of evidence and his indulgence in gratuitous and unguarded comment in the course of hearings and in the initial decision have reflected on his impartiality.

As the Ninth Circuit aptly stated in an analogous situation:

> If judicial perfection cannot be obtained, at least the observation of the forms of fairness often makes it easier to pull out of the quicksand of error. *James H. Sewell* v. *Federal Trade Commission*, 240 F. 2d 228, 233 (9th Cir. 1956), rev'd on other grounds 353 U.S. 969 (1957).

We conclude, therefore, that the complaint in this proceeding should be dismissed. The Commission unquestionably has the power to remand this matter to a hearing examiner for further evidence in order to provide an adequate basis for review. However, such a proceeding is costly, time consuming and, to some extent, harassing to respondents. The record is devoid of the testimony of dissatisfied customers claiming deception on the part of respondents. Even though proof of actual deception is not prerequisite to a finding of violation, taking into consideration all the circumstances disclosed by this record we are satisfied that the public interest will be adequately protected by continuing a close scrutiny of respondents' operations. Such disposition of the case makes it unnecessary to rule specifically on each of the points raised by respondents and counsel supporting the complaint in their appeal from the hearing examiner's initial decision.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeals of respondents and counsel supporting the complaint and upon briefs and oral argument in support thereof and in opposition to said appeals; and

The Commission having duly considered said appeals and the record herein and having determined, for the reasons stated in the accompanying opinion, that the complaint should be dismissed, such disposition of this case rendering it unnecessary to rule specifically on each of the points raised by respondents and counsel supporting the complaint in their appeals:

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

IN THE MATTER OF

PIERCE OIL & REFINING COMPANY ET AL.

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

Docket C-80. Complaint, Feb. 21, 1962—Decision, Feb. 21, 1962

Consent order requiring Springfield, Ill., concerns engaged in the sale to the public of reclaimed lubricating oil obtained from motor crankcase drainings, to cease selling their said product in the same kind of containers as those used for new and unused oil, with no markings to indicate its reprocessed nature, which furthered the deception by the words "crude" and "a perfected blend" printed thereon; and to cease similar deceptive use of the word "guaranteed".

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 Pierce Oil & Refining Company, a corporation, Springfield Refinoil Company, a corporation, and Perry W. Pierce and Twylah M. Pierce, individually and as officers of said corporations, and Perry W. Pierce, individually and trading as Sorco Oil & Refining Company, as Springfield Refinoil Company, and as Perry W. Pierce, hereinafter referred to as respondents, have violated the provisions of the 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 Pierce Oil & Refining Company and Springfield Refinoil Company are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois. Individual respondents Perry W. Pierce and Twylah M. Pierce are officers of said corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Individual respondent Perry W. Pierce is also doing business as Sorco Oil & Refining Company, as Springfield Refinoil Company and as Perry W. Pierce. All respondents have a principal office and place of business at 1023 E. Washington Street in the city of Springfield, State of Illinois.

PAR. 2. Respondents are now, and for more than a year last past have been, engaged in the sale and distribution of reclaimed, or reprocessed, used lubricating oil to dealers for resale to the purchasing public. Among brand names under which their said products are sold is that of "Saf T lube". Respondents cause and have caused

said products when sold to be transported from their place of business in the State of Illinois to purchasers thereof located in various other states of the United States.

PAR. 3. In the course and conduct of their business, respondents are now, and have been, in competition with individuals and with firms and other corporations engaged in the sale and distribution of lubricating oil in commerce between and among the various states of the United States.

PAR. 4. Respondents' oil consists in whole or in substantial part of used oil, obtained from drainings of motor crank cases and from other sources, which is thereafter reclaimed or reprocessed. Said oil is sold in containers of the same general size, kind and appearance as those used for new oil and has the appearance of new and unused oil. The containers bear no markings of any kind indicating that said product is reclaimed or reprocessed used oil.

In the absence of a disclosure on the containers that the oil therein is used, reclaimed, or reprocessed, the general understanding and belief on the part of dealers and of the purchasing public is that oil sold in containers such as are used by respondents is, in fact, new oil and not used, reclaimed or reprocessed oil. This belief is enhanced by the representations printed on respondents' oil containers as follows:

1. Refined from special crudes selected for maximum lubrication qualities under extreme temperatures and conditions.
2. SAF-T-LUB motor oil, guaranteed to give instant protection and safe lubrication to the motor. A high grade-superior motor oil perfected for maximum performance and longer life.
3. SAF T LUB. A Perfected blend for instant protection MOTOR OIL.
4. Heat resisting with maximum lubrication for automobiles, trucks, tractors, busses.

PAR. 5. Through the use of the words "crude" and "a perfected blend" on their containers, respondents have represented that their oil is made from new unused blends of crude oils. In truth and in fact, respondents' oil is reclaimed from used motor oil and contains oils of various types.

PAR. 6. Through the use of the word "guaranteed" respondents have represented that their said products are guaranteed in every respect.

PAR. 7. Said statement and representation was false, misleading and deceptive. In truth and in fact, the guarantee provided did not disclose the name of the guarantor, nor the terms, conditions or extent of the application of the guarantee.

PAR. 8. Respondents' said acts and practices further serve to place in the hands of the uninformed or unscrupulous dealers a means and

instrumentality whereby such persons may mislead the purchasing public with respect to the nature of respondents' product.

PAR. 9. The aforesaid acts and practices of the respondents, and the failure to disclose that their oil is composed in whole or in part of used oil which has been reclaimed or reprocessed, has had, and now has, the tendency and capacity to mislead and deceive a substantial number of retailers and members of the purchasing public into the erroneous and mistaken belief that said oil is refined by respondent from virgin crude oil, and to induce the purchasing public to purchase substantial quantities of respondents' product because of such erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents, Pierce Oil & Refining Company and Springfield Refinoil Company, are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their office and principal place of business located at 1023 East Washington Street, in the city of Springfield, State of Illinois.

Respondents, Perry W. Pierce and Twylah M. Pierce, are officers of said corporations, and their address is the same as that of said corporations.

Respondent, Perry W. Pierce, is also doing business as Sorco Oil & Refining Company, as Springfield Refinoil Company, and as Perry W. Pierce, all of which have a principal office and place of business at 1023 East Washington Street, in the city of Springfield, State of Illinois.

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

ORDER

It is ordered, That respondents, Pierce Oil & Refining Company, a corporation, Springfield Refinoil Company, a corporation, and their officers, and Perry W. Pierce and Twylah M. Pierce, individually and as officers of said corporations, and Perry W. Pierce, individually and trading as Sorco Oil & Refining Company, as Springfield Refinoil Company and as Perry W. Pierce, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of lubricating oil, do forthwith cease and desist from:

1. Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container.

2. Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes, has been manufactured from oil that has not been previously used.

3. Representing, directly or by implication, that their products are guaranteed, unless the name of the guarantor is disclosed and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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

IN THE MATTER OF

JANICE JUNIORS, INC., ET AL.

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

Docket C-81. Complaint, Feb. 21, 1962—Decision, Feb. 21, 1962

Consent order requiring New York City manufacturers to cease violating the Flammable Fabrics Act by selling in commerce dresses which were so highly flammable as to be dangerous when worn, and furnishing customers with a false guaranty that the required tests were made and showed the dresses not to be highly flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Janice Juniors, Inc., a corporation, Nat Rolfe and Phil Rolfe, 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 Flammable Fabrics 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, Janice Juniors, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Nat Rolfe and Phil Rolfe are President and Secretary, respectively, of Janice Juniors, Inc. The individual respondents formulate, direct and control the policies, acts and practices of said corporate respondent. The business address of all respondents is 1400 Broadway, New York, N.Y.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned hereinabove were dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, articles of wearing apparel made of fabric which was, under Section 4 of the Act, as amended, so highly flammable as to be dangerous when worn by individuals, which fabric had been shipped and received in commerce, as the terms "article of wearing apparel", "fabric" and "commerce" are defined in the Flammable Fabrics Act.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 4. Respondents have furnished their customers with a guaranty with respect to the articles of wearing apparel mentioned in paragraphs 2 and 3 hereof, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that said articles of wearing apparel are not, in the form delivered by respondents, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was false in that with respect to some of said articles of wearing apparel, respondents have not made such reasonable and representative tests.

PAR. 5. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and of the Rules and Regulations promulgated thereunder and as such 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Janice Juniors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with business address at 1400 Broadway, New York, N.Y.

Respondents Nat Rolfe and Phil Rolfe are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Janice Juniors, Inc., a corporation, and its officers, and respondents Nat Rolfe and Phil Rolfe, 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) Manufacturing for sale, 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 Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric, which fabric has been shipped or received in commerce, and which under Section 4 of the Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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 Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the article of wearing apparel covered by the guaranty, is 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 fabric contained in the said article of wearing apparel was manufactured or from whom it was received.

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

IN THE MATTER OF

CANADIAN FUR CORPORATION ET AL.

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

Docket C-82. Complaint, Feb. 21, 1962—Decision, Feb. 21, 1962

Consent order requiring Newark, N.J., furriers to cease violating the Fur Products Labeling Act by failing to show in labeling, invoicing, and advertising, the true animal name of fur used in fur products; to show on labels the name of the registered manufacturer, etc.; to disclose on invoices when fur was artificially colored or composed of flanks, and the country of origin of imported furs; by invoicing "Japanese Mink" as "Mink", and failing to set forth the term "Persian Lamb" as required on invoices; by failing in other respects to comply with labeling and invoicing requirements; by advertising which represented prices of fur products as reduced from regular prices which were, in fact, fictitious, and represented prices falsely as "cut 50% and more"; and by failing to keep adequate records as a basis for price and value claims.

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 Canadian Fur Corporation, a New York corporation, and Canadian Fur Corporation, a New Jersey corporation, and Jacob Dornfeld and Morris Dornfeld, individually and as officers of the said corporations, and Sidney Dornfeld, individually and as general manager of fur operations of the said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Canadian Fur Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and respondent Canadian Fur Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. The office and principal place of business of both corporations is 1300 McCarter Highway, Newark, N.J.

Respondent Jacob Dornfeld is secretary of the New York corporation, and vice president of the New Jersey corporation. Respondent Morris Dornfeld is treasurer of the New York corporation, and secretary and treasurer of the New Jersey corporation. Respondent Sidney Dornfeld is general manager of the fur operations of the said corporate respondents. These individuals control, direct and formulate the acts, practices and policies of the said corporate respondents. The office and principal place of business of these individuals is the same as that of the said corporate respondents.

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

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2)

of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

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

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

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

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

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

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

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

3. To show the country of origin of the imported furs used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the animal that produced the

fur from which the fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as being "Mink", when they were, in fact, "Japanese Mink".

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth in the manner required, in violation of Rule 8 of said Rules and Regulations.

(c) Invoices failed to disclose that fur products were composed in whole or in substantial part of flanks, when such was the fact, in violation of Rule 20 of said Rules and Regulations.

PAR. 8. 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. 9. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents, which appeared in issues of the Newark News, a newspaper published in the City of Newark, State of New Jersey, 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) Represented prices of fur products as having been reduced from regular or usual prices where the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular

course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of said Rules and Regulations.

(c) Represented through percentage savings claims such as "prices cut 50% and more" that prices of fur products were reduced in direct proportion to the percentage of savings stated, when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 10. Respondents, in advertising fur products for sale as aforesaid, made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 11. 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 and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Canadian Fur Corporation is a corporation organized, existing and doing business under and by virtue of the laws of

the State of New York, and respondent Canadian Fur Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. The office and principal place of business of both corporations is 1300 McCarter Highway, Newark, N.J.

Respondent Jacob Dornfeld is secretary of the New York corporation and vice president of the New Jersey corporation. Respondent Morris Dornfeld is treasurer of the New York corporation and secretary and treasurer of the New Jersey corporation. Respondent Sidney Dornfeld is general manager of the fur operations of the said corporate respondents. The office and principal place of business of these individuals is the same as that of the said corporate respondents.

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

ORDER

It is ordered, That respondents Canadian Fur Corporation, a New York corporation, and its officers, and Canadian Fur Corporation, a New Jersey corporation, and its officers, and Jacob Dornfeld and Morris Dornfeld, individually and as officers of said corporations, and Sidney Dornfeld, individually and as general manager of the fur operations of the said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution, in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received, in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. 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.

B. Setting forth on labels affixed to fur products:

1. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

2. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder mingled with non-required information.

3. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

C. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

D. Failing to disclose that fur products are composed in whole or in substantial part of flanks, when such is the fact.

3. Falsely or deceptively invoicing fur products or otherwise falsely or deceptively identifying such fur products with respect to the name or names of the animal or animals that produced the fur from which such fur products were manufactured.

4. 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:

A. 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 said Rules and Regulations.

B. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of business.

C. Represents through percentage savings claims that prices of fur products are reduced in direct proportion to the percentage of savings stated when such is not the fact.

5. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there

are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

JAN ORIGINALS, INC., ET AL.

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

Docket C-83. Complaint, Feb. 21, 1962—Decision, Feb. 21, 1962

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by labeling fur products falsely to show that the fur contained therein was natural, and failing to disclose on labels and invoices that certain furs were artificially colored.

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 Jan Originals, Inc., a corporation, and Sam Brown and Sam Soifer, 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. Respondent Jan Originals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 307 Seventh Avenue, New York, N.Y.

Respondents Sam Brown and Sam Soifer are president and treasurer, respectively, of the said corporate respondent and control, direct and formulate 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 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 misbranded or otherwise falsely or deceptively labeled in that said fur products were labeled to show that the fur contained therein was natural, when in fact such fur was bleached, dyed or otherwise artificially colored, 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.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such products which failed to disclose that the fur contained in the fur products was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

PAR. 6. 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products

Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jan Originals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 307 Seventh Avenue, New York, N.Y.

Respondents Sam Brown and Sam Soifer are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Jan Originals, Inc., a corporation, and its officers, and respondents Sam Brown and Sam Soifer, 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 sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce; as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Representing directly or by implication on labels that the fur contained in fur products is natural, when such is not the fact.

B. 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.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

IN THE MATTER OF

GIMBEL BROTHERS

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

Docket 7888. Complaint, May 13, 1960—Decision, Feb. 23, 1962

Order requiring a corporation operating retail stores in New York City, Milwaukee, Pittsburgh, and Philadelphia, to cease violating the Fur Products Labeling Act by advertising in a Philadelphia newspaper which failed to disclose the names of animals producing the fur in fur products, the country of origin of imported furs, and that certain furs were artificially colored; represented prices of fur products as reduced from usual prices when they had never sold at such prices and as "⅓ off" when such was not the fact; and failed to maintain adequate records as a basis for price and value claims.

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 Gimbel Brothers, a corporation, hereinafter referred to as respondent, has 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. Gimbel Brothers 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 34th Street and Broadway, New York, N.Y. Corporate respondent oper-

ates a number of branch stores. The acts and practices as hereinafter alleged relate to the Philadelphia, Pa., branch store located at 8th and Market Streets.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has 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 advertised in violation of the Fur Products Labeling Act in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said 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. 4. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondent which appeared in issues of the Evening Bulletin, a newspaper published in the city of Philadelphia, 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, respondent 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 products 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 that fur products contained or were composed of bleached, dyed or otherwise artifically colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

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

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

(e) Represented through the use of percentage savings claims through such statements as "⅓ Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated when such was not the fact in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 5. Respondent in advertising fur products for sale as aforesaid made claims and representations respecting prices and reductions therefrom of fur products. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 6. The aforesaid acts and practices of respondent, 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.

