IN THE MATTER OF

HELENE CURTIS INDUSTRIES, INC., ET AL.

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

Docket C-227. Complaint, Sept. 11, 1962—Decision, Sept. 11, 1962

Consent order requiring Chicago manufacturers of equipment for use by beauty shop operators, to cease representing falsely in brochures, pamphlets, circulars, and other advertising literature that their "Tahitian South Seas" and "Magic-Aire Gold Star" hair dryers employed a new method of hair drying, were "air-conditioned", had a wider temperature range than was the fact, and were "Fully 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 Helene Curtis Industries, Inc., a corporation, and Central Beauty Equipment Company, Inc., a corporation, and Willard Gidwitz and Gerald Gidwitz, individually and as officers of said corporations, 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. Corporate respondents Helene Curtis Industries, Inc., and Central Beauty Equipment Company, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their offices and principal places of business located at 4401 West North Avenue, Chicago, Ill. Corporate respondent Central Beauty Equipment Company, Inc., is a wholly owned subsidiary of corporate respondent Helene Curtis Industries, Inc.

Willard Gidwitz and Gerald Gidwitz are officers of the respondent corporations. They formulate, direct and control the policies, acts and practices of the said corporate respondents. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, sale and distribution of equipment, for use by beauty shop operators, including electric hair dryers. The said hair dryers, under various brand names including "Magic-Aire Gold Star" and "Tahitian South Seas", are sold to beauty shop operators and to distributors for resale to beauty shop operators.

PAR. 3. In the course and conduct of their business respondents cause, and have caused, their products, when sold, to be transported from their place of business in the State of Illinois to purchasers and distributors thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents at all times mentioned herein have been, and now are, in substantial competition with corporations, firms and individuals engaged in the sale of hair dryers of the same general kind and nature as those sold by respondents.

PAR. 5. Respondents in the course and conduct of their said business, and for the purpose of inducing the purchase of their products, advertise the same by means of brochures, pamphlets, circulars and other advertising literature. The following are among and typical of the statements made in said advertising:

A new air-conditioned dryer that sells at conventional dryer prices

* * * * * * *

The South Seas Tahitian never needs reactivation

* * * * * * *

At last an entirely new concept in hair drying

* * * * * * *

Now you can give every patron the cool comfort, sheer luxury of air conditioned drying at the price you would expect to pay for a conventional hot air dryer

* * * * * * *

Automatic temperature control . . . permits operator to select the perfect temperature—from room temperature to 130°

* * * * * * *

Fully guaranteed—including a service warranty.

PAR. 6. Through the use of said advertisements and others similar thereto, not specifically set out herein, respondents have represented and are now representing directly and by implication:

1. That the "Tahitian South Seas" hair dryer:

(a) Employs a new method of hair drying;

(b) Is "air-conditioned", that is, that it furnishes cool dry air rather than hot humid air to the user's hair and that it removes moisture from the air;

(c) Under normal operating conditions furnishes hot air within a temperature range from room temperature to 130°.

2. By the use of the words "Fully guaranteed" in the advertising of their said product, that the entire product is guaranteed by them in every respect.

PAR. 7. Through the use of said advertisements and others similar thereto, not specifically set out herein, respondents Helene Curtis Industries, Inc., and Willard Gidwitz and Gerald Gidwitz individually and as officers of said corporate respondent, have represented and are now representing directly and by implication:

1. That the "Magic-Aire Gold Star" hair dryer:

(a) Employs a new method of hair drying;

(b) Is "air-conditioned", that is, that it furnishes cool dry air rather than hot humid air to the user's hair and that it removes moisture from the air;

(c) Under normal operating conditions furnishes hot air within a temperature range from room temperature to 130°.

2. By the use of the words "Fully Guaranteed" in the advertising of their said product, that the entire product is guaranteed by them in every respect.

PAR. 8. In truth and in fact:

1. The Tahitian South Seas and Magic-Aire Gold Star hair dryers:

(a) Are not a new type of hair dryer nor do they employ a new concept in hair drying, nor do they constitute a new discovery in hair drying;

(b) Are not "air-conditioned", do not furnish cool dry air to the user's hair, and do not remove moisture from the air;

(c) Do not permit operation from room temperature to 130°. The temperature control thermostat employed in each of these hair dryers is only calibrated from 91° through 128°.

2. The guarantees provided with the "Tahitian South Seas" and the "Magic-Aire Gold Star" hair dryers do not guarantee the entire product in every respect, but are limited both as to time and extent. Moreover, service charges and transportation charges are made for repairs or adjustments, which fact is not disclosed in respondents' advertisements.

For the foregoing reasons, the statements and representations set forth in paragraphs 6 and 7 are false, misleading and deceptive.

PAR. 9. The use by the respondents of the foregoing false, misleading and deceptive statements has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' hair dryers by reason thereof.

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 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, Helene Curtis Industries, Inc., and Central Beauty Equipment Company, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their offices and principal places of business located at 4401 West North Avenue, Chicago, Ill. Corporate respondent Central Beauty Equipment Company, Inc., is a wholly owned subsidiary of corporate respondent Helene Curtis Industries, Inc.

Respondents Willard Gidwitz and Gerald Gidwitz 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 Helene Curtis Industries, Inc., a corporation, and its officers, Central Beauty Equipment Company, Inc., a corporation and its officers and Willard Gidwitz and Gerald Gidwitz, individually and as officers of said corporations, and respondents' repre-

sentatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hair dryers in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication:

(*a*) That said hair dryers are so equipped that they can remove moisture from the air they furnish to the user, unless specifically limited to models of said hair dryers which are in fact equipped to remove moisture from the air;

(*b*) That said hair dryers furnish cooled or dried air to the user's hair, unless specifically limited to models of said hair dryers which do in fact furnish cooled or dried air to the user's hair;

(c) That said hair dryers will furnish hot air to the user at any temperature outside the range actually afforded by their heat control thermostat.

2. Using the term "air-conditioned" to describe said hair dryers or representing in any other manner that said hair dryers are air conditioned, unless specifically limited to models of said hair dryers which furnish cool, dried air to the user's hair.

3. Representing directly or by implication that any operating principle of any of respondents' hair dryers, or any component of such hair dryers, which is not new or based on a new discovery or a new application to hair dryers of a known principle is new or based on a new discovery or application.

It is further ordered, That respondents, Helene Curtis Industries, Inc., a corporation, and its officers, Central Beauty Equipment Company, Inc., a corporation, and its officers and Willard Gidwitz and Gerald Gidwitz, individually and as officers of said corporations and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hair dryers or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that any product is guaranteed unless all of the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

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.

Complaint

IN THE MATTER OF

JOHN H. GINSBACH DOING BUSINESS AS ALAMO FRUIT DISTRIBUTORS, LTD.

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

Docket C-228. Complaint, Sept. 11, 1962—Decision, Sept. 11, 1962

Consent order requiring a Texas fruit packer to cease violating Sec. 2(c) of the Clayton Act by paying commissions or discounts on a large number of purchases of citrus fruit by brokers and direct buyers for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent John H. Ginsbach is an individual doing business as Alamo Fruit Distributors, Ltd., with his office and principal place of business located in Alamo, Texas, with mailing address as P. O. Box 1025, Alamo, Texas.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter referred to as citrus fruit or fruit products. Respondent sells and distributes his citrus fruit through company salesmen, brokers and wholesalers, as well as direct to customers located in many sections of the United States. When brokers are utilized in making sales for him, respondent pays them for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box, or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of his business over the past several years, respondent has sold and distributed and is now selling and distributing his citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several States of the United States other than the State of Texas in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from his place of business or packing plant in the State of Texas, or from other places within the

State, to such buyers or to the buyers' customers located in various other States of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such fruit.

PAR. 4. In the course and conduct of his business, as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of his brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted, or allowed, and is now paying, granting, or allowing to these brokers, and other direct buyers on their purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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 John H. Ginsbach is an individual doing business as Alamo Fruit Distributors, Ltd., with his office and principal place of business located in Alamo, Texas, with mailing address as P.O. Box 1025, Alamo, Texas.

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

ORDER

It is ordered, That the respondent John H. Ginsbach, an individual doing business as Alamo Fruit Distributors, Ltd., and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit, or fruit products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

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

IN THE MATTER OF

GEORGE FROST COMPANY ET AL.

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

Docket C-229. Complaint, Sept. 11, 1962—Decision, Sept. 11, 1962

Consent order requiring Shirley, Mass., distributors of men's belts, wallets, and related products to wholesalers and retailers, to cease stamping the words "genuine cowhide" on split leather belts, describing such belts in catalogs as "Solid Finished Cowhide Belts", and failing to disclose that the belts, which resembled top grain leather, were in fact made of split leather.

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 George Frost Company, a corporation and Kenneth Chase, 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 George Frost Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located on Leominster Road, in the city of Shirley, State of Massachusetts.

Respondent Kenneth Chase is an officer of the corporate respondent. He, in conjunction with a Board of Directors, formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of men's belts, wallets and related products to wholesalers and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Massachusetts 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. Respondents, for the purpose of inducing the purchase of certain of their belts, have engaged in the practice of misrepresenting the material of which certain of their belts are made or composed and also by failing to disclose the facts relative thereto by the following methods and means:

(a) The respondents mark or stamp on their said belts the words "genuine cowhide", thereby representing, directly and by implication, that their belts are made of top grain leather. In truth and in fact, said belts are not made of top grain leather but are made of split leather. Top grain leather is that portion of the hide which includes and is composed of the outer surface or hair side. Split leather consists of a cut or under layer of the hide which remains after the top grain or surface portion has been removed or separated from the hide. Split leather is inferior in many respects to top grain leather and commands a lower price on the market than top grain leather. There is a preference in the trade and among the purchasing public for belts

composed of top grain leather, as compared with belts composed of split leather.

(b) In catalogs used by respondents in promoting the sale of their said split leather belts said belts are described as "Solid Finished Cowhide Belts," thereby representing, contrary to the facts, that said belts were made of top grain leather.

(c) Respondents' aforesaid split leather belts resemble in appearance belts made of top grain leather and no disclosure is made on or in connection with said belts that they are made of split leather.

PAR. 5. By the aforesaid practices, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the quality and composition of their aforesaid belts.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of belts of the same general kind and nature as those sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead wholesalers, retailers and 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' said belts by reason of said erroneous and mistaken belief.

PAR. 8. 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 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. Respondent George Frost Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its office and principal place of business located on Leominster Road, in the city of Shirley, State of Massachusetts.

Respondent Kenneth Chase is an officer of said corporation, and his 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 respondents, George Frost Company, a corporation, and its officers, and Kenneth Chase, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of split leather belts or any other leather product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the expression "genuine cowhide" or the expression "Solid Finished Cowhide Belts", or any other expression or word of similar import, in connection with leather products made of split leather or misrepresenting in any manner the kind or quality of the materials of which their leather products are composed.

2. Offering for sale or selling leather products made wholly or in part of the under layer or flesh side of hides, known as split leather, without affirmatively disclosing such fact on or in immediate connection with such product and in the advertising of such product in a clear and conspicuous manner.

3. Furnishing means or instrumentalities to others by and through which they may mislead the public as to any of the matters and things prohibited in paragraphs 1 and 2 hereof.

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

MURRAY MADOW TRADING AS MADOW'S

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

Docket C-230. Complaint, Sept. 11, 1962—Decision, Sept. 11, 1962

Consent order requiring a furrier in East Canaan, Conn., to cease violating the Fur Products Labeling Act by failing to show on labels and in advertising when a fur product contained used or artificially colored fur, failing to label, invoice, and advertise products as secondhand where required, and failing in other respects to comply with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Murray Madow, an individual trading as Madow's, 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. Murray Madow is an individual trading as Madow's with his office and principal place of business located at East Canaan, Conn. Respondent is engaged in the retail sale of fur products by auction and otherwise.

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 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 without labels and with labels which failed:

1. To show that the fur product contained or was composed of used fur, when such was the fact.

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

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:

1. The disclosure "secondhand", where required, was not set forth on labels, in violation of Rule 23 of said Rules and Regulations.

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

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondent in that invoices were not furnished to purchasers of fur products as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The disclosure "secondhand", where required, was not set forth on invoices, in violation of Rule 23 of said Rules and Regulations.

2. Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in that said fur products were not advertised as required under the provisions of Section 5(a) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

Among and included in the advertisements as aforesaid but not limited thereto were advertisements of respondent which appeared in issues of the Connecticut Western News, a newspaper published in Canaan, State of Connecticut.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements which failed:

1. To disclose that the fur products were composed of used fur when such was the fact, in violation of Section 5(a)(2) of the Fur Products Labeling Act.

2. 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.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the advertisements failed to disclose that fur products were "secondhand" when such was the fact in violation of Rule 23 of said Rules and Regulations.

PAR. 9. 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 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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 Murray Madow is an individual trading as Madow's with his office and principal place of business located at East Canaan, Connecticut.

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

ORDER

It is ordered, That respondent Murray Madow, an individual trading as Madow's or under any other trade name, 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, 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. Failing to disclose that fur products are "secondhand", when such is the fact.

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

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. Failing to disclose that fur products are "secondhand", when such is the fact.

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

3. 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 set forth all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

B. Fails to disclose that the fur product is "secondhand", when such is the fact.

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

IN THE MATTER OF

SOUTHWESTERN SUGAR & MOLASSES COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

Docket 7463. Complaint, Apr. 1, 1959—Decision, Sept. 12, 1962

Consent order requiring distributors of "blackstrap" molasses—the largest purchasers of domestic and "offshore" molasses in the United States—with main office in New York City and a direct branch in Houston, Tex.,

To cease their attempts to eliminate competition in the sale of blackstrap molasses, in the course of which they engaged in such unfair practices as coercing independent competitor customers to maintain prices they established and policed, including un-incurred freight charges; refusing to sell to independent competitor-customers or "hot truckers" who sold at lower delivered prices than they prescribed or, in the alternative, leasing trucking equipment to preclude price-cutting; and requiring truckers to provide "kickbacks" in order to continue hauling blackstrap molasses under lease arrangements; and

To cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as selling their molasses to certain favored distributors at a discount of ¼-cent to ½-cent per gallon from the established market price.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45) and subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, ap-

proved June 19, 1936 (U.S.C., Title 15, Sec. 13) 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:

COUNT I

Charging violation of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Southwestern Sugar & Molasses Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business at 115 Broadway, New York, N.Y. Respondent operates a direct branch in Houston, Texas.