Schnader, Harrison, Segal & Lewis, by *Mr. Bernard J. Smolens* and *Mr. Edward W. Mullinix*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Gimbel Brothers, a corporation, is charged with having violated the Fur Products Labeling Act and the Federal Trade Commission Act. The facts are as follows:

1. Gimbel Brothers 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 at 34th Street and Broadway, New York, New York. This proceeding relates solely to the respondent's Philadelphia retail store.

2. Subsequent to the effective date of the Fur Products Labeling Act, respondent, in connection with its Philadelphia operations, has been and is now engaged in the introduction into commerce and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has 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.

3. Respondent's Philadelphia store has caused advertisements of its fur products to be published in newspapers which have substantial circulation in states other than the State of Pennsylvania. These advertisements are and have been intended to aid, promote and assist in respondent's sale and offering for sale of its fur products. Only one such advertisement, engrossing approximately a page and a half of newspaper space, was introduced into the record, and only one part of that advertisement is relied upon as the basis for this action. A photostatic copy of the portion relied upon appears on p. 362a.

4. The foregoing advertisement is charged to be false and deceptive and in violation of the Fur Products Labeling Act and the Rules and Regulations thereunder in five respects:—first, in that it

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

In support of this charge, it is pointed out that in the "mink, beaver, fox" designation the particular type of fox, as specified in the Name Guide, was not disclosed. In the Guide there are listed nine types of fox furs—Black, Blue, Cross, Grey, Kit, Platinum, Red, Silver and White. There is no unqualified Fox classification. § 5(a)(1) of the Act is as follows:

Sec. 5. (a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if 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 such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;

5. The advertisement does not purport to describe specifically any individual garment or group of garments. It is general in nature, calling attention only to some of the types of fur that are included in the merchandise offered. In such an advertisement the listing of all the names of all the furs advertised and the colorings or other physical characteristics of the various garments would be meaningless because the details of name or other characteristic could not be referenced to any particular garment. The argument that specific names should be set forth in an advertisement such as is at issue here can be reduced to an absurdity if it be applied to a general advertisement in which all of a stock of furs or fur garments are offered at specified prices. Certainly it would not be expected, under such circumstances, that all the names and characteristics of all the fur products involved in the advertised sale would have to be set forth in the general advertisement. That same reasoning applies

The Evening Bulletin Tuesday, September 29, 1959 G 17

sample sale!

PHILADELPHIA STORE ONLY

Fashion flair and workmanship in the custom bracket, but at take from-the-rack prices! Gimbels is famous for sales of fine samples, caviar of the fashion world! These were made as this season's showpieces, will be outstanding wherever they are worn. The wools, many imported are superb. Mink, fox, beaver climax each design. Each coat is individually made, fine hand artistry of a master tailor. Models of perfection for sizes 10, 12, 14.

luxury furs on 100% wool coats... even 100% cashmere

28 sample coats were $118, now $78

31 sample coats were $148, now $98

30 sample coats were $195, now $128

44 sample coats were $225, now $148

sorry, no mail or phone—Gimbels Misses' Better Coats (211)—Third Floor, Chestnut—Philadelphia Store only

to the situation which is presented in this proceeding. There is no claim that each individual garment was not properly marked as to name and other required characteristics. The advertisement cannot be looked upon as in any way misleading or deceptive.

6. Looking again at the statute, it is clear that the reference "a fur product or fur" and that the advertisement is faulty only if it is intended to aid, promote, or assist in the sale of "*such* fur product or fur (*italics* added), applies only to individual garments. Had the Congress any other intent, the wording of the statute could have readily expressed that intent by a very slight variance of the language used. The intent and meaning of the statute is clear, and does not require a merchant to list in a general advertisement the names of all the animals that produced the many furs that might be contained in the numerous garments offered for sale. The converse is true when the merchant advertises specific garments, for in such cases the names of animals, and other required characteristics, must be stated. The respondent is found not to have violated the provisions of § 5(a) (1) of the Fur Act.

7. The second violation charged is that respondent's advertisement

> (b) Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of § 5(a) (3) of the Fur Products Labeling Act.

In support of this charge it is pointed out by counsel supporting the complaint that following respondent's advertising of "mink, beaver, fox", the advertised coats were inspected at respondent's store by a Commission investigator, who observed that the beaver-trimmed coats were labeled as dyed beaver, and that respondent's invoices listed one coat, which was among those advertised, as being trimmed with dyed beaver, and other coats as trimmed with dyed mink and dyed beaver. The advertisement did not disclose that the mink and beaver trimmings were dyed. There is no dispute as to these facts. § 5(a) of the Act is as copied above; subsection (3) thereunder is as follows:

> (3) does not show that the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;.

The singular designation is again used. Following the reasoning set forth in the paragraph above, the same advertisement being here under consideration, the same conclusion is reached—that the requirement of the Act is applicable only when specific garments are advertised and described. The respondent is found not to have violated the provisions of § 5(a) (3) of the Fur Act.

8. The third violation charged is that respondent violated § 5(a) (6) of the Fur Act in that its advertisement does not

> disclose the name of the country of origin of the imported furs contained in the fur products * * *.

Some of the "mink, beaver, fox" fur in the advertised garments originated in Canada and Norway. At the bottom of the first page (not reproduced herein) of respondent's advertisement is a statement in small but readable print, "—fur products labeled to show country of origin of imported furs * * *". This is compliance under Rule 38(b), which is as follows:

Rule 38—*Advertising of Furs and Fur Products.*

* * * * * * *

(b) In general advertising of a group of fur products composed in whole or in part of imported furs having various countries of origin, the disclosure of such countries of origin may, by reference, be made through the use of the following statement in the advertisement in a clear and conspicuous manner: "Fur products labeled to show country of origin of imported furs."

This charge of the complaint will be dismissed.

9. The next two charges of the complaint are that respondent has made fictitious-pricing representations and savings claims, in violation of § 5(a)(5) of the Act and Rule 44(a) of the Regulations. The specific charges are, as set forth in paragraph 4 of the complaint, subsections (d) and (e), that in its advertising respondent falsely and deceptively advertised products, in that it

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

(e) Represented through the use of percentage savings claims through such statements as "⅓ Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated, when such was not the fact, in violation of § 5(a)(5) of the Fur Products Labeling Act.

The advertisement hereinabove reproduced, listing

29 sample coats were $118, now $78
31 sample coats were $148, now $98
30 sample coats were $195, now $128
44 sample coats were $225, now $148,

is a representation that the coats listed in the advertisement had previously been priced and offered for sale by respondent at the higher prices, that is, unless there is a clear implication to the contrary by the statements in the advertisement that this was a "sample sale" and that these were "sample" coats. Much evidence was offered and many arguments were advanced relating to this phase of the proceeding.

10. The "sample" coats offered by respondent through this advertisement had been procured by respondent's buyer for the Philadelphia store at special discount prices from various manufacturers. They

were coats which were pilot models which the manufacturers had used to show to wholesale buyers as representative of the lines of coats being offered for presentation to the retail trade. As pilot models they were original creations, had been carefully and individually handmade and trimmed perhaps with better fur than the mass-production coats patterned after the samples. They had been procured at one-third off the price for which the coats made from these samples were regularly sold by the manufacturer. By applying its regular mark-up, respondent was able to offer these coats at retail to the public at one-third off the price at which the coats would have sold if they had been regular stock, and, as the record indicates, at one-third less than was the regular selling price of the coats for which these were the pilot samples. These facts were not contradicted. Nor was the fact contradicted that these particular coats had never before been offered for sale by the respondent, so the higher price mentioned in the advertisement could not have been the present or former regular price of these sample coats. There was no direct proof in the record that respondent had not previously offered for sale at the higher prices mentioned in the advertisement coats similar to those referred to therein, or coats manufactured through the use of the advertised samples as pilot models. That issue was not met. If the prospective purchasers of these coats had known what a sample coat was, they would not have been misled by the advertisement. The respondent's records disclose fully the facts upon which the advertised prices were based.

11. In its defense respondent presented a highly-qualified expert in women's fashions and women's wear—the fashion editor of the Philadelphia Inquirer. Based on a broad advertising and retailing experience and familiarity with merchandising techniques followed by retailers of women's clothes, she testified that the average woman customer in the Philadelphia area would understand the term "sample" as used in the trade, and would have interpreted the higher-price figure in respondent's advertisement as being the price at which coats patterned after the advertised sample coats were currently being sold by the retailers who had purchased them, and that the saving mentioned was from that price, and would be one-third.

12. To controvert this testimony, there were produced in Washington, D.C., from the Washington area, seven witnesses, whose reliability respondent questions, whose testimony indicated that they did not understand a sample coat to be as above described and therefore thought the advertisement signified that respondent had previously offered these coats, or coats like these coats, at the higher price, and that, therefore, the purchasers of these coats would be saving one-third of the amount they would have paid for the coats had they been bought from respondent at this higher original price. Respond-

ent's contention that the testimony of these public witnesses was unreliable is based on the argument that women in the Philadelphia area understand what a sample coat is, whereas those in the Washington area do not.

13. To support this contention, another highly-qualified expert was presented, who testified that she was, and had been for three years, familiar with the advertising of women's wear in the Washington area and that she had never seen a sample sale advertisement in any of the area papers, thus supporting the conclusion that sample sales are rare in Washington and that the women in Washington would therefore not be expected to understand the terms "sample" and "sample sale" as would the women in Philadelphia, where sample sales were shown to be more frequent. Fortunately it is unnecessary to base a conclusion as to the meaning of respondent's advertising on the bound-to-be-unpopular determination of the comparative knowledge of Washington and Philadelphia women.

14. Respondent's expert testified as to the manner in which the average woman in Philadelphia would interpret the advertisement, but the Commission has said repeatedly that its obligation runs not just to the intelligent or well-informed person, nor to the person of average intelligence, but also to those who are even less informed. Undoubtedly there were and are many women—prospective purchasers of women's fur-trimmed coats—even in the Philadelphia area, who would understand and believe that the higher prices mentioned in the advertisement were prices at which the respondent had previously sold or offered for sale the same coats as those advertised, or similar coats. The conclusion is that respondent's advertisement is misleading and deceptive as to its price and savings representations.

15. There is one other defense presented by respondent which requires a determination of the meaning of the statutes under which this proceeding was brought. This defense is based upon facts peculiar to this proceeding, and must be determined entirely upon those facts. Hence the conclusion reached herein would be applicable only in proceedings involving precisely the same facts and circumstances.

16. During 1958 respondent's Philadelphia newspaper advertising totaled over 4,000,000 lines, of which 64,810 related to fur products; during 1959 the total was in excess of 4,500,000 lines, of which over 75,000 lines related to fur products. The single advertisement upon which the case in support of the complaint herein is based was an isolated incident which respondent asserts was contrary to the company's policy and occurred despite the fact that respondent had taken all practicable precautions to prevent such occurrences. It was respondent's policy, at the time, that the advertisement after being prepared in the advertising department and made up into proof be submitted to the fur department buyer for approval. This adver-

tisement was not so submitted. Shortly before the advertisement was published, respondent's experienced copywriter, responsible for preparing such advertising, left respondent's employ, and was replaced by a person of less experience who is no longer employed by respondent.

17. Following the publication of this advertisement, and prior to the issuance of the complaint in this case, respondent tightened its policy rules by requiring all fur advertisements to be cleared through the office of the Assistant to the Comptroller of the Philadelphia store, this office being charged with responsibility for the store's compliance with all matters involving governmental regulations. The record shows that respondent has on many occasions conferred with Federal Trade Commission personnel for interpretations and suggestions, and has always complied with the suggestions and recommendations received. The respondent has adopted and maintains a firm policy to comply with the laws and regulations administered by the Federal Trade Commission, and has periodically so instructed its employees. This, the respondent asserts, is motivated to accord with the company's interest in maintaining good customer relationships. It was also stated in the record that it was and is against company policy to use the word "were" in comparative pricing advertisements, and that "were" had never been so used prior to September 29, 1959, and has not been so used since that time.

18. The foregoing facts are established by the record and are urged by respondent as requiring a finding that the publication of the one advertisement involved in this proceeding does not constitute "acts or practices" within the meaning of § 5 of the Federal Trade Commission Act. The Act speaks in the plural, which would indicate an intent of the Congress not to subject a respondent to prosecution for a single isolated act of violation. Public policy and the public interest would seem not to favor, much less require, the issuance of a cease-and-desist order against an institution having an established policy of cooperation and compliance with the law and the regulations thereunder; but public policy and public interest are ultimately for decision by the Commission itself, and no conclusions reached herein will be based on the Hearing Examiner's interpretation of either of these terms.

19. It is the Hearing Examiner's conclusion that under all the facts and circumstances of this proceeding, the respondent cannot be found to have engaged in acts or practices (the complaint charges "acts and practices") in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, or of the Federal Trade Commission Act. Accordingly,

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

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner:*

This matter is before us for consideration of an appeal by complaint counsel from the hearing examiner's initial decision dismissing the complaint.

We are here principally concerned with a single advertisement of fur products which respondent caused to appear in a newspaper of interstate circulation. A reproduction of the advertisement appears on page 362a.

The complaint herein, issued May 13, 1960, charges respondent with six separate violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. The hearing examiner dismissed all of the charges and with one exception committed error in doing so. Each of these separate matters are now considered *seriatim.*

The Improper Animal Name Charge

Paragraph 4(a) of the complaint charges that respondent's advertisement was false and deceptive in that it:

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

The advertisement in question uses merely the word "fox" to describe certain of the fur products offered for sale. This designation was at the time of complaint, and is now, an improper designation for some of the fur products advertised in that "fox" is not the correct name of the animals which produced the fur used to trim some of the coats offered in the advertisement.[1] The record reveals that some of the coats were trimmed with Norwegian blue fox and dyed white fox.

The hearing examiner dismissed this charge of the complaint because in his opinion "The advertisement does not purport to describe specificially any individual garment or group of garments." He concluded "The intent and meaning of the statute is clear and does not require a merchant to list in a general advertisement the names of all the animals that might be contained in the numerous garments offered for sale." In so holding, the examiner disregarded the prior holding of this Commission in *Hoving Corporation*, Docket No. 7195 (September 23, 1960). In that matter, an advertisement somewhat similar

[1] On November 3, 1961, the Fur Products Name Guide was amended to permit the use of the single word "fox" to describe the genus and species of the red fox and its color phases, which are known as black fox, gross fox, platinum fox, silver fox, and red fox.

to the one here involved represented that a group of fur products were "mink, chinchilla, fox". The hearing examiner there found that "fox" was an improper designation. On appeal, we affirmed his finding, pointing out that even if the advertisement be considered as "institutional", that is, not intended to aid or promote the sale of any specific fur products, nevertheless the correct name of the animal which produced the furs must be disclosed. Here it is not even claimed that the advertisement is "institutional", leaving the examiner's decision without even the color of correctness. We hold that respondent's use of the word "fox" to describe the lot of furs, which included Norwegian blue and dyed white fox, violated Section 5(a)(1) of the Fur Products Labeling Act.

The Failure To Disclose Dyed Furs

In paragraph 4(b) of the complaint, it is alleged that the advertisement was false in that it:

Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

Some of the mink, fox and beaver fur products advertised were dyed, and the advertisement does not disclose this fact. The hearing examiner dismissed this charge following the same reasoning he used in dismissing the previous charge. The examiner's overtechnical conclusion that because the Act refers in the singular to "a fur product or fur", it cannot be held to apply to a "general advertisement" in which "numerous garments [are] offered for sale" is clearly erroneous. A multiple violation is even less excusable than a single one. Respondent's counsel concedes that if all the furs in the lot advertised were dyed, it "might" be held that the Act requires disclosure. Thus, he is presumably not wedded to the examiner's theory but makes his plea for avoidance on the ground that the unqualified animal designations in the advertisement cannot be identified with the specific fur products which were dyed. While this is true, it does not in any manner rebut or dilute the fact that dyed furs were advertised for sale without disclosure of the fact of dyeing. That the dyed furs were commingled with natural furs in the lot advertised only makes the unqualified designation partly true. An advertisement which is partly true is, of course, partly false and subject to prohibition under the statute.