Respondents Abraham I. Kaplan, Peter Berdeshevsky, and Lutz H. Frieler, are president, vice president and secretary-treasurer, respectively, and Stanley J. Posner is an employee, of said corporation. The individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent herein named.

PAR. 2. All herein named respondents are now and have been for several years last past, engaged in the purchase, storage, sale and distribution of the commodity "blackstrap" molasses to users and distributors of livestock feed and others. The corporate respondent is the largest purchaser of domestic and "offshore" molasses in the United States. In 1955, sales of the corporate respondent were approximately $20,000,000.

PAR. 3. In the regular and usual course and conduct of their business, respondents cause, and for the past several years have caused, their commodity "blackstrap" molasses, when purchased and sold, to be transported from places in the States of Louisiana and Texas, among others, to purchasers and sellers thereof located in various States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in "blackstrap" molasses in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, among and between the various States of the United States.

PAR. 4. In the course and conduct of their business, the respondents have been and are now in substantial competition in the sale of "blackstrap" molasses with other sellers of such product. In many areas, respondents sell their products to two or more molasses distributors, who are in substantial competition each with the other in the resale of said product.

PAR. 5. From time to time as hereinafter alleged, respondent South-

western Sugar & Molasses Co., acting individually and through its respondent officers and employees, its wholly owned subsidiaries and affiliate companies or "satellites," has engaged in certain acts and practices for the purpose and with the objective of eliminating and suppressing, or attempting to eliminate and suppress, the competition of others engaged in the sale and distribution of "blackstrap" molasses, and of otherwise furthering the dominant position of the corporate respondent in the purchase, sale and distribution of the aforesaid product in commerce.

PAR. 6. Pursuant to and in order to effectuate and carry out such purpose and objectives in the purchase, distribution and sale of said product in commerce, respondents from time to time have engaged in, performed, and carried out, by various means and methods, the following acts and practices, among others:

1. Persuaded, induced, coerced, intimidated, compelled, caused or otherwise influenced or attempted to influence certain independent competitor-customers of said respondents to maintain and not sell below prices established and policed by respondent Southwestern, which prices included charges for freight in certain instances where no freight charges were incurred;

2. Refusing to sell molasses to independent competitor-customers, or "hot truckers," who resold said product at delivered prices which were lower than those prescribed by Southwestern; or in the alternative, leasing the trucking equipment of independent competitor-customers ("hot truckers") in order to preclude any "cutting" of prices established and maintained by respondent Southwestern;

3. Requiring truckers to provide rebates or "kick-backs" in order to continue hauling "blackstrap" molasses under lease arrangements.

PAR. 7. The acts and practices as hereinabove alleged, have had and now have the tendency and capacity unlawfully to restrain, lessen, and eliminate competition in the purchase, distribution and sale of the aforesaid product in commerce; and do restrain, lessen and eliminate competition; and in consequence thereof, injury has been done, and is now being done, by respondents to competition in commerce among and between the various States and said acts and practices are all to the prejudice and injury of the public, and of respondents' competitors, and constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

COUNT II

Charging violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Commission alleges:

PAR. 8. Paragraphs 1 through 4, are hereby incorporated by reference and made a part of the charge as fully and with the same effect as though here again set forth verbatim.

PAR. 9. In the course and conduct of their business in commerce, the respondents have been and are now, in each of several trading areas, and in particular in the Houston, Texas, area, discriminating in price in the sale of "blackstrap" molasses of like grade and quality by selling said product to favored distributor-customers at significantly lower prices than they are selling to nonfavored distributor-customers who are competitively engaged, each with the other, in the resale of said product. One or more of sales involved in such discriminations have been and are now in commerce, and said commodity has been and now is sold for resale within the United States.

Respondents have effected said discriminations between and among their customers in the manner and by the method hereinafter described.

In the course and conduct of their business in commerce, respondents sell "blackstrap" molasses to favored distributor-customers at the established market price of said product less a specified discount of ¼-cent to ½-cent or more per gallon, while respondents sell to nonfavored distributor-customers at the established market price of said product without any discount whatsoever. Because of the highly competitive nature of the particular business, ¼-cent to ½-cent discount per gallon readily determines the loss or retention of resale customers by the distributor-customers of the respondents.

PAR. 10. In addition to the practices alleged in paragraph 9 herein, which are acts and practices in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, it is further alleged that in the course and conduct of their business in commerce, respondents entered into long term contracts of different time periods with certain of their customers. Each of the contracts provided for the sale and purchase of specified quantities of said product at agreed upon price and shipping terms less specified discounts. In addition, the contracts, within certain specified price ranges, provided for protection against market price fluctuations during the period covered by the contracts.

Contracts with favored customers provided for larger discounts, longer shipment periods and greater price protection against market fluctuations, among other provisions. During approximately the same period, contracts made with nonfavored customers provided for smaller discounts, shorter shipment periods and less price protection against market price fluctuations among other provisions.

PAR. 11. The effect of respondents' discriminations in price and

terms of sale, as above alleged, may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged, and between and among respondents' favored and nonfavored customers.

PAR. 12. The acts and practices of respondents as above alleged constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Eugene Kaplan supporting the complaint.

Berlack, Israels & Liberman, by *Mr. Harris Berlack* and *Mr. Monroe S. Singer*, of New York, N.Y., for respondents other than Berdeshevsky.

Curtis, Mallet-Prevost, Colt & Mosle, of New York, N.Y., for respondent Berdeshevsky.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on April 1, 1959, charging them, in Count I thereof, with the use of unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act by engaging in certain acts and practices to eliminate competition in the sale and distribution of "blackstrap" molasses and, in Count II thereof, with violating Section 2(a) of the Clayton Act, as amended, by discriminating between various customers as to price and terms of sale. After being served with said complaint respondents appeared by counsel and thereafter filed their respective answers to the complaint, except for respondent Kaplan. A motion to dismiss was filed as to respondent Kaplan based on the ground that he was deceased. Said motion was granted by order of the undersigned, dated July 7, 1959, to the extent that provision for dismissal as to said respondent would be made in the initial decision to be issued at the conclusion of this proceeding.

Thereafter, all of the respondents, except respondents Kaplan and Berdeshevsky, entered into an agreement dated June 21, 1962, containing a consent order to cease and desist, purporting to dispose of all of this proceeding as to all parties except respondents Kaplan and Berdeshevsky. Said agreement, which has been signed by all respondents who are parties thereto, by counsel for said respondents and by counsel supporting the complaint, and approved by the Director of the Commission's Bureau of Restraint of Trade and the Chief of the Division of Discriminatory Practices, of said Bureau,

has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings published May 6, 1955, as amended, the parties having heretofore filed the requisite notice of their desire to avail themselves of the privilege of disposing of this proceeding by consent agreement.

The signatory respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that such respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. The order agreed to provides for the dismissal of Count II of the complaint as to respondents Frieler and Posner, as individuals, and of so much of said count as alleges "primary line injury", for the reasons set forth in said agreement.

There has also been filed in this proceeding a motion to dismiss the complaint as to the remaining respondent, Peter G. Berdeshevsky, on the grounds that said respondent has had no connection with the corporate respondent or the other respondents since October 8, 1957, that he has not been engaged in any way since that date in the distribution of blackstrap molasses, and that prior thereto he did not individually participate in the activities charged in the complaint. Counsel supporting the complaint in his answer to said motion, states that he has no reason to disagree with the facts set forth in the motion to dismiss and therefore does not oppose the granting thereof.

Based on the facts set forth in the motion to dismiss as to respondent Berdeshevsky, which are not substantially disputed by counsel supporting the complaint, and in view of the lack of opposition to the granting of said motion, it is the opinion of the hearing examiner that this proceeding may appropriately be dismissed as to said re-

spondent, subject to this decision's becoming the decision of the Commission with respect to the remaining respondents.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all of the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties signatory thereto, and that this proceeding will otherwise be appropriately disposed of as to all remaining parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings published May 6, 1955, as amended, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent Southwestern Sugar and Molasses Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 55 Fifth Avenue, in the city of New York, State of New York. Said corporate respondent operates a direct branch in the city of Houston, State of Texas. Respondents Lutz H. Frieler and Stanley J. Posner are employees of said corporate respondent. The respective addresses of respondents Lutz H. Frieler and Stanley J. Posner are 1110 Fair Oaks, Houston, Texas, and 309 Quincy, El Paso, Texas. (Said corporate respondent formerly had its principal office and place of business located at 115 Broadway, New York, New York, and it is so designated in the complaint. Respondent Lutz H. Frieler formerly was secretary-treasurer of said corporate respondent and is designated as such in the complaint.)

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named in paragraph 1, hereof. The complaint states a cause of action against said respondents under the Federal Trade Commission Act and the Clayton Act, as amended, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Southwestern Sugar and Molasses Company, a corporation, its officers, representatives, agents and employees, and Lutz H. Frieler and Stanley J. Posner, individually and as employees of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses in commerce, as "commerce" is defined in the Federal

Trade Commission Act, do forthwith cease and desist from doing or performing any of the following acts and practices:

(a) Entering into, continuing, maintaining, or enforcing any agreement or understanding, express or implied, with any purchaser of blackstrap molasses to fix, establish or maintain the price at which such product is to be resold by such purchaser or by which such purchaser agrees or undertakes to include in any delivered price or price quotation any freight or other charge which is different from actual cost incurred.

(b) Persuading, inducing, coercing, intimidating, compelling or attempting to cause or influence any customer of said respondents:

(i) To adopt, maintain, or sell or offer to sell such product at any particular price or prices; or

(ii) To include in any delivered price or price quotation any freight or other charge which is different from the actual cost incurred.

(c) Refusing to sell or offer to sell to, or otherwise deal with, any competitor-customer or prospective competitor-customer of blackstrap molasses for the reason that such purchaser or prospective purchaser has resold, or is reselling, such product at prices lower than those prescribed by said respondents.

(d) Requiring any trucker or other hauler of blackstrap molasses to pay rebates or "kickbacks" to the said respondents in order to haul respondents' blackstrap molasses.

It is further ordered, That respondents Southwestern Sugar and Molasses Company, a corporation, its officers, representatives, agents and employees, and Lutz H. Frieler and Stanley J. Posner, as employees of said corporation, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(a) Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product from a terminal owned or operated by respondents to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality from the same terminal who in fact competes with the purchaser paying the higher price in the resale and distribution of said blackstrap molasses as such, or in fact competes with such purchaser in the resale and distribution of said blackstrap molasses as an ingredient of other products.

(b) Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product for shipment from a point other than a terminal owned or operated by respondents to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality (for shipment in the manner described in this subparagraph (b)) who in fact competes with the purchaser paying the higher price in the resale and distribution of said molasses as such, or in fact competes with such purchaser in the resale and distribution of said blackstrap molasses as an ingredient of other products.

For the purpose of determining "net price" as used in this order, there shall be taken into account rebates, allowances, commissions, discounts, terms and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.

It is further ordered, That the allegation in Paragraph 11 of the complaint that the effect of respondents' alleged discriminations in price and terms of sale may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged be dismissed.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice as to respondents Lutz H. Frieler and Stanley J. Posner as individuals, insofar as it relates to the allegations under Count II of the complaint; and as to respondent Abram I. Kaplan (incorrectly named in the complaint as Abraham I. Kaplan) in its entirety.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Peter Berdeshevsky, subject to this decision's becoming the decision of the Commission as to the other respondents in the proceeding.

Final Order

The Commission by its previous order having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed July 6, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Southwestern Sugar and Molasses Company, Lutz H. Frieler and Stanley J. Posner shall,

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

By the Commission, Commissioner MacIntyre not concurring.

IN THE MATTER OF

LANOLIN PLUS, INC.

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

Docket 8150. Complaint, Oct. 19, 1960—Decision, Sept. 12, 1962

Order requiring a Newark, N.J., distributor to cease representing falsely in advertising in newspapers and magazines and by means of television and radio broadcasts that its "Rybutol" vitamin-mineral would be of benefit in the treatment of tiredness, loss of a sense of well-being and happiness, and premature aging, and would provide pep, strength and energy over night, unless such claims were expressly limited to cases where symptoms were caused by a deficiency of the nutrients contained in the preparation and clear disclosure was made of the fact that such symptoms were generally due to causes other than nutritional deficiency.

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 Lanolin Plus, Inc., a corporation, hereinafter 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, Lanolin Plus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 37 Empire Street in the city of Newark, State of New Jersey.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for the said preparation, the formula thereof and directions for use are as follows:

Designation: Rybutol.

Formula: Each Rybutol Gelucap contains:

Vitamin B–1 (Thiamin Chloride)	15 mg.
Vitamin B–2 (Riboflavin)	6 mg.
Vitamin C (Ascorbic Acid)	30 mg.
Niacinamide	10 mg.
Calcium Pantothenate	3 mg.
Vitamin B–6 (Pyridoxine HCL)	0.5 mg.
Mixed Tocopherols (Vitamin E)	5 mg.
Powdered Whole Dried Liver	100 mg.
Dried Debittered Yeast	100 mg.
Choline Dihydrogen Citrate	20 mg.
Inositol	20 mg.
dl-Methionine	20 mg.
Folic Acid	0.1 mg.
Vitamin B–12 (Activity Equiv.) (From Vitamin B–12 Activity Concentrate)	3 mcg.
Ferrous Gluconate	30 mg.
Dicalcium Phosphate, Dried	200 mg.
Potassium Iodide	0.15 mg.
Magnesium Sulfate, Dried	7.2 mg.
Copper Sulfate, Dried	5 mg.
Manganese Sulfate	3.4 mg.
Cobalt Sulfate	0.2 mg.
Potassium Chloride, C.P.	1.3 mg.

with excipients and fillers in a coated tablet.

Directions: Adults—As a supplementation to the daily diet, one RYBUTOL Gelucap daily. As an aid in preventing or correcting deficiency symptoms (if due to a dietary deficiency of the essential vitamins listed), one to three RYBUTOL Gelucaps daily or as directed by a physician.

PAR. 3. Respondent causes the said preparation, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various states of the United States, and in the District of Columbia, having sufficient power to

carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

VIDEO	AUDIO
PAN LEFT ON BOTTLE TILL NEW CARD APPEARS WITH LEGEND: "NEW-FOUND PEP AND ENERGY—*OVERNIGHT!*"	*ANNCR:* * * * prove to yourself that Rybutol will give you new-found pep and energy. Yes, get rid of that "growing old" feeling . . . and do it overnight!
DISSOLVE TO MCU HAGGARD MAN IN CHAIR. HIS WIFE STANDS IN BACKGROUND.	If you're too tired too often, if you've lost that sense of well-being and happiness . . . Due to a lack of B1, B2 & Niacin, . . . MORE

VIDEO	AUDIO
CUT TO CU OF WOMAN'S WORRIED FACE. KEEP HUSBAND IN SHOT.	*ANNCR:* This is your chance to discover—once and for all . . . what Rybutol can do . . . and for only ninety-nine cents!
CUT TO TCU OF DUMMY RYBUTOL BOTTLE. CARD ALONGSIDE WITH LEGEND:	High potency Rybutol gives you a combination of 20 essential vitamins and minerals that are absorbed directly into your blood stream at full strength.
CUT TO MCU OF MAN AT BATHROOM MIRROR, KNOTTING HIS TIE. WOMAN STANDS BESIDE HIM. WE SEE THEIR HAPPY REFLECTION IN MIRROR.	Tomorrow morning, Rybutol must make you feel stronger, peppier, with more energy than you've ever known . . . or your money back!

How old are you? It's how young you look, act and feel that counts. The fact is that today you can be a young 50, a young 60, yes a young 75, because now medical research proves high potency RYBUTOL actually makes your blood grow younger. It's true! Clinical tests proved it in case after case. Look, in the photograph of living blood, arrows show young blood cells before RYBUTOL. Now one week after RYBUTOL the young red blood cells you need to feel your healthiest are increased three times. So if you need Vitamins B_1, B_2 and Niacin, if you feel and look years older than you actually are, start taking RYBUTOL today and get that young blood feeling again fast. It's guaranteed. You'll look and act younger in just one week or money back. Prove it to yourself with this Can't-Lose RYBUTOL Offer—buy three months' supply and get twenty-five days' supply free.

PAR. 6. Through the use of the said advertisements and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that Rybutol (a) will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, and (b) will provide pep, strength and energy overnight.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, Rybutol (a) will not be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should except in a small minority of persons whose tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than they should are symptoms of an established deficiency of one or more of the nutrients provided by the preparation, and (b) even in such cases of established deficiency the use of the said preparation will not provide pep, strength or energy overnight.

Furthermore, the statements and representations in said advertisements have the capacity and tendency to suggest and do suggest to persons who experience feelings of tiredness, loss of a sense of well-being, loss of happiness, and who appear and feel older than they should, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of respondent's preparation. In the light of such statements and representations, said advertisements are misleading in a material respect and therefore constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material fact that in the great majority of persons experiencing tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than they should these symptoms are not caused by an established deficiency of one or more of the nutrients provided by Rybutol, and that in such case the said preparation will be of no benefit.

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

Mr. Berryman Davis supporting the complaint.

Mr. Andrew Graham, *Mr. William L. McGuire*, and *Mr. Robert A. Gerlin* of New York, N.Y., and *Mr. Herbert A. Fogel* of Philadelphia, Pa., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This is a proceeding brought by the Federal Trade Commission, by complaint issued October 19, 1960, charging respondent with violation of the Federal Trade Commission Act in the advertising of its vitamin and mineral product, Rybutol. The principal question of law posed is whether the Commission, after accepting a stipulation governing the advertisement of a particular product, may properly require affirmative disclosures in subsequent advertising by another owner of that product when such affirmative disclosures were not required in the original stipulation.

The factual issue is whether or not respondent's advertising is misleading because it claims overnight restoration of strength and energy and fails to indicate that, in connection with general symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, Rybutol will only be of benefit in the minority of cases where the symptoms are due to a deficiency in one or more of the nutrients provided by the preparation.

The Proof Offered

Ten hearings were held commencing March 8, 1961, and concluding November 16, 1961, interspersed by long intervals primarily due to the limited availability of medical experts and other engagements of counsel.

Proposed findings and conclusions were ordered filed January 22, 1962, and counter proposals by January 29, 1962.

Very generally, the proof consisted of expert testimony on the efficacy of vitamin therapy and the causes of the symptoms claimed to be cured by conceded advertisements for Rybutol. Published data of the Department of Agriculture and the testimony of experts from that department were offered on the general subject of nutritional deficiency, and data concerning the quantity of vitamin preparations used by physicians and by laymen were introduced.

Basis for Decision

On the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions therefrom and order. All findings and conclusions not specifically adopted in terms or in substance are disallowed as erroneous or immaterial.

FINDINGS

(1) Respondent Lanolin Plus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 37 Empire Street, in the city of Newark, State of New Jersey.

(2) Respondent is now and for sometime last past, has been engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

(3) The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: Rybutol.

Formula: Each Rybutol Gelucap contains:

Vitamin B–1 (Thiamin Chloride)	15 mg.
Vitamin B–2 (Riboflavin)	6 mg.
Vitamin C (Ascorbic Acid)	30 mg.
Niacinamide	10 mg.
Calcium Pantothenate	3 mg.
Vitamin B–6 (Pyridoxine HCL)	0.5 mg.
Mixed Tocopherols (Vitamin E)	5 mg.
Powdered Whole Dried Liver	100 mg.
Dried Debittered Yeast	100 mg.
Choline Dihydrogen Citrate	20 mg.
Inositol	20 mg.
dl-Methionine	20 mg.
Folic Acid	0.1 mg.
Vitamin B–12 (Activity Equiv.) (From Vitamin B–12 Activity Concentrate)	3 mcg.
Ferrous Gluconate	30 mg.
Dicalcium Phosphate, Dried	200 mg.
Potassium Iodide	0.15 mg.
Magnesium Sulfate, Dried	7.2 mg.
Copper Sulfate, Dried	5 mg.
Manganese Sulfate	3.4 mg.
Cobalt Sulfate	0.2 mg.
Potassium Chloride, C.P	1.3 mg.

with excipients and fillers in a coated tablet.

Directions: Adults—As a supplementation to the daily diet, one RYBUTOL Gelucap daily. As an aid in preventing or correcting deficiency symptoms (if due to a dietary deficiency of the essential vitamins listed), one to three RYBUTOL Gelucaps daily or as directed by a physician.

(4) Respondent causes said preparation, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and, at all

times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

(5) In the course of its business, respondent has disseminated, and caused the dissemination of, advertisements concerning said preparation, Rybutol, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements by means of television and radio broadcasts transmitted by stations located in various states of the United States and in the District of Columbia. Such broadcasts are carried across state lines and are designed to induce and likely to induce the purchase of Rybutol.

(6) Among and typical of the representations contained in advertisements disseminated by respondent are the following:

VIDEO	AUDIO
PAN LEFT ON BOTTLE TILL NEW CARD APPEARS WITH LEGEND: "NEW-FOUND PEP AND ENERGY—OVERNIGHT!"	ANNCR: * * * prove to yourself that Rybutol will give you new-found pep and energy. Yes, get rid of that "growing old" feeling . . . and do it overnight!
DISSOLVE TO MCU HAGGARD MAN IN CHAIR. HIS WIFE STANDS IN BACKGROUND.	If you're too tired too often, if you've lost that sense of well-being and happiness . . . Due to a lack of B1, B2 & Niacin, . . . MORE
CUT TO CU OF WOMAN'S WORRIED FACE. KEEP HUSBAND IN SHOT.	*ANNCR:* This is your chance to discover—once and for all . . . what Rybutol can do . . . and for only ninety-nine cents?
CUT TO TCU OF DUMMY RYBUTOL BOTTLE. CARD ALONGSIDE WITH LEGEND:	High potency Rybutol gives you a combination of 20 essential vitamins and minerals that are absorbed directly into your blood stream at full strength.
CUT TO MCU OF MAN AT BATHROOM MIRROR, KNOTTING HIS TIE. WOMAN STANDS BESIDE HIM. WE SEE THEIR HAPPY REFLECTION IN MIRROR.	Tomorrow morning, Rybutol must make you feel stronger, peppier, with more energy than you've ever known . . . or your money back!

How old are you? It's how young you look, act and feel that counts. The fact is that today you can be a young 50, a young 60, yes a young 75 because now medical research proves high potency RYBUTOL actually makes your blood grow younger. It's true! Clinical tests proved it in case after case.

Look, in the photograph of living blood, arrows show young blood cells before RYBUTOL. Now one week after RYBUTOL, the young red blood cells you need to feel your healthiest are increased three times. So if you need Vitamins B1, B2 and Niacin, if you feel and look years older than you actually are, start taking RYBUTOL today and get that young blood feeling again fast. It's guaranteed. You'll look and act younger in just one week or money back. Prove it to yourself with this Can't Lose RYBUTOL Offer—buy three months' supply and get twenty-five days' supply free.

Respondent represented directly and by implication in the foregoing advertisements stipulated to in this proceeding that Rybutol: (a) Will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, and (b) will provide pep, strength and energy overnight.

(7) While the lack of certain of the nutrients included in the vitamins and minerals contained in Rybutol may cause symptoms of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, such symptoms are among those present in the early stages of a great many other diseases.

(8) Rybutol, if taken for the vague symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, would not, in the normal course of medical practice, be expected to make the patient feel much better overnight. Medical art as distinguished from medical science, embraces the use of remedies without scientifically-established therapeutic value. Certain of the remedies of this character are known as placebos. A tablet containing the ingredients contained in Rybutol, or one made up of a completely inert substance, might be prescribed as a placebo. In a significant number of cases, particularly those involving patients subject to suggestion, the patient might respond favorably, although there would be no causal relationship between the ingredients contained in the placebo tablet and the condition causing the symptoms. Except given as a placebo, the ingredients contained in Rybutol would not be expected to have any significant effect except on a deficiency caused by lack of the specific nutrients contained in such formula.

(9) The dosage prescribed in the directions for Rybutol is less than the dosage ordinarily prescribed for the alleviation of iron deficiencies in iron deficiency anemias. Taken over a period of time it would, however, assist in remedying an iron deficiency and also in remedying a deficiency in the vitamins included in its formula.

(10) There is general agreement among medical experts: (a) That cases of frank vitamin deficiency such as those found in cases of beri beri and pellagra are extremely rare in the United States today, (b) that vitamins and minerals are necessary, (c) that they can be secured

by an adequate diet or by supplementary use of pills or other therapy, (d) that the lack of vitamins or minerals could cause symptoms such as those described in the complaint, and (e) that such symptoms are present in the early stages of a great many diseases and can be caused by emotional stress or strain of various kinds.

(11) The general symptoms described in the advertising of Rybutol would not be alleviated by its administration if due to diseases, emotional or other stresses, and not to deficiencies of the nutrients contained in Rybutol.

(12) There is a difference of opinion among doctors concerning the desirability of the routine administration of vitamins or minerals in cases where the history, age or general condition of the patient give no indication that the addition of vitamin or mineral supplements are required. There is also a difference of opinion among doctors concerning the desirability of attempting to ascertain whether or not vitamin or mineral deficiencies exist by the expedient of prescribing vitamins and minerals and observing the results.

(13) Tests for certain mineral deficiencies such as iron deficiencies are relatively inexpensive and routinely administered. Tests for deficiencies in vitamins vary in the degree of effectiveness and in the relative value and the cost of performing the test.

(14) Except possibly in the case of families in the very low income group, a diet containing essential vitamins is available to everyone in the United States.

(15) A substantial number of manufacturers of processed foods such as bakery bread, ready-to-eat cereals and milk replace to a greater or lesser degree the vitamins lost in processing. In the case of some national groups in the United States, however, certain foods such as French bread, Jewish Rye bread, and home-baked type bread are not fortified with vitamins.

(16) Vitamins can be lost through improper preparation and storage of foods. Vitamin deficiency can also be caused by failure to eat the food provided or plate loss, as that is sometimes described.

(17) There is a large sale—in the magnitude of some 330 million dollars—of vitamin preparations annually in the United States.

(18) Such sale of vitamin products and fortification of processed foods and milk would tend to reduce possible vitamin deficiencies in the diet of persons in the United States.

(19) A great majority of the persons exhibiting symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, experience those symptoms from

causes other than from deficiencies due to lack of the nutrients contained in Rybutol.

The hearing examiner has made this finding on the basis of the demeanor of the expert witnesses and for the following additional reasons:

(a) He accepts the opinion of the expert witnesses called by counsel supporting the complaint because of their outstanding qualifications and their wide experience in the field. The fact that certain grants were given by the Nutrition Foundation which is preponderantly financed by food processors to two of them is not regarded as having influenced their testimony in any way. That Foundation, in addition, numbers among its members two manufacturers of pharmaceuticals, and the suggestion that the Foundation would alienate these members by unjustly attacking vitamin therapy is rejected. Moreover, the dedication of the witnesses to professional standards was apparent.