The Failure to Disclose Foreign Origin

The third principal charge of the complaint is contained in subparagraph (c) of paragraph 4, which alleges that the advertisement:

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

The record reveals that some of the coats advertised were trimmed with fur which was imported from foreign countries. The advertisement does not disclose this fact, but the hearing examiner dismissed the charge because a disclosure of foreign origin was made in another advertisement appearing on an adjacent page in the newspaper. The foreign origin declaration found in the second advertisement obviously only refers to the different furs there offered for sale. The two advertisements are separated by an unrelated women's sweater advertisement of four-column width. In addition, each advertisement is outlined with a heavy black border clearly setting it off as a separate advertisement. Quite obviously the foreign origin declaration in the one advertisement was insufficient to inform the public that some of the furs depicted in the advertisement in question were imported and the dismissal of this charge was erroneous.

The Fictitious Pricing Charges

In subparagraphs (d) and (e) of paragraph 4, the complaint charges that the advertisement made fictitious and false pricing representations as follows:

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

Represented through the use of percentage savings claims through such statements as "⅓ Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated when such was not the fact in violation of Section 5(a)(5) of the Fur Products Labeling Act.

It is respondent's contention that the record shows only that respondent had never sold the advertised *sample* coats before; that the price saving representations in the advertisement were based upon the regular ("were") prices of *production* model coats patterned after the samples; and that there is no record evidence to show that respondent did not sell such *production* model coats at the higher "were" prices contained in the advertisement.

The hearing examiner's findings and conclusions on this subject are confusing and to a certain extent contradictory. His finding that

the price saving representations were misleading and deceptive is apparently based upon the respondent's admission that it had never before sold or offered any part of the particular lot of sample coats presented in the subject advertisement. He specifically found that the record contained "no direct proof" that the respondent had not made prior sales or offerings of regular production models of these coats and concluded, "That issue was not met." In view of his finding the advertisement to be deceptive, it must be concluded that he considered the lack of "direct proof" that respondent had not made prior sales of production model coats as immaterial.

We are not so persuaded. Sample coats are by definition identical in all material respects to production model coats patterned after them. Thus, if Gimbel's had in the recent regular course of business sold production models of the advertised coats at the higher ("were") prices, its advertisement would be neither misleading nor deceptive. We turn now to a consideration of such evidence as was adduced on this decisive point.

If the hearing examiner's conclusion that this issue was not met is correct, it would appear that he was instrumental in creating the hiatus for he stopped complaint counsel's cross-examination of respondent's comptroller on this point, saying: ". . . there isn't question in my mind that the witness has said the word 'were' was wrongly used there and the implication could well be taken by a customer that they had been offered at this higher price by Gimbel's. I don't think there is any dispute about that." It is noteworthy that respondent's counsel offered no objection to this conclusion.

In addition to characterizing the word as used in the advertisement as "inaccurate", the Gimbel comptroller testified with respect to the meaning of the representation "were $118" which appeared in the advertisement: "I don't think it means was Gimbel's price." The witness was then asked flatly whether the "were" price of $118 was Gimbel's price. His answer was not responsive but revealed that the higher price ". . . reflected the valuation that we were saying represented the one-third off." The hearing examiner then interrupted the examination with the remark we quoted above.

In our view, this testimony is conclusive on the question of prior sales at the "were" prices. The witness involved was a high-ranking official of the respondent. In response to repeated direct questions as to the "were" prices, he replied that they were not Gimbel's prices but reflected a valuation Gimbel's was "saying" represented one-third off.

We are convinced that this issue was met and, on the basis of all the evidence, we conclude that respondent had not in the recent regular course of business sold either sample or production model coats of the type advertised at the "were" prices listed in its advertisement.

Respondent introduced evidence which purported to show that an unspecified number of unnamed retailers located in unnamed areas purchased production model coats patterned after the sample coats sold to Gimbel's at prices 50% higher than the prices paid by Gimbel's for the sample coats and that said retailers resold said coats at prices approximately 50% higher than the "now" prices listed in Gimbel's advertisement. Even if this evidence is given full weight, it avails respondent nothing since it does not reveal that Gimbel's ever sold similar coats at the higher "were" prices. This evidence has no relevance to the issues here involved and complaint counsel's objection to it should have been sustained.

Respondent attempted to show that the prospective customers to whom the advertisement was directed, that is, women in the Philadelphia area, understand that a "sample sale" is an offering of one-of-a-kind samples and that production models, patterned after the samples, had been sold (not necessarily by the advertiser) at the higher "were" prices. The record contains much evidence and argument on this point, none of it convincing.

Respondent relies in the main upon the testimony of an expert witness, the fashion editor for a leading Philadelphia newspaper. While undoubtedly an expert in her chosen field, we are not persuaded that the point which respondent seeks to establish is susceptible of proof by expert testimony or at least by the expert produced. The understanding or impression communicated to a consumer by respondent's entire advertisement is most likely to be accurately learned from a sampling of the consumers themselves. But the evidence adduced by complaint counsel in rebuttal on this point has even less value than respondent's since it consists of the "impression" testimony of consumers residing in the Washington, D.C., area where respondent has shown "sample sales" are extremely rare or nonexistent. The testimony of such witnesses could not, of course, rebut respondent's attempted showing as to what Philadelphia consumers, apparently constantly exposed to "sample sale" advertisements, understand such advertisements to mean.

It is noteworthy that the hearing examiner, having heard and observed the witnesses for both sides, was of the opinion that even in the Philadelphia area many women would understand from the advertisement that respondent itself had previously sold the same or

similar coats at the higher "were" prices. We are also convinced of this and so find.

But as we view it a finding favorable to respondent on this point would not save this particular advertisement. By the use of the word "were" prior sales by respondent itself are definitely indicated, and even though Philadelphia consumers may understand what is meant by a "sample sale", they can and will be misled by this advertisement into the erroneous assumption that the sale coats were samples of coats previously sold by Gimbel's. In other words, the representation "were" is not cleansed of deception by reason of being used in a "sample sale" advertisement regardless of the degree of sophistication found to exist in the consumers to whom the advertisement was directed.

On the basis of all of the evidence we are convinced that the price saving representations made in the advertisement are false and deceptive and find the charges made in subparagraphs (d) and (e) of paragraph 4 of the complaint to be sustained and proved.

The hearing examiner's dismissal of the fictitious pricing charges is a surprising result in view of his finding that the ". . . respondent's advertisement is misleading and deceptive as to its price and savings representations." While, at first reading, the decision appears to be founded upon the patently erroneous ground that a single advertisement cannot constitute "acts or practices" within the meaning of Section 5 of the Federal Trade Commission Act, a closer scrutiny reveals that the dismissal is based upon "all the facts and circumstances of this proceeding". It is apparent that the "facts and circumstances" which the hearing examiner had in mind were those adduced by respondent which purported to show that the advertisement in question was a single instance, inadvertent departure from an established policy of compliance with the law. As we view it, respondent's record of compliance is not so stainless as to force the conclusion that public protection does not require a cease and desist order. We have, in the past, issued two cease and desist orders against Gimbel Brothers, and on six different occasions this respondent has entered stipulations with the Commission in which it agreed, without confessing illegality, to cease certain actions the Commission deemed unlawful.

It is highly significant that the official responsible for approving respondent's advertisements testified that the "⅓ off" representation in the advertisement was proper. By so testifying, he indicated that future similar representations not based upon respondent's usual and regular prices would be approved. The purpose of an order to cease and desist is not to punish but to safeguard the public from future violations. Under the circumstances of this case, such an order is necessary and will issue.

The Failure to Maintain Records Charge

The final charge in the complaint is contained in paragraph 5, which reads:

> Respondent in advertising fur products for sale as aforesaid made claims and representations respecting prices and reductions therefrom of fur products. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

The hearing examiner found that the respondent's records disclose fully the facts upon which the advertised prices were based and dismissed the charge. With this conclusion, we agree.

At the time this complaint issued, the Commission interpreted Rule 44(e) as requiring that sellers making pricing representations must maintain records ". . . in sufficient detail and in such form as affirmatively to disclose the accuracy of the representations." (*Morton's Inc.*, Docket No. 6976, February 25, 1960). However, this Commission holding was appealed to a circuit court which held that the interpretation extended the rule beyond the scope of our rule-making power. (*Morton's Inc., et al.* v. *Federal Trade Commission*, 286 F. 2d 158 [1st Cir. 1961].) Thus the law as it now stands requires only that respondent keep such records as are needed to disclose the truth or falsity of the pricing representations made. In this matter, respondent kept and produced all records possible under the circumstances. Records of prior sales at the "were" prices were not produced for the simple reason that such sales had not been made.

We have noted that we are here principally concerned with a single advertisement which respondent caused to appear in a newspaper of interstate circulation. However, it violated the law in several respects. Moreover, prior to the institution of this proceeding this respondent was before the Commission charged with other violations of the Fur Products Labeling Act. There the Commission chose to not "issue a complaint"; instead it resorted to the utilization of the "ingenious" aspect of administrative process of affording respondent the opportunity of disposing of the charges through an informal stipulation providing for voluntary compliance with the law. On that occasion respondent in 1959 agreed to forthwith cease and desist certain false and misleading advertising claims in connection with the offering for sale, transportation, or distribution of any fur product made wholly or partly of fur. In that connection respondent agreed that its advertising of such products through labels on garments would clearly show the name or names of animals producing the furs as required by law and regulations, the name of the country of origin of imported

furs contained in a fur product, and accurately show the facts when any fur products offered for sale by respondent contain or are composed of bleached, dyed, or artificial fur, when such is the fact.

That was not the only instance where respondent was before the Commission on charges that it had violated the law through false and misleading advertising. On several earlier occasions in connection with the advertising, offering for sale and sale and distribution of other products, respondent entered into informal stipulations with the Federal Trade Commission to cease and desist the use of particular statements which the Commission deemed to be false and misleading. These repeated instances of the Commission's willingness and effort to guide respondent down the road to voluntary compliance with the requirements of the law apparently have not deterred it from the violation of law we have found here. Nevertheless, the Commission's willingness and efforts to bring about voluntary observance of the law are clear in its repeated contacts with the respondent in this case.

When one reviews the background and history of the Commission's repeated contacts with the respondent and its use of the informal administrative process, there is little or no cause to wonder why an informal administrative process was avoided in the Commission's disposition of respondent's clear violations of law which have been established in this instance.

It should be kept in mind that we are not here dealing with a violation of the Federal Trade Commission Act; instead we are here concerned with clear violations of the Fur Products Labeling Act. Congress made the provisions of that law specific for the protection of the consumer. In doing so, Congress did not provide the Commission with the flexibility and the latitude it has in the enforcement of Section 5 of the Federal Trade Commission Act.

The initial decision of the hearing examiner is vacated and set aside and in lieu thereof we are issuing our own findings of fact, conclusions and order to cease and desist.

Commissioner Elman dissented to the decision in this matter.

DISSENTING OPINION

By ELMAN, *Commissioner:*

I think the complaint should be dismissed.

I

At the risk of seeming to restate the obvious, I should like to preface what I have to say about this case by making some general observations on the Commission's so-called adjudicative function. By doing

so, my reasons for writing a dissent in a case which itself is of little importance may emerge more clearly.

The Federal Trade Commission is an administrative agency, not a court. Congress has given the Commission a broad range of powers to carry out its statutory responsibilities. One of these—and not necessarily the most effective or important—is the power to file complaints in formal proceedings looking to the issuance of cease-and-desist orders against particular respondents.

In one basic respect, court and agency are alike. Both are governed by the fundamental principle that in adjudicative proceedings the tribunal must decide the issues fairly, impartially, and solely on the basis of facts of record or within official notice.

In another basic respect, however, an agency is not at all like a court, even as to adjudicative proceedings. The difference between them in this regard reflects a distinctive characteristic of the administrative process.

A court is a passive, disinterested arbiter of controversies that happen to be presented to it by the parties. Its business is determined fortuitously, comprising matters brought to it by litigants, not those which it chooses to hear. If a case on its docket—no matter how it got there—presents a justiciable controversy, a court ordinarily has no choice but to decide it. A court may feel that its time and energy are being wasted on cases that for one reason or another ought not be before it, but—generally speaking—it cannot on that ground refuse to hear and decide them. Almost inevitably, therefore, judge-made law tends to evolve episodically and without symmetrical or even coherent design.

This characteristic of the judicial process was an important reason for the creation of administrative agencies. The job of an agency, unlike a court, is to regulate through *administration*, a unique process of governmental activity that requires positive, planned, and systematic effort to achieve the statutory objectives. The Federal Trade Commission is a clear example of this. In his address before both Houses of Congress on January 20, 1914, when President Wilson asked for the establishment of an interstate trade commission, he said it was needed "as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate * * *."[1] As Mr. Justice Brandeis aptly characterized it in his notable opinion in the *Gratz* case,[2] the

[1] Congressional Record, 63d Cong., 2d Sess., p. 1963.

[2] *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 435 (dissent).

Commission represented a "new experiment on old lines" in dealing with unfair and restrictive trade practices.

Congress did not contemplate that the Commission would function, like a court, as a passive arbiter of controversies. It was not created merely to apply specific legal standards to isolated commercial acts. If Congress had had a design so narrow, it would hardly have thought it necessary to establish a new kind of governmental mechanism endowed with a comprehensive range of powers for "doing justice" where the processes of the courts are inadequate. Congress gave the Commission a most challenging assignment, expecting that it would be met by creative, resourceful, and, above all, planned affirmative action.

Congress deliberately chose, therefore, not to leave the Commission circumscribed with respect to selection of cases. It recognized that the Commission, if it were to fulfill its responsibilities as an agency and not a court, should have full control over the selection of cases on its docket. Congress knew that the extent of the benefits which the public would derive from the Commission would bear a direct relation to the public importance of the practices assailed.

Accordingly, it provided, in Section 5(b) of the Federal Trade Commission Act, that two determinations must be made by the Commission before it can issue a complaint: (1) that there is "reason to believe" a violation of law exists; and (2) that a proceeding by the Commission with respect to such violation "would be to the interest of the public." Thus, Congress directed the Commission not to proceed on a hit-or-miss basis, depending upon the complaints that arrive in its mail. It perceived that the way in which cases are selected may be as important as the way they are decided; and it told the Commission, in effect, that cases for complaint should be selected in order of priority of public importance.