(b) He refuses to accept the estimates by the independent experts called by the respondent to the extent that they attempt to cast doubt on the opinions of the experts of counsel supporting the complaint, among other reasons, because; their experience was more limited in scope, and they appeared to place heavy reliance upon results of routine administration of vitamins without adequate regard to the placebo effects.

(c) He refuses to accept the contradictory testimony of respondent's expert who had previously approved the advertising in question while employed by respondent's advertising agency because such prior approval would have a tendency, whether consciously or not to color the witness' testimony, and because the witness appeared during the proceeding to have intimately associated himself with respondent's position. Moreover, in his exposition of the literature offered by respondent, the witness failed clearly to point out the limitations inherent in the surveys conducted by the Department of Agriculture and tended to rely on them to an extent not justified by the reports of such surveys.

(d) He interprets, on the basis of his testimony as a whole, the testimony of Dr. Richard W. Vilter (who was asked whether the symptoms described in the Rybutol advertising would be more frequently associated with vitamin deficiencies than with other diseased conditions and who answered it would be just as frequent with other diseases as with vitamin deficiencies) as meaning merely that the witness did not agree that such symptoms would be *more* likely to be associated with vitamin deficiencies. Moreover, the questioner excluded other causes than disease from the question.

(e) He does not regard the surveys of the Department of Agriculture as reaching any conclusion contrary to the opinion of the experts

called by counsel supporting the complaint. These surveys were based on a calculation of the vitamin content contained in the foods which the 6,060 questionnaires (used to determine statistically the eating habits of 50,000,000 American households) stated the interviewed householders had used during a week's period. A determination of vitamin and mineral adequacy was made by comparison with the Recommended Dietary Allowances of the National Research Council (RX 31). In the general discussion, appearing at page 27 of National Research Council's publication, the council states in part, ". . . it must be realized that diets less than recommended dietary allowances do not of necessity imply nutritional deficiency." Thus the Council's statement shows that there is no basis for a finding that symptoms will arise because even a deficiency cannot be implied in cases where the diet fails to meet recommended allowances. Moreover, in the reports of the Department of Agriculture (e.g., Report No. 6 of Household Food Consumption Survey 1955 [RX 2b]), the following clear statement regarding deficiencies in diet appears:

> . . . This does *not* prove that all of those families were poorly fed or subject to malnutrition. The recommended allowances provide a considerable margin of safety over average needs. This margin varied for the different nutrients. About 90 per cent of the householders had food that provided at least two-thirds of the recommended amounts of ascorbic acid and calcium, and the diets of an even higher percentage furnished at least two-thirds of the allowances for other nutrients. (Italic supplied.)

After stating that food discarded as plate waste or during and after preparation was not recorded so that the amounts of nutrients might be smaller, the report continued:

> The nutrient content was calculated only for foods. *No estimate was made* of the minerals in the local water or in baking powder, for calories in alcoholic beverages, *or for any vitamin or mineral supplements.* (Italic supplied.)

(20) The hearing examiner takes official notice that the stipulation entered into as part of the disposition of the Commission's proceedings, "*In the Matter of V.C.A. Laboratories, et al*", Docket No. 6071, has never been amended, altered, modified, vacated or rescinded. In accepting the stipulation, the Commission (50 F.T.C. 1011) closed the case "without prejudice, however, to the right of the Commission to reopen the same or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances." Said stipulation involved the product Rybutol at a time when it was owned by a corporation completely disassociated with respondent, although having the same president. Respondent is successor by several mesne conveyances to the business

of the sale of Rybutol. The business of the sale of Rybutol has been continuous since before the entry into the stipulation in Docket No. 6071, and the product with the same or substantially similar formula has been distributed, advertised, offered for sale and sold through the same channels of trade as are used in the sale of that product by respondent. Advertisements received in evidence in this proceeding were disseminated subsequent to the entry into the stipulation in Docket No. 6071.

CONCLUSIONS

(1) The Federal Trade Commission has jurisdiction of the person of respondent and of the subject matter of this proceeding. Respondent is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the acts and practices herein referred to, take place in commerce within the meaning of such Act. The proceeding is in the public interest and is not in any way a violation of a stipulation entered into by the Commission, or a private dispute between the food and the medicine industries, as the respondent claims.

(2) The findings of fact heretofore made have been made on the basis of substantial and reliable evidence.

(3) Rybutol is a preparation containing ingredients which come within the classification of drugs, as the term drug is defined in the Federal Trade Commission Act.

(4) Since Rybutol will not be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, except in those cases where such symptoms are caused by a deficiency of one or more of the nutrients provided by that preparation, and, even in such cases, the use of the preparation will not provide pep, strength and energy overnight; the advertisements disseminated by respondent, while they refer incidentally to the lack of certain nutrients, tend to create a misleading impression on persons to whom such advertising is directed, i.e., that there is a substantial probability that the symptoms will respond to treatment by Rybutol.

(5) The misleading character results from three separate circumstances:

(a) Respondent does not inform the public that the general symptoms described appear in the early stages of many diseases, are caused by a variety of conditions other than vitamin or mineral deficiency, and that in such cases, which are in the majority, the preparation will not be of benefit;

(b) The preparation will not produce results overnight, and

(c) The advertisements, considered as a whole, fail clearly to bring to the attention of of the viewer that the preparation is only valuable in cases where there is a deficiency of the nutrients contained therein.

(6) The dissemination by respondent of advertising containing the representations charged and failing to contain affirmative representations covering the existence of numerous other diseases, causing such symptoms in which the application of the preparation would not be of value, is misleading in material respects.

(7) The stipulation, entered into by the Commission in connection with the sale of Rybutol by a former owner of the business of the sale of Rybutol, is not *res judicata* as against the Commission; does not inure to the benefit of the respondent which was a stranger to the proceeding, and cannot be used to prevent the Commission from taking such action in the public interest as may be required to prevent unfair and deceptive acts and practices in commerce which were initiated or carried on following the entry into the stipulation in Docket No. 6071. (See *F.T.C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 398 [5 S. & D. 498, 502] (1953)). To suggest that the Commission has refused to honor the spirit of its stipulation is wholly without basis in fact or law.

(8) The Commission is not required to adopt any specific procedure in carrying on its functions and, in the presence of what it believes to be a violation of the Federal Trade Commission Act, may proceed by complaint and is not required to offer respondent an opportunity to enter into a stipulation. (See *In the Matter of Lifetime, Inc.*, Docket No. 7616, Opinion by Chairman Dixon, December 1, 1961 [59 F.T.C. 1231, 1250]).

(9) Despite the decision in *Alberty et al* v. *F.T.C.*, 182 F.2d 36 [5 S. & D. 184] (D.C. Cir. 1950) that an affirmative order of the Federal Trade Commission must be stricken; it is now clear, even in the same circuit, that affirmative orders should be issued in proper circumstances. *Theodore Kagen Corp.* v. *F.T.C.*, 283 F.2d 371 [6 S. & D. 837] (D.C. Cir. 1960). Such orders were held appropriate in *Keele Hair and Scalp Specialists, Inc.* v. *F.T.C.*, 275 F.2d 18 [6 S. & D. 719] (5th Cir. 1960) and *Ward Laboratories, Inc.* v. *F.T.C.*, 276 F.2d 952 [6 S. & D. 787] (2d Cir. 1960), where medicinal preparations were involved and also in *Bantam Books, Inc.* v. *F.T.C.*, 275 F.2d 680 [6 S. & D. 744] (2d Cir. 1960), a case involving book abridgement. Here, although it had knowledge that its product had previously been subject to attack for false and misleading advertising; nevertheless, respondent asserted that the product would rejuvenate overnight when

it is clear that any such miraculous cure would be due to purely accidental psychological causes, if it ever occurred, rather than to the effects of the mild dosage contained in Rybutol. Such circumstances require the issuance of an order sufficiently stringent so that the unwary public will not again be deceived. (See *Charles of the Ritz* v. *F.T.C.*, 143 F.2d 676 [4 S. & D. 226] (2d Cir. 1944), *Colgate-Palmolive Company, et al.* (F.T.C. Docket No. 7736 [59 F.T.C. 1452, 1457]), Opinion of Commissioner Elman dated December 29, 1961)). The circumstance, that the respondent's product is generally regarded as harmless to the consumer's health, does not prevent unfair practices to induce its use from constituting an unwarranted assault on the consumer's pocketbook. (See *Bantam Books, Inc.* v. *F.T.C.*, 275 F.2d 680 [6 S. & D. 744] (2d Cir. 1960)). Moreover, continued self-dosage in cases of some of the more serious diseases which may give rise, in the early stages, to similar symptoms to those allegedly cured; rather than prompt medical diagnosis and treatment, might well have serious consequences.

(10) The hearing examiner relies upon the expert testimony of the witnesses called by counsel supporting the complaint. (See *Erickson* v. *F.T.C.*, 272 F. 2d 318 [6 S. & D. 697] (7th Cir. 1959), *Dr. W. B. Caldwell, Inc.* v. *F.T.C.*, 111 F. 2d 889, 891 [3 S. & D. 218, 221] (7th Cir. 1940)), and does not construe the reports of the survey of the Department of Agriculture as contrary to such testimony. The technique of sampling was not designed to record vitamin and mineral supplements, and the reports did not show that the recorded deficiencies in recommended allowances had a real or substantial relationship to the existence of symptoms such as those described in respondent's advertising. *Bristol-Myers Co.* v. *F.T.C.*, 185 F. 2d 58 [5 S. & D. 204] (4th Cir. 1950).

(11) The dissemination by the respondent of the false and misleading advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act. *Exposition Press, Inc. and Edward Uhlan* v. *F.T.C.*, 295 F. 2d 869 [7 S. & D. 240] (2d Cir. November 6, 1961).

ORDER

It is ordered, That respondent Lanolin Plus, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated Rybutol, or any other preparation of substantially similar

composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from, directly or indirectly:

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

(a) That the use of said preparation will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness or appearing or feeling older than one should, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms have been caused by an established deficiency of one or more of the nutrients provided by the preparation and, further, unless the advertisement clearly and conspicuously reveals the fact that in the great majority of persons these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit.

(b) That the use of said preparation will provide pep, strength or energy overnight.

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

Opinion of the Commission

By Kern, *Commissioner:*

The complaint in this matter charges that respondent Lanolin Plus, Inc., violated the Federal Trade Commission Act by the dissemination of false advertisements of its vitamin preparation Rybutol.

The hearing examiner, in his initial decision filed February 2, 1962, held that such charges of false advertising were sustained by the record and he ordered respondent to cease and desist these practices. Respondent has appealed. The principal issues raised are: (a) whether the Commission is restricted in its handling of this proceeding because of its disposition of an earlier matter involving Rybutol in Docket No. 6071 and (b) whether there is substantial evidence on

the record as a whole to support the examiner's ruling as to affirmative disclosure and his order which prohibits representations for benefit in the treatment of symptoms mentioned in the complaint unless it is revealed that in a great majority of persons these symptoms are caused by conditions other than those which may respond to treatment by use of the preparation, and that in such persons the preparation will not be of benefit.

Respondent, Lanolin Plus., Inc., a Delaware corporation with offices in Newark, New Jersey, is engaged in the sale, offering for sale and distribution of Rybutol, a "drug" as that term is defined in the Federal Trade Commission Act.

In its advertisements of Rybutol, respondent has represented that the product will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, and will provide pep, strength and energy overnight.

The Commission in *VCA Laboratories, et al.*, Docket No. 6071, 50 F.T.C. 1011, on June 16, 1954, settled a prior case dealing with the product Rybutol by accepting a stipulation and agreement to cease and desist submitted by VCA Laboratories and by closing the case without prejudice. Respondent contends that the stipulation and agreement to cease and desist in the prior case (hereafter referred to as the "stipulation") in some way bars or precludes the Commission from proceeding in this matter. Such a contention is groundless. It is abundantly clear from the documents that the Commission expressly reserved its authority to take whatever action it might deem necessary in the future.[1] Moreover, VCA Laboratories, corporate respondent in Docket No. 6071, prior to the issuance of this complaint, was liquidated and dissolved. Its assets were acquired by Rexall Drug and Chemical Company, and, thereafter, by one or more mesne conveyances, were sold to Lanolin Plus, Inc. The latter, respondent herein, was in no way involved in the stipulation in Docket No. 6071 and is in fact a complete stranger to that proceeding.

In all the circumstances, the Commission by proceeding here is violating neither the letter nor the spirit of the aforementioned stipulation. The instant proceeding is a new action involving a different respondent, and such respondent has had adequate opportunity to be

[1] In its order closing the case in Docket No. 6071, in which order the Commission accepted "the proposed stipulation and agreement to cease and desist submitted by respondent", the Commission ordered:

". . . that the case growing out of the complaint herein, be, and it hereby is, closed, without prejudice, however, to the right of the Commission to reopen the same or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances." (50 F.T.C. 1011.)

heard on the issues now raised. The contention that the Commission is barred from the present action is rejected.

We turn now to a consideration of respondent's appeal on the merits. Respondent primarily takes exception to the examiner's finding that a great majority of persons exhibiting symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, experience these symptoms from causes other than from deficiencies due to the lack of the nutrients contained in Rybutol, and to the form of the order which requires as to the benefits represented disclosures in line with such finding.

We understand, sympathize with and indeed share that universal thirst to maintain that youthful feeling and would not wish unduly to discourage by arbitrary administrative interference the advertisement of drugs calculated to aid in that direction. Moreover, the pursuit of happiness (albeit it may oftentimes prove unobtainable) is one of the three unalienable rights by which, according to the authors of our Declaration of Independence, all men are endowed by their Creator; here again drugs calculated to aid in such a pursuit should not arbitrarily be interfered with by administrative regulation. However, the hearing examiner has found, and we think correctly on the basis of this record, that lack of these desirable conditions or states of mind or body may be brought about from many causes—and that the great majority of people suffer from symptoms such as tiredness, loss of sense of well-being, loss of happiness, and appearing and feeling older than one should, due to disorders other than vitamin deficiency. We believe that honest advertising of a vitamin product, which advertising is geared to the basic idea that the product benefits such symptoms, therefore requires some affirmative recognition of this basic truth. Again animadverting to our Declaration of Independence: "* * Let facts be submitted to a candid world".

Expert witnesses called by counsel for the complaint testified that the great majority of persons experiencing tiredness and the other symptoms above mentioned would have these symptoms as a result of a disease or condition other than vitamin deficiencies. Doctor Grace A. Goldsmith, M.D., Professor of Medicine, Tulane University, New Orleans, Louisiana, and an expert in nutrition, testified: "I would say more than 90 percent would have diseases other than vitamin deficiencies." Doctor Frederick John Stare, of Needham, Massachusetts, Professor of Nutrition and Chairman of the Department of Nutrition, Harvard University School of Public Health, when asked what percentage of all patients in the United States who exhibited symptoms of tiredness and the other symptoms above men-

tioned suffered such symptoms as a result of diseases other than vitamin deficiency stated that it would be 95 to 96 per cent. Dr. Thomas Stone Sappington, M.D., Associate Clinical Professor of Medicine, George Washington University, Washington, D.C., testified in a similar vein.[2]

The examiner in making his finding on this issue considered and evaluated the testimony of these experts as well as the testimony of the experts called by the respondents and other evidence introduced in the proceeding. We believe there is substantial evidence on the record as a whole to support the examiner's finding, including the expert witnesses called by complaint counsel, and, accordingly, we reject respondent's argument on this question. See *Erickson Hair and Scalp Specialists* v. *Federal Trade Commission*, 272 F. 2d 318 [6 S. & D. 697] (7th Cir. 1959).

As to the scope or form of the order, the examiner having found that the advertisements were misleading in failing to reveal that the great majority of persons suffering from the referred to symptoms have disorders other than vitamin deficiency, molded the order in a manner best calculated to eliminate such deception.[3]

Respondent relies on *Alberty, et al.* v. *Federal Trade Commission*, 182 F. 2d 36 [5 S. & D. 184] (D.C. Cir., 1950), but that case does not hold against such affirmative disclosure where it is found, as here, that the failure to make any affirmative statement in itself is misleading. *Ward Laboratories, Inc., et al.* v. *Federal Trade Commission*, 276 F. 2d 952 [6 S. & D. 787] (2d Cir. 1960), *cert. denied* 364 U.S. 827; *Keele Hair & Scalp Specialists, Inc.* v. *Federal Trade Commission*, 275 F. 2d 18 [6 S. & D. 719] (5th Cir. 1960).

The other contentions of respondent have been considered and they are all rejected. We specifically reject the assertion that the examiner's conclusion as to the possible serious consequences in certain instances of continued self-dosage of Rybutol is unsupported by the record. There is substantial evidence to support such conclusion,

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[2] Dr. Sappington testified regarding his patients who suffered from tiredness and the other symptoms mentioned in the complaint in part as follows: ". . . I would estimate or approximate that 85 per cent of patients weren't suffering from vitamin or mineral deficiencies, . . . that ten per cent of the remaining 15 per cent [later clarified in the testimony as 10 per cent of the total] of patients were suffering from primarily vitamin or mineral deficiencies, and that another five per cent had a vitamin or mineral deficiency which was secondary to a primary illness, such as cirrhosis of the liver or cancer, and so on."

[3] The same provision for affirmative disclosure was used in prior matters involving vitamin preparations. See *Phoenix Pharmaceutical Company, et al.*, Docket No. 8397, 59 F.T.C. 756, and *Approved Formulas, Inc., et al.*, Docket No. 8151, 59 F.T.C. 58. The orders in such matters were based on agreements to enter into consent orders.

including the testimony of Dr. Richard W. Vilter who testified on behalf of complaint counsel.

Respondent's appeal is denied. It is directed that the initial decision of the hearing examiner be adopted as the decision of the Commission. An appropriate order will be entered.

Final Order

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

The Commission, for the reasons stated in the accompanying opinion, having denied respondent's appeal, and having directed that the initial decision of the hearing examiner be adopted as the decision of the Commission:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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 contained in the initial decision.

In the Matter of

THE GARLAND COMPANY ET AL.

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

Docket 8302. Complaint, Mar. 3, 1961—Decision, Sept. 12, 1962

Order requiring Cleveland manufacturers of paint which they sold under a variety of brand names, to cease making such deceptive offers in advertising as "Buy A Gallon—Get A Gallon Free" and ". . . factory to you merchandising", when in fact the advertised price was the usual retail selling price for two gallons; and making use on labels on their paints of names of various non-existent companies to designate the manufacturer.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Garland Com-

pany, a corporation, and Juliette F. Harris, John Wise, John H. Harris and Edward F. Wise, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Garland Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 3748 East 91st Street, Cleveland, Ohio. Individual respondents Juliette F. Harris, John Wise, John H. Harris and Edward F. Wise are officers of the corporate respondent. Individual respondents formulate, direct and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture and sale of paint and related products to retailers for resale to the public. Said sales are made chiefly through their sales division, Merit Paint and Varnish Company, an unincorporated sales division of respondents' business organization. Respondents also lease and operate the paint departments in two department stores: one in Pittsburgh, Pennsylvania and one in Cleveland, Ohio. Respondents' said paint is sold by them under various labels and brand names, including but not limited to Bobbi Brite, Supercote, Van Dyke, Wonderama, Sally Simpson, Lady Ann, Molly Madison, Manor, Estate and Mary Kay.

PAR. 3. In the course and conduct of their business, respondents ship, and have shipped, their said paint from their said place of business in the State of Ohio to retailers and 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 paint in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, hereinbefore described, and for the purpose of inducing the purchase of said paint, respondents advertise said paint, and also assist, instruct, furnish advertising mats and material to, and, in other ways, aid and cooperate with various retailers in the advertising of said paint in newspapers and periodicals of general circulation. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

FREE PAINT OFFER
BUY A GALLON
GET A GALLON
FREE!

EXTREME Hiding and Covering Power
Savings through our cooperative buying
and factory to you merchandising.
The quality of 68 years of paint
manufacturing.
2 Gallons 6.90

* * * * * * *

LADY ANN PAINT

Buy A Gallon—Get A Gallon Free

Buy A Quart—Get A Quart Free

RUBBER BASE	FLOOR AND PORCH PAINT
WALL PAINT	SALE
SALE	2 gal. 6.98
2 GAL. 6.65	
Semi-Gloss for	HOUSE PAINT
WALLS and WOODWORK	LINSEED OIL BASE
SALE	SALE 2 gal. 6.98
2 gal. 6.90	
BASEMENT AND	SALE
MASONRY PAINT	2 gal. 6.98

PAR. 5. Through the use of said advertisements and others similar thereto, not specifically set out herein, respondents represented, directly or by implication, that the usual and customary retail price of each gallon can of the respondents' paint is the price designated in the advertisement, that this advertised price is a factory price, and that if one gallon can of said paint is purchased at the advertised price,

a second gallon can will be given free, that is, as a gift or gratuity without cost to the retail purchaser.

By such acts and practices and by the furnishing of advertising mats, and other advertising material, to retailers, as set forth in paragraph 4, respondents place in the hands of retailers means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the usual and customary retail prices of said paint.

PAR. 6. The aforesaid advertisements referred to in paragraph 4 were false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each gallon can of respondents' paint was not the price designated in the advertisements but was substantially less than such price. The advertised prices were not the prices charged by the factory for said paint but were substantially in excess thereof. The second can of paint was not free, that is, was not a gift or gratuity, and was not given without cost to the retail purchaser, since the purchaser paid the advertised price which was the usual and regular selling price for two gallon cans of respondents' paint.

PAR. 7. In the conduct of their business, respondents on labels attached to the paints, manufactured, sold and distributed by them, make use of various names to designate the manufacturer of said paints. Among and typical, but not all inclusive, of said names are National Paint Specialty Company, Midwest Manufacturing Company, Bobbi Brite Paint Company, Lewis Paint Company, Van Dyke Paint Company, Windsor Paint Company and Wonder Paint Company.

The use of fictitious names on labels as aforesaid, to designate the manufacturer of the paint upon which the said labels appear, has the tendency and capacity to mislead and deceive purchasers of respondents' paint as to the true manufacturer of said paint.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the said general kind and nature as that sold by respondents.

PAR. 9. The use by 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 are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a result thereof, substantial trade in commerce

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

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

Mr. Garland S. Ferguson supporting the complaint.

Daus, Schwenger & Kottler, by *Mr. Lloyd S. Schwenger* of Cleveland, Ohio, for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

This proceeding was commenced by the issuance of a complaint on March 3, 1961, charging the respondents with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act in the sale and distribution of paint by: (a) using deceptive "free" claims to promote the sale of their products and (b) using fictitious names on paint labels to designate the manufacturer. By answer filed May 1, 1961, respondents admitted certain of the allegations of the complaint, but denied that any of their actions constituted violations of the Act. Thereafter, on March 8, 1962, the parties entered into a stipulation which by order of the hearing examiner dated April 2, 1962, was accepted and received in evidence and constitutes the official record of this proceeding. Proposed findings of fact and conclusions of law were submitted by both parties.

Consideration has been given to the proposed findings of fact and conclusions of law submitted, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent The Garland Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 3748 East 91st Street, Cleveland, Ohio. Individual respondents Juliette F. Harris, John Wise, John H. Harris and Edward F. Wise are officers of the corporate respondent. Individual respondents formulate, direct

and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

2. Respondents are now and for some time last past have been engaged in the manufacture and sale of paint and related products to retailers for resale to the public. Said sales are made chiefly through their sales division, Merit Paint and Varnish Company, an unincorporated sales division of respondents' business organization. Respondents also lease and operate the paint departments in two department stores; one in Pittsburgh, Pennsylvania and one in Cleveland, Ohio. Respondents' said paint is sold by them under various labels and brand names, including but not limited to Bobbi Brite, Supercote, Van Dyke, Wonderama, Sally Simpson, Lady Ann, Molly Madison, Manor, Estate and Mary Kay.

3. In the course and conduct of their business, respondents ship, and have shipped, their said paint from their said place of business in the State of Ohio to retailers and 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 paint in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, hereinbefore described, and for the purpose of inducing the purchase of said paint, respondents advertise said paint, and have also assisted, instructed and furnished advertising mats and material to, and, in other ways, aided and cooperated with various retailers in the advertising of said paint in newspapers and periodicals of general circulation. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

FREE PAINT OFFER
BUY A GALLON
GET A GALLON
FREE!

EXTREME Hiding and Covering Power
Savings through our cooperative buying
and factory to you merchandising.
The quality of 68 years of paint
manufacturing.
2 Gallons 6.90

LADY ANN PAINT

Buy A Gallon—Get A Gallon Free

Buy A Quart—Get A Quart Free

RUBBER BASE WALL PAINT SALE 2 GAL. 6.65	FLOOR AND PORCH PAINT SALE 2 gal. 6.98
Semi-Gloss for WALLS and WOODWORK SALE 2 gal. 6.90	HOUSE PAINT LINDSEED OIL BASE SALE 2 gal. 6.98

BASEMENT AND MASONRY PAINT SALE 2 gal. 6.98

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5. Through the use of said advertisements and others similar thereto, not specifically set out herein, respondents represented, directly or by implication, that the usual and customary retail price of each gallon can of the respondents' paint is the price designated in the advertisement, that this advertised price is a factory price, and that if one gallon can of said paint is purchased at the advertised price, a second gallon can will be given free, that is, as a gift or gratuity without cost to the retail purchaser.

6. The aforesaid advertisements referred to in Paragraph Four were false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each gallon can of respondents' paint was not the price designated in the advertisements but was substantially less than such price. The advertised prices were not the prices charged by the factory for said paint but were substantially in excess thereof. The second can of paint was not free, that is, was not a gift or gratuity, and was not given without cost to the retail purchaser, since the purchaser paid the advertised price which was the usual and regular selling price for two gallon cans of respondents' paint.

7. In the conduct of their business, respondents on labels attached to the paints, manufactured, sold and distributed by them, make use of various names to designate the manufacturer of said paints. Among and typical, but not all inclusive, of said names are National Paint Specialty Company, Midwest Manufacturing Company, Bobbi Brite Paint Company, Lewis Paint Company, Van Dyke Paint Company, Windsor Paint Company and Wonder Paint Company. In truth and in fact, these companies are nonexistent, and the products so designated are manufactured by respondents.

8. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

CONCLUSIONS

1. By the acts and practices as set forth herein and by the furnishing of advertising and of advertising mats, and other advertising material, to retailers, as set forth in Finding No. 4, respondents place and have placed in the hands of retailers means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the usual and customary retail prices of respondents' paint.

2. The use of fictitious names on respondents' paint labels as set forth in Finding No. 7, to designate the manufacturer of the paint upon which the said labels appear, has the tendency and capacity to mislead and deceive purchasers of respondents' paint as to the manufacturer of said paint.

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

4. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act. *Matter of Ohmlac Paint & Refining Co., Inc., et al.*, Docket No. 8081, Decision of the Commission, February 23, 1962 [60 F.T.C. 419].

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

6. The complaint herein states a cause of action, and this proceeding is in the public interest.

ORDER

It is ordered, That respondents, The Garland Company, a corporation, and its officers, and Juliette F. Harris, John Wise, John H. Harris and Edward F. Wise, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of paint or any other product, do forthwith cease and desist from:

1. Representing directly or by implication:

(a) That any merchandise is sold or offered for sale at factory prices when such is not the fact.

(b) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents, at retail, in the recent and regular course of business.

(c) That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact.

2. Using a fictitious name to designate the manufacturer of their merchandise.

3. Engaging in any practice or plan which will provide retailers of their merchandise with the means or instrumentalities of misrepresenting the usual and regular retail prices of such merchandise.