Reviewing the Act's legislative history in his classic study, "The Federal Trade Commission" (1924), Gerard C. Henderson observed that one of the reasons why Congress adopted the "anomalous procedure" which makes the Commission "both complainant and judge" was that "the legislators feared that the Commission would be overwhelmed with a host of petty squabbles, and therefore provided that the formal machinery of the Commission could be set in motion only by the Commission itself, where the case seemed to be of sufficient importance." (pp. 328–29)

Throughout its history, from its earliest days to the present, the Commission has been charged with failing to fulfill this responsibility

imposed on it by Congress. Surveying its docket almost forty years ago, Henderson found:

> . . . that the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern. There is constant complaint of the crowded condition of the Commission's docket. It takes months to bring a case to a hearing, and additional months to reach a decision. (p. 337)

When the Task Force of the Hoover Commission made its study in 1949, it found that time had only aggravated the conditions described by Henderson in 1924:

> As the years have progressed, the Commission has become immersed in a multitude of petty problems. . . . The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving statutory objectives.
>
> In the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance. (pp. 125, 128)

It is common knowledge that the Commission is still beset by this problem. Its resources of manpower, money, and time are necessarily limited. The basis of selection of cases in which complaints are to be issued is thus of prime importance in determining how well the Commission does its job. Here, too, there operates a kind of Gresham's law. The trivial and inconsequential cases leave little room for, and tend to drive out, the substantial and significant.[3]

The public interest requires that the Commission not squander its resources by undertaking extensive and expensive formal proceedings where, as I believe is true here, the alleged violation arises out of a single, isolated, and extraordinary episode, having no significance beyond the particular circumstances, and where the violation is, at most, technical and legalistic in the invidious sense of those terms. It is error for the Commission to find initially that it is "to the interest of the public" to place such a case on its formal docket. It only compounds the error for it to fail to dismiss the complaint when

[3] A perceptive scholar has pointed out that a basic weakness of the agencies "is that they are so overburdened with interlocutory and final decisions in cases that they do not have time, energy, or perhaps inclination to face large policy issues. It must be easy in the framework within which commissions operate to succumb to the pressure of detail. Someone has suggested that the administrator should be forewarned that the most important business is often not that in the in-basket. There is also the warning to the administrator that a heavy volume of work in his in-basket may be an index of poor work assignment." Emmette S. Redford, *National Regulatory Commissions: Need for a New Look*, 1959, p. 15.

the case is subsequently brought before the Commission for review. Issuance of an order cannot be justified on the theory that it is now too late to undo what has been done, or that, after long and costly proceedings, the Commission would "lose face" if it rescinded its original action issuing the complaint. Failure to dismiss a complaint in such circumstances serves to encourage rather than discourage the bringing of insignificant cases that drain the Commission's capacity to proceed in the significant cases raising substantial issues of law or policy which, in the public interest and for the guidance of businessmen and the bar, the Commission should undertake to resolve. Just as courts abhor hard cases because they make bad law, administrative agencies should abhor petty cases because they make no law.

The courts, which have found it necessary to keep reminding the Commission of the statutory requirement that only those proceedings should be brought that are "to the interest of the public" (*e.g.*, *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 30), have understandably been reluctant to sit in judgment on the Commission's assessment of the public interest. Compare *Exposition Press, Inc.*, v. *Federal Trade Commission*, decided by the Court of Appeals for the Second Circuit, November 6, 1961, with *Moretrench Corp.* v. *Federal Trade Commission*, 127 F. 2d 792, 795 (C.A. 2). In the *Exposition Press* case, Judge Friendly thought the lack of public interest so clear that he dissented from affirmance of the Commission's order, stating that "the government funds that have been spent on this proceeding, not to speak of the diversion of energies from more worthwhile tasks, outran any possible public benefit by a tremendous margin." (Slip op., at p. 81.)

Whatever the scope of judicial review in this respect, it is the responsibility of the Commission, primarily and principally if not exclusively, to determine whether issuance of a complaint is in the public interest. This responsibility, confronting us as it does every day of the Commission's workweek, cannot be shirked in any spirit of good-natured accommodation or deference to institutional habits. If, as I believe, major change must be made in the criteria governing selection of cases on the Commission's docket, it is the Commission which must make it. Individual members of the Commission cannot publicly announce the fact of, and reasons for, dissent when particular complaints are issued. Hence I have thought it appropriate to express here my reasons for believing that this is not the kind of case in which the public interest is served by issuance of a complaint.

II

I turn now to this particular case, which arises under the Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. 69. The benefits which the public may derive from that statute, like other regulatory acts, depend largely on how it is interpreted and applied by the responsible agency. Through practical flexibility and reasonableness in administration, the statute can be a useful instrument for protecting the consuming public against deceptive selling practices. On the other hand, if administered with artificial rigidity and literalness, the statute can impose needless burdens on business with no compensating protection of the public.

The Commission has recognized this in administering the Fur Products Labeling Act. For example, Section 5(a) provides, in absolute and unqualified terms, that "a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement * * * which is intended to aid, promote, or assist directly or indirectly" in its sale fails to reveal (1) the correct animal name, or (2) that the fur is used, (3) bleached or dyed, or (4) includes in substantial part paws, tails, bellies, or waste furs, or (5) contains an erroneous animal name, or (6) fails to reveal the country of origin of any imported furs.

Disregarding the literal language, the Commission has—as a matter of fair and sensible administration—relaxed the requirements of the statute to avoid unnecessary severity. For example, under Rule 38(b) promulgated by the Commission the country of origin need not be shown in advertising a group of furs, so long as the advertisement states the following: "Fur products labeled to show country of origin of imported furs." Similarly, Rule 38(c) gives *carte blanche* to omit all of the information required by Section 5(a) of the Act, where the advertising is "of an institutional type." The examples given are:

"X Fur Company
Famous for its Black Dyed Persian Lamb Since 1900," or
"X Company
Manufacturers of Fine Muskrat Coats,
Capes and Stoles."

It is hard to reconcile the reasonable, flexible approach followed in Rule 38 with the formalistic, technical approach taken in the Commission's opinion in this case. How, from the standpoint of protecting consumers against deception, can we distinguish between an advertisement stating generally that X Fur Company is "famous" for its furs, and one, also in general terms, that it is having a sale of furs "at ⅓ off"? The former seeks to sell by pointing to a tradition of quality, the latter by advertising a general price reduction. But, obviously,

both advertisements are "intended to aid, promote, or assist directly or indirectly" in the sale of furs and thus fall within the literal language of Section 5(a).

In the case of the one advertisement, the Commission construes the statute not to require that specific and detailed information be contained in the ad as to each and all of the particular garments offered for sale. Why should it construe the statute differently in the case of the other advertisement? The rationale of Rule 38 is that neither the statute nor its policy of protecting consumers against deception in the sale of furs requires that such particularized information be stated in *general* advertising. I cannot see why the Commission should be reluctant to apply that rationale here. As I understand the Commission's position, as expressed both in Rule 38 and in its opinion in this case, it would permit an advertisement "X Fur Company—Seller of Furs" even though the ad does not specifically disclose that some of the furs are dyed, bleached, or artificially colored. However, if X Fur Company advertises "All furs in stock on sale at ⅓ off," the Commission would apparently hold omission of such specific information unlawful. There may be a distinction between the two advertisements, but—from the standpoint of responsible administration of a statute designed to safeguard purchasers from false advertising—where is the difference? [4]

Further, the Commission's finding of a fictitious-pricing violation rests on a most strained reading of the record. Disregarding the principle that a finding should be based on all the evidence taken as a whole, the Commission resorts to patching together a case out of discrete bits and pieces. The opinion states that "if Gimbel's had in the

[4] The majority opinion, pointing out that the statute here involved is not Section 5 of the Federal Trade Commission Act but the Fur Products Labeling Act, states that the latter is "specific" and does not afford the Commission "with the flexibility and latitude it has in the enforcement of Section 5 of the Federal Trade Commission Act." Significantly, the Commission stops short of denying that the Fur Act, like the Federal Trade Commission Act, is to be invoked in a formal proceeding only upon a determination that it would serve the public interest—a determination that, in my view, cannot be supported on these facts.

The Fur Products Labeling Act expressly states in Section 8(a) that its provisions "shall be enforced" by the Commission under the "procedure provided for in the Federal Trade Commission Act . . . in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act. . . ." Thus, it is irrelevant, for present purposes, that this proceeding was brought for violation of the Fur Act rather than Section 5 of the Federal Trade Commission Act.

Further, if the Fur Act deprives the Commission of "flexibility" and "latitude," how can we explain or justify the flexibility and latitude of administration reflected in Rule 38, which certainly cannot be reconciled with the "specific" provisions of Section 5(a) of the Fur Act. Have the "specific" provisions of Section 5(a) somehow become more specific since August 9, 1952, when Rule 38 (16 C.F.R. § 301.38) was promulgated by the Commission?

recent regular course of business sold production models of the advertised coats at the higher ('were') prices, its advertisement would be neither misleading nor deceptive." This, the opinion declares, is the "decisive point." As thus stated, there seems to be an implication, not expressly disavowed, that the burden was on Gimbel's to come forward with facts proving that the advertised price claims were truthful. It is elementary, however, that the burden was on Commission counsel to present evidence to substantiate the complaint's allegations that these claims were false and misleading.

The opinion labors mightily to overcome the deficiency of proof in the record on this issue. It states, on the one hand, that "[i]f the hearing examiner's conclusion that this issue was not met is correct, it would appear that he was instrumental in creating the hiatus" by stopping complaint counsel's cross-examination of a witness. This may have been error on the examiner's part, suggesting the possibility of a remand in order to amplify the record; but if there is a hiatus in the record as it now stands, we cannot properly find that a violation has been proved. But the Commission concludes, "on the basis of all the evidence," that "this issue was met." Its conclusion seems to rest on a dubious string of inferences drawn from remarks of the hearing examiner, silence by respondent's counsel, and an admittedly nonresponsive answer made by a witness. With all deference, I am bound to say that the obvious gap in the evidence on this issue, which it was the burden of Commission counsel to present, cannot be filled simply by stating, "on the basis of all the evidence," that it does not exist.

Finally, the "*seriatim*" treatment of the charges inflates the apparent importance of the case far out of proportion. The opinion states that the case is "primarily concerned" with a single newspaper advertisement. Actually, that advertisement, which appeared in the Philadelphia *Evening Bulletin* for September 29, 1959, is all there is in the case, despite the fact that respondent placed over 75,000 lines of newspaper advertising relating to fur products in the same year, and almost 65,000 in the previous year. And, as the hearing examiner found, the advertisement appeared as the result of a solitary act of inadvertance, contrary to respondent's elaborately enforced practice of scrupulous adherence to the statutory requirements in advertising furs. Moreover, the minor loophole in respondent's advertising procedures that then existed has long since been plugged by a requirement that all fur adds must now be cleared by a high-ranking official specifically

charged with responsibility for assuring compliance with the Act.[5]

The peculiar combination of circumstances that produced this particular advertisement is not likely to be repeated, and it is hard to see how the entry of a cease-and-desist order could have any substantial effect in making any such ads less likely in the future. The purpose of a cease-and-desist order is not to punish but to prevent future violations. If, as a practical matter, entry of an order will add little or nothing by way of prevention, how is the public benefitted?

The Commission's portrayal of respondent as having a proclivity for fur advertising violations is overdrawn. First, the stipulation under the Fur Act which it cites referred to Gimbel's of New York; this case arose out of an advertisement by Gimbel's Philadelphia store. The record indicates, as respondent's counsel stated at the oral argument, that Gimbel's various stores "are pretty much autonomously operated with respect to advertising and merchandising policies." Even more important, the stipulation (No. 9245, approved November 24, 1959) did not deal with advertising at all, but only with labeling and invoicing. It is true, in a general sense, that labeling is often considered a part of advertising, insofar as it may assist in selling the product. But both the Fur Act and our orders issued under it treat labeling, invoicing, and advertising as distinct matters.

Moreover, when respondent has shown, as it has here, that its procedures for screening advertising (as distinguished from invoicing and labeling) negate the likelihood of future advertising violations, it is no justification for a cease-and-desist order directed only against *advertising* to show that there is a danger of future invoicing or labeling violations. Conversely, since there is no proof here of invoicing or labeling violations, we have no reason to doubt respondent's assurance that it has scrupulously conformed to the terms of the stipulation. Apparently, then, the Commission infers a propensity to disobey one

[5] The hearing examiner made the following finding:

"Following the publication of this advertisement, and prior to the issuance of the complaint in this case, respondent tightened its policy rules by requiring all fur advertisements to be cleared through the office of the Assistant to the Comptroller of the Philadelphia store, this office being charged with responsibility for the store's compliance with all matters involving governmental regulations. The record shows that respondent has on many occasions conferred with Federal Trade Commission personnel for interpretations and suggestions, and has always complied with the suggestions and recommendations received. The respondent has adopted and maintains a firm policy to comply with the laws and regulations administered by the Federal Trade Commission, and has periodically so instructed its employees. This, the respondent asserts, is motivated to accord with the company's interest in maintaining good customer relationships. It was also stated in the record that it was and is against company policy to use the word 'were' in comparative pricing advertisements, and that 'were' had never been so used prior to September 29, 1959, and has not been so used since that time."

provision of the law from irrelevant facts which may even suggest a propensity to obey another.[6]

III

I do not mean to suggest by what I have said that the Commission should stand idly by, ignoring violations of law simply because they are of relatively minor significance. To object to swatting flies with a sledge-hammer is not to object to swatting them at all. The Commission is not confined to a choice between "issue a complaint" or "file and forget." The genius of the administrative process is that it affords flexibility of action in dealing with problems. The Commission may determine, for example, that although formal adjudicative proceedings would involve a disproportionate expenditure of resources, the law and the public interest would be fully served through some other kind of administrative action, *e.g.*, informal or voluntary compliance procedures, rulemaking, industry guidance, publicizing reports or studies, reference to other federal or local agencies also having jurisdiction in the matter, etc.

In his *Exposition Press* dissent, Judge Friendly characterized the opinion of Mr. Justice Brandeis in the *Klesner* case as "a summons to the Commission to do what it had been created to do, to get on with 'the great purpose of the act,'. . . ." (Slip op., at p. 81). Today's decision suggests that that summons is still timely.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on May 13, 1960, issued and subsequently served its complaint in this proceeding upon respondent, charging it with violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In the initial decision filed January 31, 1961, the hearing examiner held that none of the complaint's allegations were sustained and ordered it entirely dismissed.

The Commission having considered the appeal by complaint counsel, the opposition thereto by respondent and the entire record in this proceeding, and having determined that the initial decision should

[6] The irrelevance of stipulations entered under other statutes, mentioned by the Commission, is even more apparent; they tell us nothing of Gimbel's fur merchandising practices and they support no inferences concerning the likelihood of future fur advertising violations, since Gimbel's procedures for screening fur ads are separate and distinct.

be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Gimbel Brothers, is a corporation organized under the laws of the State of New York, with its principal office located at 34th Street and Broadway, New York, N.Y.

2. Gimbel Brothers is primarily a department store retailer selling to the public a wide variety of goods, including women's fur-trimmed coats. Respondent's department stores are located in several sections of the country, including New York, N.Y.; Milwaukee, Wis.; and Pittsburgh and Philadelphia, Pa.

3. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondent has been, and is now, engaged in the introduction into commerce and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has 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 said Fur Products Labeling Act.

4. To aid, promote and assist it in the sale of its fur products, respondent causes advertisements prepared by it to appear and be disseminated in newspapers having substantial circulation in states other than the states in which respondent's stores are located. One such newspaper utilized by respondent is *The Evening Bulletin*, which is published in Philadelphia, Pa., but has wide circulation in other states, including the State of New Jersey.

5. This matter is primarily concerned with an advertisement which respondent caused to appear in said *The Evening Bulletin* edition of September 29, 1959. The following is a reproduction of the advertisement in question: (See p. 362a)

6. The women's coats depicted and described in the advertisement are fur products as that term is defined in Section 2(d) of the Fur Products Labeling Act.

7. Among the coats offered for sale in the advertisement in question were coats trimmed with dyed white fox and natural Norwegian blue fox. The correct names of the animals which produced the furs on these coats are not disclosed by the advertisement in question.

8. Among the coats offered for sale in the advertisement in question were coats trimmed with dyed mink, beaver, and white fox furs. The

fact that said furs were bleached, dyed, or otherwise artificially colored is not disclosed by the advertisement.

9. Among the coats offered for sale in the advertisement were coats trimmed with beaver which originated in Canada and natural blue fox which originated in Norway. Respondent did not disclose in the advertisement the countries of origin of said imported furs. The foreign origin disclosure made in another of respondent's advertisements which appeared on an adjoining page of the newspaper referred only to the furs advertised in that advertisement and was insufficient to inform the public of the foreign origin of the fur products offered in the advertisement in question.

10. The coats depicted and described in the advertisement were purchased by respondent from several manufacturers at prices one-third less than the prices charged by said manufacturers to other retailers for production models of the same coats. The coats depicted and described in the advertisement were not production models but were samples individually made to show to prospective wholesale buyers.

11. The prices at which the advertisement in question offered the coats to the public, that is, "now" prices, reflected respondent's customary markup for goods of this type of 66⅔ percent of its purchase cost and resulted in its receipt of its customary profit of approximately 40 per cent of the retail price.

12. Respondent had not in the recent regular course of its business sold sample coats of the type described in its advertisement or production model coats patterned after said sample coats at the higher "were" prices set out in said advertisement.

13. Through use of the terminology "⅓ off" and the words "were" and "now", respondent represented, contrary to fact, that the higher "were" prices set out in its advertisement were the regular or usual prices charged by respondent for fur products of the type depicted in the advertisement in the recent regular course of its business. Through use of said terminology, it represented and implied contrary to fact that customers purchasing the fur products offered at the "now" prices would effect an approximate 33⅓ per cent saving from the prices at which respondent had sold similar fur products in the recent regular course of its business.

14. Respondent has maintained records disclosing the facts upon which its pricing representations are based consisting solely of the invoices of the manufacturers from whom the advertised coats were purchased. Said records do not support the price respresentations made in respondent's advertisement.

CONCLUSIONS

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

2. This proceeding is in the public interest.

3. The aforesaid acts and practices of the respondents are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and, as specified under the provisions of said Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

4. The charge made in paragraph 5 of the complaint that respondent had not maintained full and adequate records disclosing the facts upon which its pricing claims were based was not sustained and the hearing examiner's dismissal of this charge was proper and correct.

ORDER

It is ordered, That respondent, Gimbel Brothers, a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, 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. 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:

1. Fails to disclose:

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

(b) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur;

(c) The name of the country of origin of any imported furs contained in a fur product.

2. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of business.

3. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

It is further ordered, That the charge made in paragraph 5 of the complaint be, and it hereby is, dismissed.

It is further ordered, That respondent, Gimbel Brothers, 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.

By the Commission. Commissioner Elman dissenting.

IN THE MATTER OF

S. KLEIN DEPARTMENT STORES, INC.

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

Docket 7891. Complaint, May 16, 1960—Decision, Feb. 23, 1962

Order dismissing charges that a New York City department store made deceptive pricing and savings claims, misrepresented the fiber content of merchandise, and failed to disclose when products were irregular in newspaper advertising.

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 S. Klein Department Stores, Inc., a corporation, hereafter referred to as 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 S. Klein Department Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at Union Square, New York, N.Y.

PAR. 2. Respondent is now, and at all times material hereto has been, engaged in the business of operating department stores selling merchandise to the public in competition with other corporations, firms and individuals also engaged in selling to the public merchandise of the same nature. Respondent owns and operates department stores located in the cities of New York, Westchester, and Hempstead, in the State of New York, and in Newark, in the State of New Jersey.

PAR. 3. In the course and conduct of its business respondent has been and is engaged in disseminating and in causing to be disseminated in newspapers of interstate circulation, and in radio and television broadcasts of interstate transmission, advertisements designed and intended to induce sales of its merchandise and that of its concessionaires. The amount expended by respondent upon such advertising is approximately one million dollars per year.

PAR. 4. Among and typical, but not all inclusive, of the statements appearing in the advertisements described in paragraph 3 are the following:

Save 50%
Cuban Revolt Stops
Mattress Export—Shipment
* * *
Made to retail at 39.50—19.99
" " " " 59.50—29.99
" " " " 79.50—39.99
From one of the Nation's best known
makers—save $25.05
Thomas Cotton Sport Coats
Made to retail at $35.00—9.95
Roto-Broil Rotisseries
Made to retail at $69.95 29.99
Callaway's "Profile"
Cannon's "Checker" Bath Towels
Made to retail at $1.29—69¢
Full 4½ to 5 ft. Aluminum and
Frosted Glass Tub Enclosures
$89.95 Value—39.95
Cultured Pearl Necklaces & Chokers
All hand knotted!
All with 14 Kt. white gold clasps.
Guaranteed equal to $15 necklaces
and chokers 5.99
Guaranteed equal to $20 necklaces
and chokers 8.99
Guaranteed equal to $30 necklaces
and chokers 12.99
Guaranteed equal to $45 necklaces
and chokers 19.99
Cashmere Sweater Event!
Precious mink on Cashmere Sweaters
sold nationally at $89 to $139—$50
Long sleeve cardigans * * * nationally
sold at $22.95 to $26.95—$10.00
2 to 15 cup Automatic Coffee Percolators
List price $24.95 7.99
12 Automatic Skillets

List price 19.95 7.99
Natural Mink Stoles & Capes * * *
Made to retail at $299 to $329 . . . . $189 * * *
Pure Silk Costumes
Made to retail at 25 to 35.00 11.00

PAR. 5. Through the use of the amounts in connection with the words and terms "list", "sold nationally at", "value" and "equal to", the respondent represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in its trade area, and through the use of said amounts and the lesser amounts that the differences between said amounts represented a saving to the purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use of the amounts in connection with the words and terms "made to retail at" and "save" the respondent represented that said amounts were the prices at which it usually and customarily sold the merchandise referred to in the recent, regular course of business and through the use of the said amounts and the lesser amounts that the differences between said amounts and the lesser amounts represented savings from the prices at which the merchandise referred to had been sold by respondent in the recent, regular course of its business.

Through and by the use of the words "Pure Silk" in describing its costumes offered for sale respondent represented that said costumes were composed of 100% silk fibers.

PAR. 6. The aforesaid representations were false, misleading and deceptive.

In truth and in fact, the amounts set out in connection with the words "list", "nationally sold at", "value" and "equal to" were in excess of the prices at which the articles of merchandise referred to were usually and customarily sold at retail in respondent's trade area and the difference between such amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been usually and customarily sold in respondent's trade area.

In truth and in fact, the amounts set out in connection with the words "made to retail at" and "save" were in excess of the prices at which the articles of merchandise referred to had been sold by respondent in the recent, regular course of its business and the difference between said amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been sold by respondent in the recent, regular course of its business.

The costumes described as "Pure Silk" did not contain any silk fibers.

PAR. 7. Respondent advertises and sells merchandise which is known as "seconds" or "irregulars" without disclosing such fact in the advertising of such merchandise or in connection with the merchandise itself. Such merchandise is of less value than first class merchandise, and, in the absence of a disclosure that it is "seconds" or "irregulars", it is believed to be, and is accepted by the public as, first class merchandise.

PAR. 8. The use by respondent of the foregoing false, misleading and deceptive statements and representations had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondent's merchandise because of such mistaken and erroneous belief. The failure of respondent to disclose the facts as alleged in paragraph 7 had the tendency and capacity to lead the public into the erroneous and mistaken belief that the merchandise referred to therein was first class and into the purchase thereof because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has thereby been done to competition in commerce.

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

Mr. Frederick J. McManus and *Mr. Garland S. Ferguson* supporting the complaint.

Paul, Weiss, Rifkind, Wharton & Garrison, by *Mr. Jay H. Topkis* and *Mr. Peter M. Fishbein*, of New York, N.Y., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on May 16, 1960, charging it with having engaged in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by (a) misrepresenting the prices of, and the savings to be realized on, certain merchandise advertised for sale by it, (b) misrepresenting the fiber content of certain of said merchandise, and (c) failing to reveal that certain of said merchandise was

irregular. After being served with said complaint respondent appeared by counsel and thereafter filed its answer denying, in substance, that it had engaged in the illegal conduct charged.

Prior to the holding of any hearings herein respondent moved to dismiss the complaint for failure to allege facts sufficient to sustain the jurisdiction of the Commission. After the hearing of oral argument on said motion on August 30, 1960, the examiner to whom this proceeding was then assigned denied such motion by order dated September 15, 1960. An interlocutory appeal to the Commission from said order of the hearing examiner was denied by order of the Commission issued November 18, 1960.

The undersigned was substituted as hearing examiner on October 10, 1960, after the hearing examiner theretofore assigned to hear this proceeding disqualified himself from further participation therein. Hearings on the complaint were held in abeyance pending the outcome of a suit by respondent for an injunction against the hearing examiner and the members of the Federal Trade Commission in the United States District Court for the District of Columbia. Hearings were thereafter held on various dates between April 5, 1961, and June 1, 1961, in Washington, D.C., and New York, N.Y. At such hearing testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. A motion by respondent at the end of the case-in-chief to dismiss the complaint, for insufficiency of proof and lack of jurisdiction, was denied by the undersigned examiner at the hearing held May 10, 1961. Proposed findings of fact and conclusions of law were filed by counsel supporting the complaint and by counsel for respondent on July 19, 1961, and a supporting memorandum of law was filed by respondent on said date.

After having carefully reviewed the entire record in this proceeding and the proposed findings and conclusions [1] and the supporting memorandum filed by respondent, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following:

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[1] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

FINDINGS OF FACT

I. The Business of Respondent

1. Respondent S. Klein Department Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at Union Square, New York, N.Y.

2. Respondent is now, and for a number of years has been, engaged in the business of operating department stores selling merchandise to the public in competition with other corporations, firms and individuals also engaged in selling to the public merchandise of the same nature. Respondent owns and operates department stores located in New York City, Westchester County and Hempstead in the State of New York, and in Newark, N.J. During the fiscal year 1958 respondent's sales were in excess of $84,000,000.

3. In the course and conduct of its business respondent has been and is engaged in disseminating and in causing to be disseminated, in newspapers having a substantial interstate circulation, advertisements designed and intended to induce sales of its merchandise and that of the concessionaires who operate certain of its departments. The amount expended by respondent upon such newspaper advertising is approximately $3,000,000 a year.

4. Respondent has questioned whether the mere solicitation of customers in newspapers of interstate circulation is a sufficient showing of interstate commerce, for purposes of sustaining the Commission's jurisdiction, in the absence of evidence of actual sales of merchandise in commerce pursuant to such solicitation. The Commission has already ruled that it has jurisdiction, under these circumstances, in its order denying respondent's interlocutory appeal in this proceeding. A similar ruling was subsequently made by it in its decision in *Bankers Securities Corp.*, Docket 7039, December 1, 1960. Aside from the fact that the examiner is bound by these rulings, he entertains no doubt as to the Commission's jurisdiction under the facts alleged.

It is well settled that the transmission of intelligence for commercial purposes across state lines is interstate commerce. *International Textbook Co.* v. *Pigg*, 217 U.S. 91. This has been held to include trade in news and the circulation of newspapers across state lines. *Associated Press* v. *U.S.*, 326 U.S. 1; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178. It also includes the advertising of products for sale in publication which are circulated in commerce. *Lorain Jour-*

nal Co. v. *U.S.*, 342 U.S. 143. The case relied upon by respondent, *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U.S. 436, is of doubtful application in view of the Supreme Court's subsequent holding in the *Lorain Journal* case. It may also be noted that *Blumenstock* was based on the line of cases which held that insurance policies were not articles of commerce, and that the making of contracts pertaining thereto was merely incidental to commerce. However, these cases have since been overruled in *U.S.* v. *Southeastern Underwriters Ass'n.*, 322 U.S. 533.

The fact that the Wheeler-Lea Amendment to the Federal Trade Commission Act specifically makes the interstate advertising of foods, drugs, devices and cosmetics illegal is not as suggested by respondent, indicative of a Congressional interpretation that the Commission did not previously have jurisdiction over the interstate advertising of these products. The legislative history of the amendment makes it clear that its sponsors regarded the Commission as already having jurisdiction under these circumstances, but that they wished to give it the additional power of injunctive relief in the case of products where there was imminent danger to life and limb. Aside from the legislative history, the fact that Congress considered it necessary to spell out advertising, in commerce, as being illegal may just as readily be ascribed to an overabundance of caution on its part, considering the then uncertainty in the state of the law (some of the cases cited above, including *Southeastern Underwriters* having not yet been decided), as to an intention to enlarge the Commission's jurisdiction. Certainly there is no affirmative evidence of any Congressional intent to limit the Commission's jurisdiction over the interstate advertising of other products.

In the opinion of the examiner a showing that the goods advertised by respondent moved in commerce is not an essential element of the offense. The gravamen of the charge is the use of misrepresentation in the advertising of the product, not in the actual sale which occurs thereafter. The act, practice or method of competition charged to be unfair or deceptive is the use of false advertising claims in inducing sales, rather than the sales themselves. If the act or practice charged to be unfair occurs in commerce the Act has been violated, without a showing that the act or practice has resulted in a sale in commerce. It is concluded and found that, in disseminating and causing to be disseminated advertisements in newspapers which circulate in commerce, respondent is engaged in commerce, within the meaning of the Federal Trade Commission Act.

II. The Alleged Illegal Practices

The Issues

1. The principal issue involved in this proceeding is whether respondent has misrepresented the comparative prices of certain of the products which it advertised for sale, and the savings which would be realized on the basis of such prices. In advertising many of its products for sale respondent uses what is generally referred to as comparative price advertising, i.e., it compares its price with some supposedly more usual selling price. The comparison in most of the advertisements involved in this proceeding is between the price at which the merchandise was purportedly "Made to Retail" and the price at which it was actually offered for sale by respondent. In some of the advertisements the comparison is with the price at which the product purportedly was "sold nationally", or with the product's "list price" or its "value".

2. In connection with respondent's comparative price claims, there is raised a basic issue as to what certain of the comparative price statements used by respondent mean, particularly its reference to a "made to retail" and a "list" price. In addition, there is presented the issue whether such prices are, in fact, bona fide prices for purposes of reflecting the savings to be realized.

3. The complaint also charges respondent with two other forms of deceptive advertising, (a) misrepresenting the fiber content of certain garments and (b) failing to reveal that certain merchandise was irregular. There is no serious issue of fact in connection with these two advertisements, respondent's primary contention in this regard being that there is no public interest involved.

"Made To Retail At"

4. There is no dispute as to the fact that in a number of its advertisements respondent stated that the product in question was "made to retail at" a specified price, and then indicated the price at which it was actually being offered for sale. For example, it advertised that certain men's sport coats were "made to retail at $35.00", followed by a statement of the actual price at which the coats were being offered, viz, "$9.95". Counsel supporting the complaint and respondent are in sharp disagreement as to what is meant by the phrase "made to retail at". The complaint alleges that "made to retail at" means the price at which respondent itself "usually and customarily sold the merchandise referred to in the recent, regular course of business". Respondent contends, on the other hand, that this language means "either (a) that the manufacturer expected that the merchandise

would retail at the 'made to retail price', or (b) that *other* retailers had actually sold the merchandise at the 'made to retail' price."

5. No evidence was offered by counsel supporting the complaint as to how the consuming public would interpret an advertisement by a retail store which stated that a product was "made to retail" at a particular price. To support their position as to the meaning of this phrase Government counsel rely entirely on the decision of the Commission in *American Broadloom Carpet Co.*, 53 FTC 239, in which the Commission purported to uphold the finding of its hearing examiner that—

> * * * respondent's use of such terms as "original" and "woven to sell for" could reasonably be interpreted as representing that the prices represented in connection therewith were customary and usual with respondent.