FINAL ORDER

The Commission by its previous order having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed June 29, 1962, be, and it hereby is, adopted as the decision of the Commission.

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 the order to cease and desist.

By the Commission, Commissioner Elman not participating.

IN THE MATTER OF

FARBER BROS., 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-231. Complaint, Sept. 12, 1962—Decision, Sept. 12, 1962

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by failing, on invoices, to show the true animal name of fur, when fur was artificially colored, or when fur products were made of cheap or waste fur; failing to set forth the terms "Dyed Broadtail-processed Lamb" and "natural" as required; and failing in other respects to comply with invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Farber Bros., Inc., a corporation, and Ralph Farber and Max Farber, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of such 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. Farber Bros., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Ralph Farber and Max Farber are officers of the said corporate respondent and control, direct and formulate the acts, practices and policies of said corporate respondent.

Respondents are manufacturers of fur products and have their office and principal place of business at 242 West 30th Street, New York, N.Y.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur", and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced in that 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 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 products.

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 that the fur products were composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such was the fact.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. 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 "Dyed Broadtail-processed Lamb" was not set forth in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) The term "natural" was not used as part of the information required to describe furs contained in fur products, which furs were not pointed, bleached, dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) The disclosure that fur products were composed in whole or substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur was not set forth on invoices in violation of Rule 20 of the said Rules and Regulations.

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 Farber Bros., 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 242 West 30th Street, in the city of New York, State of New York.

Respondents Ralph Farber and Max Farber 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 Farber Bros., Inc., a corporation, and its officers, and respondents Ralph Farber and Max Farber, 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 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 on invoices pertaining to fur products the name or names of any animal or animals other than the name of the animal or animals producing the fur contained in the fur product as specified in the Fur Products Name Guide and as prescribed in the Rules and Regulations.

C. 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.

D. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb."

E. Failing to set forth the term "Natural" as part of the required information to describe furs which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

F. Failing to disclose that fur products are composed in whole or substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

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

CHARLES A. ROGERS, SR., ET AL. DOING BUSINESS AS CHAS. A. ROGERS & SONS

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

Docket C-232. Complaint, Sept. 12, 1962—Decision, Sept. 12, 1962

Consent order requiring a Texas fruit packer to cease violating Sec. 2(c) of the Clayton Act by paying commissions or discounts on a large number of purchases of citrus fruit by brokers and direct buyers for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Charles A. Rogers, Sr., Charles A. Rogers, Jr., and William M. Rogers are individuals and copartners doing business as Chas. A. Rogers & Sons, with their office and principal place of business located at Donna, Texas, with mailing address as P.O. Box 1088, Donna, Texas.

PAR. 2. Respondents are now and for the past several years have been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are sometimes referred to as citrus fruit or fruit products. Respondents sell and distribute their products directly, and in many instances through brokers, to buyers located in various sections of the United States. When brokers are utilized in making sales, respondents pay said brokers for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box or equiv-

alent. Respondents' annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of their business over the past several years, respondents have sold and distributed, and are now selling and distributing, citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of Texas in which respondents are located. Respondents transport, or cause such citrus fruit, when sold, to be transported from their place of business or packing plant in the State of Texas, or from other places within said state, to such buyers or to the buyers' customers located in various other states of the United States. Thus, there has been at all times mentioned herein, a continuous course of trade in commerce in said citrus fruit across state lines between said respondents and the respective buyers thereof.

PAR 4. In the course and conduct of their business, as aforesaid, respondents have been and are now making substantial sales of citrus fruit to some, but not all, of their brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondents paid, granted or allowed, and are now paying, granting or allowing to these brokers and other direct buyers on their purchases a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR 5. The acts and practices of respondents in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, 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 Charles A. Rogers, Sr., Charles A. Rogers, Jr., and William M. Rogers are individuals and copartners doing business as Chas. A. Rogers & Sons, with their office and principal place of business located at Donna, Texas, with mailing address as P.O. Box 1088, Donna, Texas.

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

ORDER

It is ordered, That the respondents Charles A. Rogers, Sr., Charles A. Rogers, Jr., and William M. Rogers, individually and as copartners doing business as Chas. A. Rogers & Sons, their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or fruit products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

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

EMILE BERNAT & SONS COMPANY ET AL.

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

Docket 8462. Complaint, Jan. 19, 1962—Decision, Sept. 13, 1962

Order dismissing, for failure of proof, complaint charging Jamaica Plain, Mass., manufacturers with violating the Wool Products Labeling Act by deceptively tagging or labeling skeins of knitting yarn with respect to the length of yarn therein.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Emile Bernat & Sons Company, a corporation, Eugene Bernat, William Bernat, and John O. Cohen, 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 said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof, would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Emile Bernat & Sons Company is a Massachusetts corporation, with its office and principal place of business at 117 Bickford Street, Jamaica Plain, Mass.

Respondents Eugene Bernat, William Bernat and John O. Cohen are officers of said corporation. They formulate, control and direct the policies, acts and practices of the corporation. Their business address is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since September 1960, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of the wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively tagged, labeled or otherwise identified with respect to the length of yarn on skeins manufactured, packaged and sold by respondents.

Among and typical of such misbranded products, but not limited thereto, were skeins of knitting yarn labeled "approximately 150 yards", which in fact measured *less than approximately 125 yards*, and "approximately 275 yards", which, in fact, measured *less than approximately 243 yards.*

PAR. 4. In the course and conduct of their business, as aforesaid, respondents have been and are in substantial competition with corporations, firms and individuals, likewise engaged in the manufacture and sale of wool products, including knitting yarn, in commerce.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, 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. Edward B. Finch supporting the complaint.

Mr. George H. Lewald, of *Ropes & Gray*, of Boston, Mass., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

The complaint herein, issued January 19, 1962, alleges that respondents' acts and practices were and are in violation of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and that they constituted and now constitute unfair and deceptive acts and practices as well as unfair methods of competition in commerce under the Federal Trade Commission Act.

The acts and practices in commerce complained of consist of alleged false labeling as to the length of certain wool products, i.e., skeins of wool.

Although not stated in the complaint, the facts developed at the hearing are that the same labeling specified the weight, the correctness of which has not been challenged.

There is no expressed provision in the Wool Products Labeling Act, or elesewhere, requiring labeling or marking as to length which would be applicable to the wool products in question in this case.

The only examples of misbranding cited in the complaint are two. One is a label on a skein of wool reading "approximately 150 yards", whereas the yarn allegedly measures "approximately 125 yards" and the proof at the hearing is something over 140 yards. The other is a label on a skein of wool reading "approximately 275 yards", whereas the yarn allegedly measures "approximately 243 yards" and the proof is something over 266 yards.

Respondents contend that the length stated on the two labels is indeed "approximately" correct, the difference in yardage, as proved at the hearings, being so small. A skein of wool may sell at retail for about 60 cents.

Respondents also contend that the ultimate purchasers are guided by weight, the correctness of the label of which is not an issue, and that the length is stated on the labels only for a secondary purpose involving no deception.

Both of these contentions are sustained in this decision.

The hearing herein was held in Washington, D.C., on April 30, 1962. Prior to this date, there was also a prehearing conference. All proposed findings and conclusions not adopted herein are rejected.

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent Emile Bernat & Sons Company is and has been a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business at 117 Bickford Street, Jamaica Plain, Massachusetts.

2. Individual respondents Eugene Bernat and William Bernat are officers of said corporation, the first being president and the latter being treasurer, with their business address the same as that of corporate respondent. They are the corporation's principals.

3. Individual respondent John O. Cohen was and is a member of the board of directors of said corporation. He was its comptroller up to and including January 26, 1962. He has owned no stock in the corporation for over five years.

3(a). Said individual respondents, except respondent John O. Cohen, have cooperated and now cooperate in formulating, directing and controlling the acts, policies, and practices of the corporate respondent, including the acts and practices hereinafter referred to. The word "respondents" as hereinafter used shall not be deemed to include respondent John O. Cohen.

4. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since September 1960, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

I

Length Stated Only as "Approximately"

5. Proof of alleged unfairness and deception was limited at the hearing to two skeins of wool of different types and the label on each.

6. Among said wool products referred to in paragraph 4 of these Findings, there is a package of hand knitting yarn labeled "Bernat Nylo Germantown." The label bears a legend, entirely in the same bold type, using capital letters: 2 OUNCES, APPROX. 150 YARDS.

6(a). In truth and in fact the yarn measures 140 yards, 33.5 inches. The complaint alleges a skein labeled "approximately 150 yards" but measuring less than "approximately 125 yards."—The stated weight of two ounces has not been questioned.

6(b). During the years referred to in the complaint, 1960–61, respondent corporation marketed 900,000 two-ounce packages of yarn with the brand name above referred to.

6(c). It may be, although it is not clear, that all of these packages have borne the same label with the same legend inasmuch as respondents' testimony is that the length stated on the label is approximated from the weight and thickness of the yarn. However, this does not necessarily mean that each skein of yarn would actually measure the same in length, since there might be allowable variations due to spinning or moisture factors (See Part II of these Findings, in which it is found that there are such allowable variations).

6(d). The retail price of this skein of wool is not shown in the record, although it is probably something like the 60 cent price shown for the other skein, which is considerably longer (See Finding 7(d)). Thus, a few yards variation is only a matter of pennies, if not of normal allowable variation (See Part II).

7. Among the said wool products referred to in Paragraph 4 of these Findings, there is also a package of hand knitting yarn labeled "Bernat Nylo Sports". The label bears the following legend, entirely in the same bold type using capital letters: 2 OUNCES, APPROX. 275 YDS.

7(a). In truth and in fact the yarn measures 266 yards, 4.5 inches. The complaint alleges a skein labeled "approximately 275 yards" but measuring less than "approximately 243 yards".—The stated weight of two ounces has not been questioned.

7(b). During the years referred to in the complaint, 1960–61, respondent corporation marketed 1,800,000 two-ounce packages of yarn with the foregoing brand name.

7(c). It may be that all of these packages have borne the same label and the same legend, but this is subject to the same qualifications and considerations stated in these Findings as to the other skein (See Finding 6(c)).

7(d). The retail price of this skein of wool is something like 60 cents a skein (Tr. page 94), so that alleged shortage in reference to the approximate yardage means here only a matter of pennies to the ultimate consumer, even assuming there is no allowable variation.

8. Accordingly, it is hereby found that when respondents labeled the one skein as approximately 275 yards, whereas it measures 266 yards, 4.5 inches, they were telling the truth, and the label was not false, misleading, deceptive, or otherwise unfair. It is significant that APPROX. and the stated yardage are both in the same bold type, which is also the type in which the weight is stated.

9. The same finding is made as to the skein labeled 150 yards, whereas it actually measures 140 yards, 33.5 inches, namely, that respondents were telling the truth and that the label is not misleading, deceptive or unfair.

10. In view of the conclusions reached in paragraphs 8 and 9, immediately preceding, the question of whether proof based on only two sales items out of 2,700,000 is nevertheless a fair sampling because the stated yardage was concededly estimated on all labels, is a question that need not be passed on here.

The above findings dispose of this case, but the conclusions reached are corroborated by the following further findings and conclusions herein:

II

Bought by Weight

11. With the exceptions of tapestry, mending or embroidery yarn, weight appears to be the sole basis on which the ultimate consumer determines how much yarn is needed to complete a particular garment (Tr. pages 87, 90).

12. With the foregoing exceptions, printed pattern instructions set forth the quantities of yarn needed to hand knit particular garments in terms of weight units (Tr. page 90; RX–6, 7).

13. Such pattern instructions stated in terms of weight are contained in instruction books distributed by respondents to reach ultimate consumers, who purchase them from retailers (Tr. pages 56–58; RX–6, 7). Ultimate consumers are guided, at least in the first instance, by such instruction books (Tr. page 90).

14. This emphasis on weight as the important consideration is rec-

ognized in the Trade Practice Rules of the Hand Knitting Industry. Again with the exception of tapestry, mending and embroidery yarns, which are expressly excepted and are sold by length units, the Rules (16 CFR 177.6) require the quantity of hand knitting yarn to be disclosed on the label only by weight.

15. The uncontradicted testimony is that the purpose of the approximate yardage figure is principally to enable the retailer to interchange one yarn with another—for instance, if he is out of the brand which the customer first purchased. The manufacturer determines the approximate yardage figure by the weight of the yarn in the package and the yarn's "count", or diameter (Tr. pages 89, 92, 93). Some manufacturers do not put the figure on the label but give the information to the retailer separately (Tr. page 87). Respondents themselves no longer use the yardage figure on the label (Tr. page 70), having discontinued this figure in January 1962 (Tr. page 70), about the time the complaint herein was issued.

III

Weight Itself Subject to Allowances

16. As already found herein, the approximate yardage figure is determined by respondents by the weight of the yarn in the package, and its count or diameter.

17. But the weight of the yarn required to be stated is itself subject to allowances, namely, for moisture. The Trade Practice Rules for the Hand Knitting Yarn Industry (16 CFR 177.6 (a)) provide that the weight shown on the label shall be "without inclusion of more than 10% moisture (such 10% moisture content being equivalent to 11.1% moisture regain)."

18. Moreover, apart from moisture and temperature, a 5% variation over or under a specified "count" is, according to the testimony (Tr. page 94), allowable under the standards of the American Society of Testing Materials, whose measuring methods were followed in this case by the Commission (Tr. page 29). The uncontradicted testimony is that unavoidable variation in spinning makes it impossible to maintain an exact and constant count throughout (Tr. page 92, 93). Moreover, count, like weight, is affected by moisture and temperature (Tr. page 95).

19. Accordingly, inasmuch as the stated yardage on the labels reflects weight and count, themselves both subject to allowances, there would seem to be no inherent unfair trade practices or methods of

competition in stating yardage in reasonably approximate, rather than absolute terms.

20. The variability as to weight and count also disposes of complaint counsel's contention that the stated yardage is almost invariably less than the actual yardage so as to thereby invite an inference of misrepresentation. The factual basis for this argument, namely that stated yardage is almost invariably less than actual, has not been proved by offering in evidence only two skeins of wool out of 2,700,000 or in any other way.

21. Accordingly, the conclusions reached in Part I of these Findings, Paragraphs 8 and 9, that the stated yardage on the labels is not false, misleading or deceptive, or otherwise unfair, are confirmed and hereby reiterated.

CONCLUSIONS OF LAW

1. The acts and practices of the respondents as proved at the hearing were not, and are not, in violation of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder. Nor do they constitute unfair and deceptive acts and practices or unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

2. There is no proof that respondent John O. Cohen cooperated, or is now cooperating, in formulating, directing or controlling the acts, policies and practices of the corporate respondent, including its acts and practices in connection with labeling.

MOTION

As part of this decision, respondents' motion to dismiss the complaint made at the end of complaint counsel's case and renewed at the conclusion of the case, is hereby granted.

ORDER

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

FINAL ORDER

This matter having come on to be considered by the Commission, subsequent to entry of its order of August 22, 1962, placing the case on its docket for review; and

The Commission having duly reviewed the entire record and being of the opinion that certain of the hearing examiner's findings of fact are not wholly supported by the evidence and that said findings should be modified; and

The Commission having determined that as so modified the initial decision will be appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision be modified by striking therefrom the one-sentence paragraph on page 570 thereof, which reads, "Both of these contentions are sustained in this decision."

It is further ordered, That the initial decision be modified by striking therefrom findings numbered 8 and 9 on page 572 thereof and substituting therefor the following:

> 8. Under the circumstances, it is found that the proof fails to establish that the lengths stated as approximations on the two labels in evidence are false and deceptive.

It is further ordered, That the findings in the initial decision numbered 10 through 20 be renumbered 9 through 19, respectively.

It is further ordered, That the initial decision be modified by striking therefrom finding numbered 21 on page 574 thereof.

It is further ordered, That the initial decision be modified by striking therefrom paragraph numbered 1 of the Conclusions of Law on page 574 thereof and substituting therefor the following:

> 1. There has been a failure of proof that the alleged practices are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, or that said practices constitute unfair and deceptive practices or unfair methods of competition within the meaning of the Federal Trade Commission Act.

It is further ordered, That as so modified the initial decision herein be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioner Elman not participating.

IN THE MATTER OF

LARRY LIGHTNER, INC.

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

Docket C-233. Complaint, Sept. 13, 1962—Decision, Sept. 13, 1962

Consent order requiring a Texas fruit packer to cease violating Sec. 2(c) of the Clayton Act by paying commissions or discounts on a large number of purchases of citrus fruit by brokers and direct buyers for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Larry Lightner, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its offices and principal place of business located in Brownsville, Texas, with mailing address as Post Office Box No. 761, Brownsville, Texas.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and dstributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through company salesmen, brokers and wholesalers, as well as direct, to customers located in many sections of the United States. When brokers are utilized in making sales for it, respondent pays them for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗-bushel box, or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing its citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several States of the United States other than the State of Texas in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of Texas, or from other places within the State, to such buyers or to the buyers' customers located in various other States of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and is now paying, granting or

allowing to these brokers and other direct buyers on their purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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 Larry Lightner, Inc., is a corporation doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at Brownsville, Texas, with mailing address as Post Office Box 671, Brownsville, Texas.

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

ORDER

It is ordered, That the respondent Larry Lightner, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit, or fruit products, in commerce, as "commerce" is

defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

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

IN THE MATTER OF

PFEIFERS OF ARKANSAS ET AL.

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

Docket C-234. Complaint, Sept. 13, 1962—Decision, Sept. 13, 1962

Consent order requiring a furrier in Little Rock, Ark., to cease violating the Fur Products Labeling Act by failing to show on invoices the true animal name of furs and the country of origin of imported furs, and to disclose when furs were artificially colored; by setting forth required information on invoices in abbreviated form; by advertising in newspapers which represented sale prices as reduced from regular prices which were in fact fictitious, and falsely stated purchasers could "Save ¼, ⅓, ½, and more"; and by failing 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 Pfeifers of Arkansas, a corporation and John Hannahs, individually and as the manager of the fur department of the 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 Pfeifers of Arkansas is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arkansas with its office and principal place of business located at 514–24 Main Street, Little Rock, Ark. Respondent Pfeifers of Arkansas is a department store engaged in retailing various commodities including fur products.

Respondent John Hannahs is manager of the fur department of the said corporate respondent and controls, directs and formulates the acts, practices and policies of the fur department of the said corporate respondent. His office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce and in the sale, 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 been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced 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 products.

PAR. 4. 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 that 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.

PAR. 5. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act in that re-

spondents 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. 6. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents, which appeared in issues of the Arkansas Gazette and Arkansas Democrat newspapers published in the city of Little Rock, State of Arkansas, 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) 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.

(b) Represented through percentage savings claims such as "Save ¼, ⅓, ½, 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. 7. 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. 8. 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 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 the 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 Pfeifers of Arkansas is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arkansas with its office and principal place of business located at 514–24 Main Street, Little Rock, Arkansas. Respondent Pfeifers of Arkansas is a department store engaged in retailing various commodities including fur products.

Respondent John Hannahs is manager of the fur department of the said corporate respondent and his address is the same as that of the said corporate respondent.

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

ORDER

It is ordered, That respondents, Pfeifers of Arkansas, a corporation, and its officers and John Hannahs, individually and as manager of the fur department of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution, in commerce, of 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 "com-

merce", "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. 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.

2. 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. 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.

B. 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.

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

3. 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.

Complaint

IN THE MATTER OF

ANNIS FURS, INC., ET AL.

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

Docket C-235. Compaint, Sept. 13, 1962—Decision, Sept. 13, 1962

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by advertising in newspapers which represented sale prices of fur products as reduced from purported regular prices which were in fact fictitious and which stated falsely that customers could "Save ¼, ⅓, ½, and more"; and by failing 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 Annis Furs, Inc., a corporation, and Felix Merrick, an individual and employee of the 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 Annis Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 130 West 30th Street, New York, N.Y. Respondent Annis Furs, Inc., is a wholesaler and retailer of fur products.

Respondent Felix Merrick is an employee of the said corporate respondent and participates in controlling, formulating and directing the acts, practices and policies of the said corporate respondent. His office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, 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 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 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. 4. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents, which appeared in issues of the Arkansas Gazette and Arkansas Democrat, newspapers published in the City of Little Rock, State of Arkansas, 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) 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.

(b) Represented through percentage savings claims such as "Save ¼, ⅓, ½, 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. 5. 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. 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 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 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 the 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, Annis Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 130 West 30th Street, New York, N.Y. Respondent Annis Furs, Inc., is a wholesaler and retailer of fur products.

Respondent Felix Merrick is an employee of the said corporate respondent and his address is the same as that of the said corporate respondent.

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

ORDER

It is ordered, That respondents Annis Furs, Inc., a corporation, and its officers, and Felix Merrick, individually and as an employee of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce,

of 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. 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. 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.

B. Represents directly or by implication through percentage savings claims that the prices of fur products are reduced in direct proportion to the percentage of savings stated, when such is not the fact.

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

2. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the 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

WESTERN FRUIT GROWERS SALES CO.

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

Docket 8194. Complaint, Nov. 29, 1960—Decision, Sept. 18, 1962

Order requiring Fullerton, Calif., packers of citrus fruit and avocados to cease violating Sec. 2(c) of the Clayton Act by granting allowances or discounts on a large number of sales to brokers and direct buyers purchasing for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Western Fruit Growers Sales Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Fullerton, Calif., with mailing address as Post Office Box 171, Fullerton, Calif.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through brokers, wholesalers, jobbers, and commission merchants, as well as direct to customers located in many sections of the United States. When brokers are utilized in making sales for it, respondent pays them for their services a brokerage or commission, usually at the rate of 10 cents per 1⅗ bushel box, or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing its citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of California in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of California, or from other places within the State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such citrus fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing in their own name and for their own account for resale, and on a

large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and direct buyers on their own purchases, a commission, brokerage, or other conpensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, on their own purchases as above alleged and described are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Cecil G. Miles and *Mr. Basil J. Mezines* for the Commission.

Wadsworth, Fraser & McClung, by *Mr. E. L. Fraser*, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding is brought under § 2(c) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, § 13). The complaint charges, in substance, that respondent, for some years past, in the course and conduct of its business of making substantial sales of citrus fruit in commerce, has paid and is paying commissions, brokerages or other compensations or allowances or discounts in lieu thereof in connection with the sale (1) to some but not all of its brokers; and (2) to direct buyers who purchase such citrus fruits in their own names and for their own accounts for resale. Respondent, in its answer, admits that in the course and conduct of its business it has been and is now making substantial sales of citrus fruit to some but not all of its brokers and direct buyers purchasing in their own names, but denies that said sales were made for the brokers' own accounts, and claims, upon information and belief, that while such purchases were in such brokers' names, they were for customers of such brokers on a pool basis. Respondent further denies, in substance, the granting or allowance of any commissions, brokerages or other compensation to such purchasers in violation of § 2(c) of the Clayton Act. In this initial decision, the charges of the complaint are found to be sustained, and a cease-and-desist order is issued.

The complaint was issued November 29, 1960, and respondent, after service, filed its answer on December 30, 1960. On April 10, 11 and 12, 1961, hearings were held in Los Angeles, California, at which both parties presented their evidence and rested except for the negotiation of a stipulation proposed by counsel supporting the complaint. Such stipulation was never agreed upon, however, and on Septem-

ber 19, 1961, counsel supporting the complaint filed their motion to close the record, which was duly granted by the hearing examiner. Pursuant to order of the hearing examiner, counsel supporting the complaint filed their proposed findings, conclusions and order on October 23, 1961, and those of the respondent were filed on October 30, 1961. All proposed findings of fact and conclusions of law submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected. The proposed order submitted by counsel supporting the complaint is herein adopted.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the sole witness who appeared before him. All proposals and briefs of counsel have been studied in the light of the entire record. Upon the whole record the hearing examiner finds generally that the Commission has fully sustained the burden of proof incumbent upon it, and has established by reliable, probative and substantial evidence and the fair and reasonable inferences to be drawn therefrom, all the material allegations of the complaint; and further finds that the evidence submitted by respondent fails to establish facts constituting any valid defense to the charges of violation contained in the complaint. More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent Western Fruit Growers Sales Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Fullerton, Calif., with mailing address as Post Office Box 171, Fullerton, Calif.

Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines, and grapefruit, all of which are sometimes hereinafter referred to as citrus fruit or fruit products. It also so deals in avocados. Respondent acts as a consignment shipper for some twenty-two packing houses in California and Arizona, which packing houses in turn represent hundreds of growers. Respondent sells and distributes its citrus fruit and avocados through brokers, wholesalers, jobbers and commission merchants, as well as direct to customers located in many sections of the United States. Respondent transports, or causes such products, when sold, to be transported from its place of business or packing plant in the State of California, or from other

places within that State, to such buyers or to the buyers' customers located in various other States of the United States. Thus, respondent is now and for the past several years has been engaged in commerce as "commerce" is defined in the aforesaid Clayton Act.

One of the two real issues contested in this case is whether or not respondent violated § 2(c) on a number of occasions by invoicing some of the brokers with whom it dealt, instead of the customers to whom such brokers sold the citrus fruit in question. Respondent contends that it was compelled to bill such brokers directly in order to avoid prohibitive costs of invoicing and collecting from many separate customers on a multitude of small shipments. The other real issue contested herein involved the contention of respondent that volume discounts given to national chain-grocery organizations buying fifty or more cars per year were justified by cost savings.

The law is now well settled that § 2(c) of the Clayton Act is an absolute prohibition of the payment of brokerage by sellers either to buyers or to buyers' representatives, agents or brokers. See *The Great Atlantic & Pacific Tea Company* v. *FTC* (C.C.A. 3(1939)), 196 F. 2d 667, particularly pages 674 and 678. Many scholars of antitrust laws have sharply criticized, not only the language of § 2(c) as adopted by Congress, but the interpretation placed upon it both by the Courts and by the Federal Trade Commission, and it is claimed that the Commission uses § 2(c) proceedings more than proceedings under other sections of the Robinson-Patman amendment to the Clayton Act, because, as a learned critic has very recently put it,

> It is easy to understand why § 2(c) is invoked. That section is a *per se* statute with a vengeance: there is no requirement of proof of any likelihood of injury, and there are no defenses (Milton Handler, "Recent Antitrust Developments," Yale Law Journal, Vol. 71, pp. 75 et seq., especially p. 104).

In § 2(c) litigation, however, although the statute may be a *per se* one, the facts are never self-operative and must be proved, and "the decision depends on the circumstances of each case". *FTC* v. *Henry Broch & Company* (1960), 363 U.S. 166, 175-176, reversing C.A. 7 (1958), 261 F. 2d 725, and reinstating the Commission's decision and order against respondent (1959), 54 FTC 673. The evidence in the case at bar has therefore been given full and fair consideration, as already stated.

At the very beginning of the case respondent's counsel conceded (R. 7–8):

> The position of Western Fruit Growers Sales in this matter, charged with the violation of § 2(c), is simply this: that sales were made to brokers and discount was allowed upon the representation by the brokers that these sales were for

the broker's customers and would be in turn sold on a pool basis to the broker's customers or in small lots. * * * Under the provisions of the Act, we could stipulate that the Government has a *prima facie* case and that all it needs to do is to introduce one sales jacket containing documents showing the sale to a broker and a commission deduction to that particular broker. * * * That would be a *prima facie* case under 2(c), and the burden would shift to us to prove the fact and circumstances surrounding it, which we are entitled to do.