It should be noted, in connection with the *American Broadloom Carpet* case, that the finding made there was based on the record in that case, which disclosed that respondent used the term "original", as well as "woven to sell for", in its advertisements. Furthermore, while the examiner (whose findings the Commission purported to uphold) did, on the one hand, suggest that "woven to sell for" amounted to a representation that the product was customarily sold at the indicated price by respondent, he also found (at 244):

> Upon examination respondent was unable to produce any suggested retail price made by any manufacturer, mill or supplier with whom he dealt for the reason that none such were ever printed or communicated to him, nor did any supplier furnish respondent with any information which would justify the representation of "woven to sell for," *which very language imports that the producer of the merchandise, at the time of production, intended, designed and produced it to "sell for" the figure quoted.* [Emphasis supplied.]

Whether the Commission intended to hold that "woven to sell for" means the price "the producer of the merchandise at the time of production, intended, designed and produced it to 'sell for' ", or the price the retail outlet advertising the product customarily and usualy sold it for, is not clear from the decision. In any event, the finding in that case, based on the record there before the examiner and the Commission, cannot serve as the basis for a finding in this case concerning the meaning of the phrase "made to retail at".

6. The only evidence in the record concerning the meaning of the phrase "made to retail at" in connection with a comparative price claim, is that given by respondent's advertising manager, who testified that he interpreted it to mean the price suggested by the manufacturer of the product "where it is sold in other stores or destined to be sold in other stores at the historic markup" or, stated differently, that it is

"somewhat of a suggested retail price, with the addition that it is customarily sold at that price". It may be noted that while the complaint asserts, and counsel supporting the complaint contend, that the "made to retail" price refers to the price at which the product is customarily and regularly sold by the retailer so advertising it, counsel supporting the complaint in a number of instances have not seen fit to rely entirely on this theory to establish a case of price misrepresentation. Instead of showing merely that respondent had not customarily sold the product at the indicated "made to retail" price, counsel sought to establish in a number of instances that the price was not one which had been recommended by the manufacturer and that the product customarily did not sell at the indicated price in the trade area.

7. The examiner recognizes that the Commission is not required to sample public opinion in order to determine how the consuming public would interpret certain words in the English language. However, where the meaning contended for is not that which is implied by the normal usage of the word or phrase, such meaning must be established by substantial, reliable and probative evidence. In this case the examiner, based on a substantial number of years as a Federal Trade Commission hearing examiner, cannot ascribe to the phrase "made to retail at" any such meaning as that contended for by counsel supporting the complaint. Based on his own so-called expertise and ordinary common sense the examiner, in the absence of evidence to the contrary, finds that the phrase would imply to members of the purchasing public that it is a price at which the manufacturer contemplated the product would be sold to the public, taking into consideration the normal and customary markup in the industry. This implies, as respondent's advertising manager recognized, not merely a subjective element of what the manufacturer had in mind, but also the objective element that the product normally sells for that price in the market. The latter is a very necessary element in the meaning of the phrase since, by giving the public the "made to retail" price and the actual price of the advertiser, the advertiser is conveying to the consumer the impression that he will achieve an actual saving from a bona fide comparative price. The consumer is not interested in fictitious saving from some artificial "made to retail" price which has no meaningful relationship to the realities of the market.

8. Respondent suggests that if the examiner does not accept the meaning of the phrase "made to retail at" which is alleged in the complaint, viz, it means the price at which the advertiser customarily sells the product, the complaint must be dismissed as to the items so adver-

tised. This by no means follows. As above indicated, counsel supporting the complaint attempted to show, in a number of instances, that the products were not made to sell at the indicated prices and did not sell at such prices in respondent's trade area. Respondent attempted in a number of such instances to show to the contrary. The issue was thus clearly joined and litigated, even though the complaint incorrectly alleged the meaning of the term "made to retail at". Whether respondent's products were or were not "made to retail at" the indicated prices is reserved for later discussion, in connection with each of the various items of merchandise involved in the complaint.

"Sold Nationally At"

9. One of the advertisements challenged by the complaint refers to the merchandise in question as being "sold nationally at $22.95 to $26.95" and offers it for sale at $10.00. The complaint alleges, and counsel supporting the complaint contend, that to advertise a product as being "sold nationally at" a certain figure is to represent that this is the price at which the merchandise usually and customarily is sold in the trade area where it is being offered for sale. In the opinion of the examiner the phrase in question means exactly what it says, viz, that this is the price at which the product is generally sold in the United States. This does not imply, however, that it necessarily sells at this price in each and every trade area of the United States or that it may not be sold at lower prices in a few trade areas.

"List Price"

10. Several of the advertisements used by respondent refer to a "list price" of the product in question and then give respondent's actual sale price. The complaint alleges and counsel supporting the complaint contend that, by referring to a "list price", respondent is implying that the product in question is usually and customarily sold at that price in the trade area where it is being offered for sale. Respondent, on the other hand, seeks to give the phrase a more restricted meaning, viz, that it "means only that the price named is that which appears on the manufacturer's price list."

11. In the opinion of the examiner, a reference to a "list price" in comparative advertising implies more than that the indicated price is a price appearing on a manufacturer's schedule of suggested prices. It also implies that the listed price bears a realistic relationship to the price at which the product normally sells. A list price schedule is not unlike the use of a pre-ticketing device by a manufacturer. If a price ticket contains an artificial price which does not reflect the price at which the article normally sells, it has been held that the

manufacturer is guilty of supplying an instrumentality for deception concerning the normal selling price of the product.[2] A manufacturer who uses and distributes price lists which he has reason to believe do not reflect bona fide retail selling prices is in no different position than a manufacturer who uses and distributes fictitious price tickets.[3] A retailer who uses an artificial list price in comparative price advertising is in no better position than is the manufacturer.[4]

Respondent suggests that list prices are used in the New York area merely to help the consumer identify the product, in a manner similar to the use of a model number. While there is some testimony to this effect, principally by respondent's officials, the greater weight of the evidence is to the contrary. A retailer of appliances, to whose testimony respondent refers, actually testified that customers "very rarely" identified a product by reference to a list price. An official in respondent's appliance department testified that: "The list price, as I understand it, is the price that the manufacturer lists it and *also what some people sell it at*" (emphasis supplied). It is significant that, in advertising a rotisserie appliance, respondent used "list price" and "made to retail at" interchangeably. In connection with the phrase "made to retail" respondent has recognized, as discussed above, that there is involved an element of customary selling price, in addition to merely an indication of the price proposed by the manufacturer. It seems apparent that by using the terms "list price" and "made to retail" interchangeably respondent has indicated that it interprets both of these terms as having a similar meaning.

It is apparent from the whole context of the advertising in question that the reference to a "list price" implies that such price bears some reasonable relationship to the actual going price of the product. The whole purpose of the advertisement is to create the impression that the customer is going to make a substantial saving by buying from Klein. Respondent's basic modus operandi is to try to convince the consumer that he or she is going to get a "bargain". As respondent's advertising manager testified:

> Very simply it is Klein's business to sell bargains. We have nothing else to offer outside of offering the fashions *at the lowest prices in town against other stores that sell at regular prices * * *. We have only bargains to offer.* [Emphasis supplied.]

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[2] *The Orloff Co., Inc.*, 52 FTC 709; *Kay Jewelry Stores, Inc.*, 53 FTC 548; and *The Baltimore Luggage Company*, Docket 7683, March 15, 1961.

[3] *Art Nat'l Manufacturers Distrib. Co.*, Docket 7286, May 10, 1961; *Goodyear Tire & Rubber Co.*, 33 FTC 298.

[4] *Sears, Roebuck & Co.*, 33 FTC 334.

The customer obviously does not believe he is getting a bargain because respondent's price is below some theoretical "list price" appearing on a piece of paper issued by a manufacturer. To him the use of a list price, together with an advertised selling price, obviously implies that the difference between the two represents a realistic measure of the bargain he is being offered and the savings he can achieve. It is, accordingly, concluded and found that by the use of the term "list price" respondent represents that the amount indicated is the price at which the product usually and customarily sells in the trade area where it is being advertised, and that the difference between said amount and the amount at which the product is advertised for sale represents, substantially, the saving which will be realized by the customer over the customary selling price.

"Value" and "Equal To"

12. The other two terms used by respondent in comparative price advertising are "value" and "equal to" both of which, according to the complaint, constitute a representation that the product referred to usually and customarily sells at the indicated amount in the trade area where it is so advertised. Respondent apparently does not question that this is the normal meaning of these terms. It is, accordingly, concluded and found that by the use of amounts in connection with the terms "value" and "equal to" respondent represents that said amounts are the amounts at which the merchandise referred to is usually and customarily sold at retail in its trade area, and that through the use of such amounts and the lesser amounts at which the products are advertised for sale, it represents that the difference between such amounts represents, substantially, the savings to the customer from the prices at which said merchandise was usually and customarily sold in said trade area.

The Falsity of the Price and Savings Claims

"Made To Retail At"

(a) Mattresses

13. On January 1, 1959, and January 14, 1959, respondent advertised certain mattresses for sale in the New York Daily News and the New York Post, respectively. The advertisement in each case contained the statement: "Cuban Revolt Stops Mattress Export Shipment", and indicated that the mattresses, of which there were three grades, had been "*made to retail at*" prices from $39.50 to $79.50, respectively. They were advertised as being for sale by respondent at prices from $19.99 to $39.99, respectively. The only evidence offered to establish the falsity of respondent's "made to retail" price

claims is that respondent itself had never theretofore or did not thereafter, down to the date of the complaint, ever sell any of the mattresses at the so-called "made to retail" prices.

14. It is the opinion and finding of the examiner that counsel supporting the complaint have failed to establish the falsity of respondent's comparative price claims concerning the mattresses in question. As heretofore indicated, a representation that a product was "made to retail at" a certain price is not a representation that the retailer offering it actually ever sold it at that price, but rather that the manufacturer intended it to be sold at that price and that it did in fact generally retail at the indicated price. There is no evidence in the record as to what price the manufacturer intended to sell the mattresses for or that they did not generally sell at the specified "made to retail" prices.

(b) "Thomas" Cotton Sport Coats

15. On May 25, 1959, and May 26, 1959, repondent advertised certain " 'Thomas' Cotton Sport Coats" for sale in the New York Daily News and the New York Mirror, respectively. The advertisements stated that the coats had been "*made to retail at $35.00*", and offered them for sale at $9.95, indicating that the purchaser would "Save $25.05". Counsel supporting the complaint did not limit his proof merely to the fact that Klein's had not previously sold the coats at $35.00, but sought to establish that $35.00 was not the then market price of the coats.

16. The record discloses that the coats in question had originally been advertised for sale by the manufacturer in 1956 and 1957 for $35.00, and that they had generally been retailed at that price throughout the country. During this period the manufacturer had sold the coats to retailers at $19.75. Based on a markup of 35% to 40%, which was stated to be normal in the retail trade, and taking into account the dealer's selling costs, the coats usually sold at $35.00, although there is evidence that one retailer in New York sold them at $27.50. By 1959 the manufacture of this particular design coat had been discontinued, and the manufacturer sold his remaining stock of about 390 coats, consisting of broken sizes and odd lots, to respondent for $7.35 apiece.

17. It seems evident that by May 1959 the going retail price of "Thomas" cotton sport coats was no longer $35.00, but considerably less than that amount. They had originally been made to retail at $35.00, but that was no longer the current "made to retail" price. There can be no question but that a statement that a product is "made to retail at" $35.00, implies that it is the current price, otherwise the claim that the consumer will save $25.05 is meaningless. Clearly,

in the absence of a statement to the contrary, a prospective purchaser would assume that this is the current price and that he is buying a current model.

18. Respondent's apparent justification for using the $35.00 "made to retail" price in its advertising is that the manufacturer had given it a copy of an advertisement in which the coat was advertised as being for sale at "about $35.00", and had advised it that that was what the coats "originally sold for". Respondent contends that it did not then know that the coats were not currently being sold for $35.00. However, the manufacturer's representative testified that he told respondent's official that the advertisement in question had been run in 1956 and 1957. There can be no question from all the circumstances surrounding the transaction that respondent was aware it was dealing in a discontinued model, which was not then selling for $35.00. Even if it was not actually aware of this fact, it was under an affirmative obligation to ascertain the true facts if it wished to make a representation to the public in its advertising matter, as to the comparative price and savings on the product. This obligation to the public could not be fulfilled merely by obtaining a copy of a manufacturer's advertisement, for the record so to speak, and disregarding the facts as to whether this was actually the price at which the product was then being sold in the market.

19. It is concluded and found that respondent's representations in connection with advertising "Thomas" cotton sport coats were false, misleading and deceptive in that the price which said advertisement stated was the price at which said coats were "made to retail" did not represent the price at which such coats were then usually and customarily selling at retail in respondent's trade area, and in that the difference between said price and the price at which said coats were advertised for sale by respondent did not represent an actual saving from the price at which such coats were usually and customarily being sold in respondent's trade area.

(c) Roto-Broil Rotisseries

20. In an advertisement appearing in the New York Daily News of January 12, 1959, respondent advertised "Roto-Broil '400' Rotisseries" as being "made to retail at $69.95", and offered said product for sale at $29.99. The same rotisseries were offered for sale in a series of advertisements appearing in the Newark Evening News, the New York Mirror and The Newark Star-Ledger dated, respectively, March 31, 1959, and April 3, 1959. In all of the latter ads the product was stated to have a "list price" of $69.95, rather than a "made to retail" price, and it was offered for sale at $28.99.

21. The record discloses that the roto-broiler in question, was the manufacturer's "Golden Capri" model and that the manufacturer's list price was $69.95 at the time it was so advertised. According to the credited testimony of the merchandise manager of respondent's hard goods division, at the time the product was advertised as being "made to retail at" and as having a "list price" of $69.95 he had seen the manufacturer's price list and had actually priced the product at several stores in the area at $69.95.

22. The only evidence to show that the roto-broiler was not "made to retail at" or did not have a $69.95 "list price" is the testimony of a New York retailer, called by counsel supporting the complaint, to the effect that he had sold the product for about $40.00. However, the same witness also indicated that he tried to get and did sometimes get $69.95 for the broiler, and that he usually sold it for between $47.00 to $48.00.

23. In the opinion of the examiner the testimony of the single retailer called by counsel supporting the complaint does not destroy the effectiveness of the evidence which discloses that the product did actually list at $69.95 and that it was being sold at that price in various stores in the New York area. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the roto-broil rotisseries advertised by respondent for $29.99 and $28.99 were not "made to retail at" or did not have a "list price" of $69.95.

(d) Mink Stoles and Capes

24. In an advertisement in the New York Mirror of March 4, 1959, respondent advertised "Natural Mink Stoles & Capes" as having been "*made to retail at $299 to $329*", and offered them for sale at $189. Respondent's fur department is actually operated by a concessionaire, but the advertisement is in the name of respondent. No question has been raised as to respondent's responsibility for the advertisement of products sold by its concessionaires.

25. The only evidence cited by counsel supporting the complaint as establishing that the furs had not been "made to retail at $299 to $329" is the testimony of respondent's fur concessionaire that the particular furs advertised had never previously been sold by him for any price other than for the sale price of $189. However, the testimony of the same witness indicates that the furs in question had been purchased specially for this particular sale, and that he had sold comparable furs prior thereto at prices ranging from $249 to $299. He further testified that the furs in question had been purchased at

a price of $167.50, and that he had been advised by the manufacturer that similar furs were being sold to others at $195.00 to $225.00 and that at the normal retail markup such furs would sell at from $299 to $329. The concessionaire also shopped a number of his competitors, including Macy's, Arnold Constable and Abraham & Straus, to ascertain that comparable furs were selling at the prices indicated by the manufacturer. There is no evidence in the record to contradict the testimony of respondent's concessionaire and it is, accordingly, credited.

26. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the mink stoles and capes advertised by respondent, as above indicated, were not made to retail at $299 to $329.

(e) Pure Silk Costumes

27. In advertisements appearing in the New York Post and the New York World-Telegram on April 13, 1959, respondent advertised certain "Pure Silk Costumes" as having been "*made to retail at $25.00 to $35.00*", and offered them for sale at $11.00. Counsel supporting the complaint assert that respondent never sold the advertised costumes at any price other than $11.00. However, the record fails to establish this as a fact. Furthermore, as heretofore discussed, the fact that respondent never sold the product at the indicated price does not establish that the representation as to a "made to retail" price is false, misleading and deceptive.

28. The only evidence in the record as to what the dresses in question actually sold for in the market is the uncontradicted and credited testimony of the head buyer in respondent's dress department that dresses of the type advertised were being sold for $25.00 to $35.00 in "the Fifth Avenue stores and all the fine shops around the country". It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the representation made by respondent as to the "made to retail" price of the silk garments in question is false, misleading and deceptive.

(f) Cannon Towels

29. Respondent advertised Cannon bath towels in the New York Daily News of April 27, 1958, as being "*made to retail at $1.29*", and offered such towels for sale at 69¢. The same advertisement is the subject of a separate charge in the complaint, in which it is alleged that respondent failed to reveal that the towels were seconds or irregulars.

30. There is no evidence in the record whatsoever as to what the "made to retail" price of the advertised towels were, either as first

goods or as seconds. The gravamen of this charge actually is the failure to reveal the irregular nature of the towels, rather than any misrepresentation as to the price thereof. This charge will be separately dealt with hereinafter. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the representation made by respondent as to the "made to retail" price of the Cannon towels advertised by it is false, misleading and deceptive.

(g) Tub Enclosures

31. In a series of advertisements in the New York Sunday and Daily News appearing on various dates between November 16, 1958, and May 31, 1959, respondent advertised certain "Aluminum and Frosted Glass Tub Enclosures" as being "made to retail at $89.95", and offered such tub enclosures for sale at $39.95 (except in the advertisement of May 31, 1959, in which sale price the tub enclosure was stated to be $29.95). Respondent also advertised the same tub enclosures in the New York Times of November 9, 1958, for $39.95 but instead of using the phrase "made to retail at $89.95" it used the expression "$89.95 value".

32. The evidence discloses that the tub enclosures in question were purchased by respondent's concessionaire directly from the manufacturer, Anoroc Products, Inc., of Corona, New York. Anoroc's price list of February 9, 1959 (which antedates a number of the advertisements in evidence), discloses that the two models sold to respondent, the "Champion" and the "De Luxe", had a retail "list price" of $59.95 and $69.95, respectively. While the February 1959 price list may have been somewhat lower than the previous price list, neither of the tub enclosures in question had ever been listed for $89.95.

33. The testimony of a representative of Buildcraft Products, a major distributor of Anoroc tub enclosures in the New York metropolitan area, discloses that he sold the De Luxe tub enclosure in 1959 for $70.00, which included an installation fee of approximately $10.00. The price of the door advertised by respondent, it may be noted, did not include installation, the advertisement indicating that this was available for a separate charge of $10.00.

34. The testimony of a competing manufacturer of tub enclosures reveals that his enclosures, which are of a heavier and better quality than Anoroc's De Luxe enclosure, sell for $85.00, including an installation fee of approximately $10.00, and had sold for that price for approximately three years, including 1959. The same manufacturer testified that the Anoroc tub enclosures were midway in price between

his more expensive enclosures and certain lower-priced enclosures sold by a group of Florida manufacturers, it being his testimony that the highest price for which the De Luxe Anoroc tub enclosure had sold was $70.00.

35. Respondent's justification for using an $89.95 "made to retail" price is based partly on a self-serving letter dated June 30, 1959 (subsequent to the insertion of all but one of the advertisements in question), written by respondent's own concessionaire to respondent, stating that four named retailers were selling the Anoroc tub enclosure (models not identified) "at $89.95 and higher". One of the dealers mentioned in the letter is Buildcraft Products, whose representative testified that he sold the De Luxe tub enclosure for $70.00, including a $10.00 installation charge. Respondent's concessionaire also testified vaguely that he had been told by the manufacturer's salesman that the enclosure sold "anywhere from $50.00 to $125.00, but it averaged up somewhere around $80.00 or $90.00", and that he had also checked with a representative of his competitor, Korvette, who, while he did not sell the door for $89.95, "knew of people selling it for that".

36. The examiner is satisfied from the record as a whole that the maximum retail price on the De Luxe enclosure was $70.00, including installation, and at least $10.00 less on the Champion tub enclosure. The examiner is also satisfied that respondent made no bona fide effort to ascertain the going price on the tub enclosures when it advertised them. It could readily have obtained a price list which would have disclosed that the De Luxe enclosure listed for $69.95 and the Champion for $59.95. It was not until November 1959, when a Commission investigator showed respondent's concessionaire the manufacturer's price list, that respondent changed its advertised "made to retail price" to $69.95. Even this price was excessive since it was the list price of the De Luxe tub enclosure and, according to the testimony of respondent's concessionaire, it was the less expensive Champion enclosure which was being advertised and sold. The $69.95 price was even excessive as to the De Luxe enclosure, which was being sold for that price installed.

37. It is concluded and found that respondent made false, misleading and deceptive statements concerning the Anoroc tub enclosures advertised by it, in that the amount set out in connection with the words "made to retail at" and "value" was in excess of the price at which such tub enclosures were intended to sell by the manufacturer, and did usually and customarily sell, in the New York metropolitan area, and in that the difference between such amount and the lesser amounts at which they were advertised for sale did not repre-

sent the actual savings from the prices at which such merchandise had usually and customarily sold in respondent's trade area.

List Prices

(a) Percolators and Skillets

38. Respondent caused to be disseminated in the New York Daily News of February 18, 1959, an advertisement in which it offered for sale at $7.99 automatic coffee percolators having a purported "*list price*" of $24.95, and automatic skillets having a purported "*list price*" of $19.95. The evidence discloses that in 1959 when these items were being advertised, Merit Enterprises, Inc., the manufacturer from which respondent purchased them, had no list prices. The bulk of the manufacturer's sales (about 75%) was to discount-type operations such as respondent, including Davega, Korvette, and Master's, which sold these items at retail at from $8.00 to $11.95. A smaller percentage of the manufacturer's sales was to house-to-house canvassers, who sold the percolators at a maximum price of $19.95. Another indeterminate percentage of the manufacturer's sales was to catalog houses, which sold these items to industrial accounts for use as prizes.

39. As partial justification for the use of the list prices referred to above, respondent relies on a letter from the manufacturer's sales representative stating that the automatic coffee percolator "is selling around the country for $25.95" and, further, that a named distributor in Brooklyn had been selling it "for over a year for $25.95". This letter, it may be noted, is dated July 9, 1959, approximately five months after the percolators had been advertised by respondent, and does not refer to the price of the skillets. The distributor mentioned in the letter is a house-to-house selling organization, not a regular retail outlet, a fact concerning which respondent was informed by the manufacturer's sales representative. Respondent relies further on the fact that the prices indicated in its ads as the list prices were stamped on the cartons in which the articles were enclosed.

40. As has heretofore been found, when a "list price" is used in comparative advertising, it means more than a price appearing on some document issued by a manufacturer. It is partially that, but it also represents, as far as the consumer is concerned, a price which bears some reasonable relationship to the going price in the market. It seems clear from the record as a whole that respondent made no real effort to ascertain what the percolators and skillets were selling for in the market and, at best, was merely trying to take advantage of some technical price appearing on a carton, which price was substantially above the normal selling price of the products advertised.

The manufacturer itself had already abandoned the use of price lists, and approximately three-fourths of its products was being sold by establishments like respondent's for substantially below the represented list prices.

41. It is concluded and found that respondent made false, misleading and deceptive statements concerning the percolators and skillets advertised by it in that the amounts set out in connection with the words "list price" were not contained in any current price list of the manufacturer and were in excess of the prices at which these articles of merchandise were usually and customarily sold at retail in respondent's trade area, and in that the difference between such amounts and the lesser amounts for which the articles were advertised did not represent the actual savings which would be realized from the prices at which the merchandise had been usually and customarily sold in respondent's trade area.

"Equal To" and "Value"

(a) Pearl Necklaces and Chokers

42. In the New York Times issues of August 23, 1959 and November 15, 1959, respectively, respondent caused to be disseminated advertisements for "Cultured Pearl Necklaces & Chokers". In the issue of August 23, 1959, said pearls and chokers were offered for sale in four different price brackets, viz, $5.99, $8.99, $12.99 and $19.99, and were represented as being "guaranteed equal to" necklaces of $15.00, $20.00, $30.00 and $45.00, respectively. In the issue of November 15, 1959, cultured pearls and chokers were offered for sale in six different price brackets and were represented as being "guaranteed equal to" necklaces selling at substantially higher specified prices.

43. Counsel supporting the complaint offered evidence with respect to a single strand of pearls which had purportedly been purchased for $12.99 pursuant to respondent's advertisement of August 23, 1959, and which was allegedly represented as being "guaranteed equal to" pearls selling at $30.00. Before considering the evidence relating to the issue of whether the pearls in question were or were not equal to $30 pearls, there is presented a threshold question as to whether the record contains sufficient reliable evidence that the pearls were actually purchased from respondent pursuant to the advertisement in question. This preliminary issue arises from the fact that the person who had purportedly purchased the pearls was deceased at the time of the hearing, and the circumstances of the purchase were testified to by a Commission attorney-investigator, to whom they had been related by the deceased.

44. According to the Commission's attorney-investigator, the pearls were turned over to him on August 25, 1959, together with a copy of the advertisement by respondent in the New York Times of August 23, 1959, by one Benjamin Richter, a retail jeweler. Richter advised the Commission representative that he had purchased the pearls from respondent's establishment pursuant to the advertisement in question. Affixed to the pearls, by a metal clasp, is a tag bearing the name "S. Klein" and a price of "$12.99 + Tax". Included in the box in which the pearls were enclosed is a guarantee certificate containing the printed signature "GEMMARIUS" and stating that the "certificate is your guarantee that each pearl in this necklace is a *cultured pearl.*" Sometime between the date when he turned over the exhibit to the Commission representative and the date of the hearing, Richter died.

Respondent contends that the testimony of the Commission representative is hearsay, both as to the fact that Richter purchased the pearls from it and the fact that he did so pursuant to its advertisement of August 23, 1959. Accordingly, it contends that the testimony offered by other witnesses called by counsel supporting the complaint to establish that the pearls were not "equal to" $30.00 is immaterial since it relates to a string of pearls which is not properly in the record.

Respondent is, undoubtedly, correct that the testimony of the Commission investigator, based on what Richter reported to him, is hearsay. It does not follow, however, that such testimony may not properly be made the basis of a finding in this proceeding. Hearsay evidence may be received in evidence under the more liberal rules which apply in administrative proceedings and, where the circumstances vouch for its reliability, may be made the basis for a finding. In this case the surrounding circumstances are such, in the opinion of the examiner, as to vouchsafe the reliability of the hearsay testimony.

The pearls bear respondent's price tag thereon, and the amount on the tag, $12.99, conforms with the price in respondent's advertisement in the New York Times of August 23, 1959. The pearls, together with the advertisement, were turned over to the Commission investigator only two days after the advertisement had appeared. Although the concessionaire who operates respondent's jewelry department was called as a witness, as well as the buyer assisting him in his operation, and both testified at the instance of respondent concerning the value of the pearls in question, neither denied that the pearls were theirs or that they were not the pearls which had been offered in the adver-

tisement in question. No claim was made by either witness that the price tag was not theirs, or that the metal clasp by which it was attached to the pearls had been tampered with, or that the guarantee certificate was different from the one that accompanied their pearls. In view of Richter's death these two witnesses were in the best position to question the authenticity of the pearls and whether they had been offered pursuant to the advertisement in question. It is concluded and found that the pearls in evidence were purchased by Richter for $12.99, pursuant to an advertisement which represented that they were "guaranteed equal to $30.00".

45. The next question presented is whether the pearls were equal in value to $30.00 pearls. According to the testimony of two importers of pearls who were called as witnesses by counsel supporting the complaint, the pearls would have sold for between $5.00 and $6.00 at wholesale in 1959. The same two witnesses indicated that the usual retail markup in the industry is 100 per cent, so that the pearls would have sold at retail for between $10.00 and $12.00, with $15.00 being the outside limit of their retail value at that time. This testimony, if accepted, would mean that the $30.00 "guaranteed equal" price advertised by respondent was grossly in excess of the price at which pearls of this quality would sell in the market.

46. Respondent questions the expert judgment of the two witnesses called in support of the complaint because of an alleged discrepancy between the amounts which they testified certain other pearls shown to them by respondent on cross-examination were worth, in comparison with the actual retail prices at which such pearls were allegedly purchased by a witness acting on behalf of respondent. In the opinion of the examiner the facts relied upon by respondent are not a sufficient justification for concluding that the two importers called by counsel supporting the complaint were not qualified experts as to the value of the pearls at issue, and for disregarding their testimony concerning the retail value of such pearls. Both of the witnesses appeared to have a good grasp as to what it is that contributes to the value of a cultured pearl necklace and what makes one necklace more expensive than another. Neither one had heard the testimony of the other or discussed his testimony with the other; yet their estimates as to the wholesale and retail value of the pearls at issue were substantially in line with one another. The mere fact that several other strings of pearls shown to them on cross-examination were purchased by one of respondent's witnesses at retail for prices above those estimated by the two expert witnesses does not destroy the efficacy of their testimony.

It may be noted in this connection, that they were actually shown six strands of pearls on cross-examination. None of these pearls were actually strung in the same manner as they would be when offered for sale at retail, with a clasp affixed thereto. Each of the experts gave an estimate as to the wholesale value or price of each strand. Their estimates as to the price of each were, with one exception, substantially close to one another. Respondent's contention that their estimates are not valid is based on the fact that in three out of the six instances the estimates were substantially below those at which the pearls in question were actually purchased by its representative in department stores in the New York midtown area. In the opinion of the examiner, it is just as logical to attribute these variances to an above average markup in the three stores in question, as it is to conclude that the differences point to a lack of familiarity with prices and values by the experts. It is significant, in this connection, that in the case of the fourth strand of pearls purchased in a smaller jewelry establishment, the estimate of one of the experts was almost exactly the same as the actual retail purchase price.

In any event, the primary issue is the going value or price of the strand of pearls which is the subject of the charge in this proceeding. On this score, the testimony of both experts, as above found, is in substantial accord. It is also worthy of note that respondent produced no reliable countervailing evidence with respect to the value of these pearls.[5] Even the testimony of the two witnesses whom respondent called with respect to the value of the pearls establishes that the pearls were somewhat overvalued by respondent in its representation that they were "guaranteed equal to $30.00". The testimony of the buyer for respondent's concessionaire was to the effect that the pearls would have sold for $25.00 in 1959. While the concessionaire himself testified that the pearls would sell for $30.00 on the present market, the testimony of respondent's other witness and that of the two witnesses called in support of the complaint indicates that as a result of a scarcity

[5] Respondent sought to introduce in evidence a written estimate of the "approximate retail replacement cost" of the pearls in question at the present time. According to this proposed evidence, $30,00 would represent the approximate retail replacement cost of the pearls. Such evidence was obtained by one of respondent's attorneys, who had exhibited the pearls to an appraiser of pearls. The evidence was excluded by the undersigned as being hearsay. It may be noted, in this connection, that the situation is substantially dissimilar to that discussed above with respect to the hearsay evidence pertaining to the purchase of the pearls in question by Richter. No justification was given by respondent for not producing the person who had actually appraised the pearls, other than the alleged expense that would be involved in his testifying. Since the hearsay evidence involved the very fact at issue, viz, the retail price or value of the pearls, and there was no legal justification for the non-production of the alleged expert, and there were no circumstances vouchsafing its reliability, the examiner considered it improper to receive such evidence, particularly in the light of the fact that counsel supporting the complaint had already produced "live" evidence as to their value.

in the availability of cultured pearls the market price today is anywhere from 20% to 40% above that of 1959.

47. In justification of its use of the "guaranteed equal to" prices advertised by it, respondent cites the testimony of the operator of its jewelry concession to the effect that before fixing the prices in question, he had shopped four midtown Manhattan department stores and two jewelry stores.[6] This, in the opinion of the examiner, does not justify the use of comparative prices which the record establishes were in excess of the usual and customary prices throughout the area. When respondent seeks to make a representation as to comparative prices and savings, it cannot take refuge behind a mere sampling of prices in a few other establishments, particularly where it represents that the prices which it is using for comparative purposes are "guaranteed" to be equal to such usual and customary prices.

48. It is concluded and found that respondent made false, misleading and deceptive statements concerning certain of the cultured pearls and chokers advertised by it, in that the amount of $30.00 set out in connection with the words "guaranteed equal to" was in excess of the price at which certain of such pearls and chokers usually and customarily sold at retail in the New York City trade area, and the difference between such amount and the price at which such pearls and chokers were advertised for sale did not represent the actual savings which would be realized by the consumer.

(b) Tub Enclosures

49. As above found, respondent advertised certain aluminum and frosted glass tub enclosures as being "made to retail at $89.95", and offered such tub enclosures for sale at $39.95. In one advertisement that appeared in the New York Times of November 9, 1958, it represented that such tubs were an "$89.95 value", and offered them for sale at $39.95. It has already been found that $89.95 was considerably in excess of the price at which such tubs customarily and regularly sold in the New York trade area. As previously found, by advertising said tub enclosures as having an "$89.95 value" respondent misrepresented the usual and customary price of such tub enclosures in the New York trade area and the savings to be realized by the consumer in the purchase thereof.

"Nationally Sold At"

50. In the New York Times of June 28, 1959, respondent caused to be disseminated an advertisement for cashmere sweaters containing

[6] In the case of the department stores, the witness apparently examined what he considered to be comparable pearls in the establishments. However, in the case of the two jewelry stores he merely "window-shopped" the pearls.

the statement that such sweaters were "nationally sold at $22.95 to $26.95", and offering the sweaters for sale at $10.00. Immediately below the price the advertisement contained the following statement: "(marked 'irregular' only because of this famous maker's extremely high standards of perfection)".

51. The evidence offered by counsel supporting the complaint establishes that the sweaters of the manufacturer in question normally do retail for between $22.95 and $27.95. The basis of the claim by counsel supporting the complaint that the sweaters do not customarily sell for $22.95 to $26.95, as represented, is not based on the falsity of the price claims, as such, but on the fact that the price claims were applicable to perfect sweaters, and that the advertisement does not sufficiently reveal that the advertised sweaters are imperfect.

52, The gravamen of the charge concerning the sweaters is the failure to make a conspicuous disclosure of the imperfect nature thereof, rather than any falsity in the price claims. This failure to disclose is the subject of a separate charge, which will hereinafter be separately discussed. In the opinion of the examiner the question of whether the fictitious price charge has been sustained depends on the outcome of the charge of failure to disclose. It may also be noted, however, that there is no evidence as to the nature of the alleged irregularity of the sweaters or as to the fact that such alleged irregularity would materially affect the normal selling price of such sweaters.

The Failure To Reveal Irregularity of Merchandise

(a) Cannon Towels

53. As heretofore found, respondent in the New York Daily News of April 27, 1959, caused to be disseminated an advertisement for Cannon bath towels. Said towels were, in fact, seconds or irregulars. This fact was in no way disclosed in the advertisement. The price tags affixed by respondent do contain a legend which respondent states is the abbreviation of irregular, viz, "IRR". Actually, this abbreviation looks more like the figure one with the additional letters RR slightly above the figure, so that it is by no means clear that it is the abbreviation of irregular. In any event, the failure to reveal in the advertisement itself the fact that the towels offered were irregular, is misleading and deceptive since, in the absence of such revelation, the public would ordinarily assume that it is first-class merchandise. "The law is violated if the first contact * * * is secured by deception * * * even though the true facts are made known to the buyer before he enters into the contract of purchase" (*Carter Products, Inc.* v. *FTC*, 186 F. 2d 821, 824, CA7, 1951).

(b) Cashmere Sweaters

54. As above found, in the New York Times of June 28, 1959, respondent caused to be disseminated an advertisement for cashmere sweaters, in which there appears a statement that such sweaters are "irregular". Counsel supporting the complaint contend that the fact that such sweaters were irregular is not adequately disclosed in the advertisement. Such contention is apparently based on the fact that the words, "(marked 'irregular' only because of this famous maker's extremely high standards of perfection)", do not appear in letters sufficiently large to be noticeable by the consuming public.

55. The complaint, in paragraph 7 thereof, charges respondent with advertising merchandise "which is known as 'seconds' or 'irregular' without disclosing such fact in the advertising of such merchandise". In paragraph 3 of the bill of particulars served and filed by counsel supporting the complaint, pursuant to order of the undersigned, counsel supporting the complaint identified the merchandise involved in this charge as follows:

> The merchandise referred to in paragraph 7 of the complaint consisted of "Cannon" towels.

At no time did counsel supporting the complaint request leave to broaden the charge, as specified in the bill of particulars, so as to include the failure to conspicuously reveal the irregular nature of the cashmere sweaters. This charge as alleged in the complaint and specified in the bill of particulars is limited to Cannon towels, and involves a failure to disclose rather than an inadequate disclosure. It may also be noted that while the complaint quotes from the advertisement in question, it refers only to that portion dealing with price and makes no mention of the portion dealing with irregularity.

56. As above indicated, the advertisement does contain a reference to the irregular nature of the cashmere sweaters. This appears immediately below the statement of the price at which the sweaters are offered. While it is true that the reference to the irregular nature of the sweaters appears in letters much smaller than other portions of the advertisement, it does appear in a conspicuous place, and the examiner cannot find on this record that it is so unclear and inconspicuous that it would not generally be observed by the purchasing public. Under all the circumstances, it is the conclusion of the examiner that no finding may appropriately be made that respondent falsely and deceptively advertised its cashmere sweaters by failing to conspicuously reveal the irregularity thereof, particularly in view of the failure of the pleadings, as amplified, to clearly challenge this advertisement.

Misrepresentation as to Pure Silk Costumes

57. Respondent caused to be disseminated in the New York Post and in the New York World-Telegram of April 13, 1959, advertisements for "Pure Silk Costumes" at $11.00. These advertisements have already been discussed above, in connection with the misleading price claims allegedly made in such advertisements. The complaint also charges such advertisements to have been deceptive by reason of the fact that the costumes described as "Pure Silk" contained some nonsilk garments.

58. The record establishes that between 20% to 30% of the dresses advertised as being "Pure Silk" were, in fact, made of other fibers. One of the nonsilk garments was purchased, in response to the advertisement, by a witness called in support of the complaint. The garment in question was found, on inspection by the purchaser, to contain a label indicating that it was 80% dacron and 20% flax. It is the position of respondent that the advertisements were not misleading because (a) they revealed the fact that there were nonsilk costumes in the group and (b) the garments themselves were all plainly marked as to fiber content and the racks on which they were sold in the store made no claim as to fiber.

59. In the opinion of the examiner the facts referred to by respondent do not constitute a proper defense. While the advertisement does contain the statement that the selection "also includes cotton hopsacking dresses with lined embroidered jackets, pure silk polka-dot bouffants and other born-to-be-praised original designs", this reference appears in small print in an inconspicuous position in the advertisement where it would be apt to be overlooked by many prospective purchasers. It may be noted, in this connection, that the advertisement in the New York Post not only includes the words "Pure Silk Costumes" in large bold type, but under this phrase there also appears in type almost as large a reference to "Pure Silk Linen-Type Textures", "Pure Silk Shantungs" and "Pure Silk Prints". In this context, the reference to other fabrics is clearly inconspicuous. Furthermore, the only other nonsilk fabric referred to in the advertisement is "cotton hopsacking". There is no reference to dacron and flax fabrics, which is the composition of the garment in evidence. The fact that the garments themselves are properly labeled or that the racks on which they were being displayed contained no reference to "pure silk" is immaterial since, as above indicated, it is the initial impression created by the advertisement which controls (*Carter Products* v. *FTC*, *supra*).

60. It is concluded and found that the representation made by respondent, in advertising which it disseminated or caused to be disseminated, that certain garments were "Pure Silk" was false, misleading and deceptive in that a certain number of said garments were not, in truth and in fact, silk or made entirely from silk.

CONCLUSIONS

1. The use by respondent of the false, misleading and deceptive statements and representations hereinabove found to have been made by it had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and into the purchase of substantial quantities of respondent's merchandise because of such mistaken and erroneous belief. The failure of respondent to disclose the fact that certain of the merchandise advertised and sold by it was what is known as "seconds" or "irregulars" had the tendency and capacity to lead the public into the erroneous and mistaken belief that the merchandise referred to therein was first class and into the purchase thereof because of such erroneous and mistaken belief. As a result thereof, it may be inferred that substantial trade in commerce has been unfairly diverted to respondent from its competitors, and substantial injury has thereby been done to competition, in commerce.

2. The acts and practices of respondent, as hereinabove found, were, and are, all to the prejudice and injury of the public and of respondent's 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.

THE REMEDY

1. Respondent contends that even if the record does establish some instances in which certain products were falsely advertised by it, it is not in the public interest to issue a cease and desist order in this proceeding. It relies, in this connection, on the fact that out of 75,000 to 100,000 items which it advertises per year, the Commission challenged only 40 to 50 items during the course of investigating it and that the complaint itself challenges a lesser number of items, with evidence being offered only as to some of the items challenged in the complaint. It relies further on the fact that it seeks to check carefully its advertising claims, particularly those as to comparative prices, and that its basic advertising policy is "to be as near absolute truth as we can get", recognizing that philosophically "there is no absolute truth".

2. The fact that evidence was offered only as to a relatively small proportion of the items advertised by respondent and that the charges in the complaint have been sustained as to an even smaller number of the items is, in the opinion of the examiner, wholly immaterial. The Commission is not required to sample respondent's advertising claims *in extenso* or to challenge any specific number of advertisements. The law does not require respondent to advertise its products, nor does it require it to make any claims, comparative or otherwise, with respect thereto. If respondent elects to do so, as indeed it has a right to, it is, in effect, a guarantor that the claims it makes are truthful. It has not fulfilled its duty to the public merely because the greater proportion of its advertisements are truthful or, indeed, because 99.9% of its advertisements are truthful. It can comply with the law only when its representations are 100% truthful.

3. Respondent's contention that it seeks through its advertising procedures to "be as near the absolute truth as we can get", is no defense. In the first place, the evidence discloses that its purported efforts to check its advertising claims, particularly as to comparative prices, are somewhat exaggerated, lacking in thoroughness and not necessarily calculated to insure complete truthfulness in its pricing claims. Secondly, as above indicated, it is not enough as far as the Federal Trade Commission Act is concerned "to be as near the absolute truth" as one can get. While it may be that in matters of philosophical disputation one can never be assured of "absolute truth" a commercial establishment which seeks to make comparative pricing and other claims must be sure that its claims are 100% truthful. It must undertake whatever procedures are necessary to insure that the claims it makes are fully sustained. Only thus can it fulfill its obligation to the public.

4. While it is true that the complaint has been sustained as to only a small portion of the items advertised by respondent, the pattern of misrepresentation is such as to indicate that it is more than sporadic or *de minimis*. Furthermore, there is no assurance from the evidence in this record that such violations as have been revealed will not reoccur. It is the conclusion and finding of the examiner that the public interest requires the issuance of an order to cease and desist to prevent a reoccurrence of the activities herein found to be illegal.

ORDER

It is ordered, That respondent S. Klein Department Stores, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise, do forth-

with cease and desist from disseminating, or causing to be disseminated, directly or indirectly, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which:

1. Represents, directly or by implication, that:

(a) Any amount is the price of merchandise in respondent's trade area when it is in excess of the price at which said merchandise has been usually and customarily sold in said trade area.

(b) Any saving is afforded in the purchase of merchandise from the usual and customary price in a trade area unless the price at which it is offered constitutes a reduction from the price at which said merchandise has been usually and customarily sold in said trade area.

(c) Merchandise is composed of 100% silk fibers, when such is not the fact, or misrepresenting, in any manner, the fiber content of merchandise. Provided, however, that nothing in (c), above, shall relieve the respondent from the obligation to comply with the Textile Fiber Products Identification Act or forbid the respondent from labeling and offering products subject to that Act in the manner prescribed thereby and the Rules and Regulations promulgated thereunder by the Commission.

2. Misrepresents, in any manner, the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of merchandise has been reduced from the price at which it is usually and customarily sold in the trade area where the representation is made.

3. Uses the words or terms "made to retail at" and "save", "list", "value", "equal to", or any other words or terms of the same import, to refer to prices of merchandise unless such amounts are the prices at which the merchandise has been usually and customarily sold in the trade area where the representation is made.

4. Offers for sale merchandise which is composed of irregulars or seconds unless such fact is clearly disclosed in the advertising and in connection with said merchandise.

It is further ordered, That the complaint be, and the same hereby is, dismissed insofar as it alleges that the respondent made false, misleading and deceptive representations through the use of the words "nationally sold at" and the setting out of amounts in connection therewith, and insofar as it alleges that respondent made false, misleading and deceptive representations as to the prices at which it had sold certain merchandise in the recent, regular course of business and as to the savings which would be afforded from such prices.

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the hearing examiner's initial decision, and the Commission having considered the briefs and oral argument:

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

By the Commission, Commissioners Kern and MacIntyre dissenting.

IN THE MATTER OF

OHMLAC PAINT & REFINING CO., INC., ET AL.

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

Docket 8081. Complaint, Aug. 19, 1960—Decision, Feb. 24, 1962

Order requiring a seller of paint products in Long Island City, N.Y., to cease misrepresenting its prices in newspaper advertising by such statements as "2 for 1 Sale—Buy one gallon or quart—Get One Free", "Quality Paint at Factory Prices", etc., when the customary retail prices were substantially lower than the amounts listed, two gallons were always sold for $6.98, the price specified for one, and the advertised prices were two to four times as much as factory prices.

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 Ohmlac Paint & Refining Co., Inc., a corporation and Charles A. Jacobs, individually and as an officer of Ohmlac Paint & Refining Co., Inc., and Betty Jordan Paint Factories, Inc., a corporation, and Irving Rubin, Sidney Jacobs and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., 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 as follows:

PARAGRAPH 1. Respondent Ohmlac Paint & Refining Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is an officer of Ohmlac Paint & Refining Co., Inc., and his address is the same as that of said corporate respondent. Respondent Betty Jordan Paint Factories, Inc., is a corporation organized, existing and doing