The case was defended on this theory. If respondent's evidence were to establish a valid defense, the burden of proof, of course, was upon respondent. *FTC* v. *Washington Fish & Oyster Company, Inc.* (C.A. 9, 1960), 282 F. 2d 595, 597. Respondent has not sustained this burden of proof. Only one witness testified, Thomas Frees, sales manager of respondent. This company was organized on or about October 1, 1957, by a group of persons, each of whom had had considerable experience in the fruit selling and distribution business. By their enterprise and activities, including the practices complained of herein, they had established a substantial business by the time their affairs were investigated over two years later by the Federal Trade Commission. On March 8, 1960, the Commission adopted a resolution entitled "Resolution Directing Investigation of the Payment of Brokerage or Commissions or Allowances or Discounts in Lieu Thereof by Corporations Engaged in the Sale and Shipment of Fresh Citrus Fruit". Pursuant thereto, among many other citrus-fruit dealers in Florida, Texas and California, the respondent was ordered to file a special report setting forth information pertaining to its activities in the business (Commission's Exhibit 1–A). Official notice is taken that the Commission, after considerable negotiation, has entered cease-and-desist orders based upon consent agreements, which orders are identical with the one requested and entered herein, in some seventy-five or more § 2(c) cases against various of such citrus-fruit dealers.

Respondent complied with the Commission's order by a special sworn report dated September 28, 1960, which, together with the annexed exhibits, was transmitted to the Commission (Commission's Exhibit 1). The several sales jackets or files produced and submitted by respondent are in evidence in this proceeding as Commission's Exhibits 2–A through 20–J, and, together with the testimony of the witness Frees, constitute the entire trial record herein. It would serve no useful purpose to discuss all of these sales documents in detail. It was testified by Mr. Frees, in substance, that a substantial part of respondent's business from the time of its organization consisted of transactions with various corporations, partnerships, and individuals designated by respondent as its brokers, among which were Brown

and Loe and Tom Lange, Inc., both of St. Louis, Missouri, and Russell Ward Company, Inc., of Seattle, Washington, whose dealings, it is agreed upon the record, were representative of respondent's transactions with such brokers. The record discloses that during 1959 the respondent sold, shipped and invoiced a substantial quantity of citrus fruit to Brown and Loe at St. Louis; each and all of the invoices sent to this concern by respondent indicate that a brokerage or commission was allowed. Invoices from Brown and Loe to the ultimate customers in each of these transactions were also offered in evidence to show the final distribution of the fruit, and were received with the other documents relevant to the particular several transactions. Such invoices disclosed definitely, in many instances, that Brown and Loe had invoiced their customers at prices which were either higher or lower than the price charged by the respondent to Brown and Loe before the brokerage was deducted. There are many such examples in the record, but a few will suffice to illustrate the practice. Commission's Exhibits 3–A and 3–C show that in respondent's invoice of March 12, 1959, to Brown and Loe, twenty cartons of lemons were purchased for $2.25 a carton less brokerage, which same lemons were then invoiced by Brown and Loe to a customer, Raith Brothers Company, at $2.40 per carton, a 15¢ profit. Other exhibits (Commission's Exhibits 7–A and 7–B show that respondent, on September 17, 1958, invoiced to Brown and Loe twenty cartons of oranges at $3.00 per carton, and twenty-five cartons of another size of oranges at $2.75 per carton. These oranges were then invoiced by Brown and Loe to Raith Brothers Company at $3.25 and $3.00, respectively, a 25¢ profit per carton in each instance. In one unusual transaction (Commission's Exhibits 11–A and 11–B) it appears that Russell Ward was invoiced citrus fruit at $3.50 per carton, which it resold at $3.00 per carton, sustaining a loss of 50¢ per carton on some twenty-five cartons. It is urged by counsel supporting the complaint that this type of transactions, which are admittedly typical of many with the several brokerage firms above named, would show that these purchases were by the brokers for their own account for resale, and that they unlawfully received brokerage on these transactions from the respondent.

The respondent, while insisting that these transactions were billed to the brokers merely as a matter of convenience and were actually sales to the ultimate consumer rather than to the brokers, nevertheless admitted that insofar as the respondent was concerned, at the time it delivered the merchandise to the broker and billed him, "it was a completed transaction" (R. 10, 11, 25 through 27, 113 and 114). As already indicated, respondent has conceded that this would constitute a

prima facie case against it. Its defense consisted of an attempt to show how it could not afford to deal directly with buyers of small quantities of citrus fruit because of the additional cost of 1¾¢ per carton to it, which was more than double the $\frac{6}{10}$ of one cent per carton which it claimed was the highest profit it could make on such shipments. It is claimed that respondent cannot "police" such transactions clear through to the broker's buyer. It is urged that judicial notice be taken that the citrus market is extremely competitive, and that immediate sales of fruit must be effected when the crops mature, and that, to accomplish its distribution of these products, respondent's network of some one hundred brokers must be reached by immediate communication through telephone, telegraph, or teletype, as prices fluctuate rapidly. It is further urged:

> In the light of these circumstances and the additional costs involved in separate billing and collecting, respondent could not conduct its business in any other manner. The effect of a Commission decision against respondent most certainly would eliminate mixed load direct broker billings to the ultimate hardship of the grocers, respondent and purchasers. The Commission would not only eliminate one important channel of distribution, but favor the larger purchasers.

This claim of respondent's, in essence, was the basis for the Seventh Circuit's dismissal of the *Broch* case (261 F. 2d at p. 729), but, as the Supreme Court said in *Federal Trade Commission* v. *Broch & Company*, *supra*, 363 U.S. at page 177, in reversing such dismissal:

> If we held that § 2(c) is not applicable here, we would disregard the history * *, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve.

The testimony of Frees, bulwarked by after-the-fact letters of hearsay character from several brokers, indicates that it was the understanding between respondent and its several brokers that these direct broker billings were not considered sales between them, but were made in order to avoid the additional costs above referred to. It is unnecessary to determine here whether this position taken by respondent and its brokers was true or false. In *Modern Marketing Service, Inc.* v. *FTC*, CCA. 7 (1945), 149 F. 2d 970, it was held that motive and good faith were immaterial to a violation of § 2(c) (pages 976, 978). See also *Webb-Crawford Co.* v. *FTC*, C.C.A. 5 (1940), 109 F. 2d 268, 269. In short, § 2(c) of the Act is a *malum prohibitum* statute, and mental conditions and reasons are insufficient to avoid the statute's mandate. The law is against the practice rather than the intent, wherever brokerage is paid by a seller to a buyer or a buyer's agent, representative or broker.

While dual representation by a broker, with both the seller and the buyer, "was not prohibited by the common law if this dual status was disclosed fully" to both principals,

> It is obvious that dual representation by agents opens a wide field for fraud and oppression * * We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. * * The agent cannot serve two masters, simultaneously rendering services in an arm's-length transaction to both. *The Great Atlantic & Pacific Tea Company* v. *FTC*, *supra*, 196 F. 2d at pp. 675, 676.

The evidence here clearly establishes that these brokers were in fact acting for themselves and selling to others at a profit to themselves (or, in only the one instance above referred to, at a loss). Their acts were inconsistent with the claim that they were respondent's brokers. When they collected from their buyers, they remitted, at most, only what they, the brokers, were billed for by respondent, and respondent never indicated any interest in a further accounting from such brokers, who took both a brokerage from respondent and either a brokerage or a profit in such cases from those to whom they sold. Whether they be considered as buyers selling for themselves or as brokers for their buyers, in either event the respondent has violated § 2(c). "A seller may not pay the broker brokerage on the latter's purchases for his own account." *Southgate Brokerage Co.* v. *FTC* (C.C.A. 4, 1945), 150 F. 2d 607. Nor may a broker for a retail buyer receive commissions from the seller. *FTC* v. *Herzog, et al.* (C.C.A. 2, 1945), 150 F. 2d 450, and numerous cases cited.

The evidence further discloses that respondent granted a fluctuating discount of up to 15¢ per carton to purchasers of fifty or more cars of citrus fruit per year. Such discounts were granted to National Grocers, The Great Atlantic & Pacific Tea Company, National Tea Company, Eisner Grocery Company and Topco Associates, all of which were and are large chain supermarket concerns, who bought many carload lots between November 1, 1959, and September 30, 1960. Mr. Frees testified that this discount reflected substantial savings in communications, billing, accounting and collections, and that the average cost of a transaction was $30.00, whether the transaction involved five hundred cartons or five thousand cartons. Respondent objected to inquiry by counsel supporting the complaint on the subject of volume discounts on the ground that such matters involved a violation of § 2(a) rather than § 2(c), under which respondent was charged. Respondent nevertheless contends that its discounts to these large buyers were fully justified by cost savings, and further argues that this volume discount of up to 15¢ per carton had no relationship to

the regular 5¢-per-carton brokerage usually allowed, concluding that such volume discounts could not be considered as granted in lieu of brokerage. Counsel supporting the complaint contend, however, that respondent's policy of granting these substantial volume discounts, in any view of the evidence, cannot be reconciled with the small 6/10-of-one-percent average profit per carton on shipments allegedly consigned to brokers, as claimed by respondent; and contend further that no inference can be drawn except that the discounts granted to these large direct buyers must have been based, in part at least, on respondent's savings in the payment of brokerage. They argue that the testimony of Frees, respondent's sales manager, that the 15¢-per-carton quantity discount to the chain groups saved respondent all major cost factors incurred in selling through brokers, and the numerous substantial brokerage charges shown by the exhibits, prove conclusively that respondent passed on brokerage savings to such chain group buyers. We agree with counsel supporting the complaint, and it is found that, to that extent, such discounts or allowances to such chain group buyers were in lieu of brokerage and in violation of § 2(c) of the Clayton Act, as alleged in the complaint.

It is ordered, That respondent Western Fruit Growers Sales Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or any other food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

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

Decision and Order

This matter having been heard by the Commission upon the appeal of respondent from the hearing examiner's initial decision; and

It appearing to the Commission, upon review of the record, that the allegations of the complaint are substantiated by the evidence; and

It further appearing that the facts of the instant case are substantially similar to those involved in a large number of cases in which Commission orders have been issued in terms identical with those

contained in the initial decision herein; and that in the interest of uniform and equitable treatment of competitors, the entry of such an order against respondent is warranted by the facts presented (the Commission specifically not relying on the evidence referred to on pages 594, 595 of the initial decision relating to volume discounts granted to large direct buyers by respondent):

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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 not concurring.

IN THE MATTER OF

NASH, INC., ET AL.

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

Docket 8201. Complaint, Dec. 6, 1960—Decision, Sept. 18, 1962

Order requiring Jersey City, N.J., manufacturers of wallets, billfolds, purses, and other small leather and plastic accessories, to cease representing falsely that their split pigskin products were made of top grain leather by such practices as stamping them with the words "Saddle Pigskin", describing them on attached cards as "Leather" and "Genuine Leather", and inserting in them cards stating the true composition of nonleather pockets, linings, etc., in such a manner as not to be readily noticed by purchasers.

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 Nash, Inc., a corporation, and Daniel J. Nash and Jack Hammel, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nash, Inc., is a corporation organized, existing and doing business under the laws of the State of New Jersey,

with its principal office and place of business located at 316 Barrow Street, Jersey City 2, N.J.

Respondents Daniel J. Nash and Jack Hammel are officers of the corporate respondent. They formulate, direct and control its acts and practices, including those hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, distribution and sale of wallets, billfolds, purses and other small leather and plastic accessories to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New Jersey 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. Respondents, in the course and conduct of their business, have in certain instances misrepresented or failed to disclose the true identity of the materials from which their products are fabricated:

1. By stamping or causing to be stamped on certain of their wallets or billfolds the words "Saddle Pigskin", thereby representing that said products are made of top grain leather. In truth and in fact, said wallets or billfolds are not made of top grain leather but of corium split pigskin.

2. By inserting a printed card in their wallets or billfolds stating that such product is made of the type of leather stamped on said wallets or billfolds, except for the pockets, linings, partitions, stays and lacings (where used) which are made of other materials that simulate leather. Such a card, however, is frequently placed in the wallet or billfold in such a manner so as not to be readily noticed by prospective purchasers thereof, and they are not informed that the wallet or billfold contains materials other than that set forth by the stamping.

3. By designating and describing certain of their wallets or billfolds on cards attached thereto as "Leather" and "Genuine Leather" when, in truth and in fact, they are made of split leather.

PAR. 5. Respondents also have engaged in the practice of attaching, or causing to be attached, to their wallets or billfolds tickets upon which a price is printed, accompanied by a legend such as "Comparable Value" and "Comparable Retail", thereby representing, directly or by implication, that said wallets or billfolds are of like grade and

quality in all material respects to other wallets or billfolds currently offered for sale and sold at the price appearing on the tickets in the trade area where the representations are made. In truth and in fact, respondents' said wallets or billfolds are inferior in grade and quality in material respects to other wallets or billfolds currently selling for the price appearing on said tickets.

PAR. 6. By the aforesaid practices, respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead the public with respect to the matters and things set out in paragraphs 4 and 5 hereof.

PAR. 7. Through the use of printing on inserts in their wallets or billfolds and on invoices of the legend "House of Nash, Canada-Jamaica, Puerto Rico-Paris-New York-London-Rome" respondents represent that they operate plants or offices in such places.

Said representation is false, misleading and deceptive. While the respondents do maintain factories in Puerto Rico, and formerly did in Jamaica, B.W.I., and formerly maintained a sales office in Canada, they do not own or operate any plant or office in London, Paris, Rome or Canada.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise similar to that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead purchasers into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

Mr. Ames W. Williams supporting the complaint.
Mr. William R. Liberman, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

This proceeding was commenced by the issuance of a complaint on December 6, 1960, charging the above-named corporate respondent and the individual respondents, its officers, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by (a) misrepresenting or failing to disclose the true identity of the materials from which their wallets are fabricated, (b) misrepresenting the grade and quality of their wallets by attaching thereto a ticket upon which is imprinted a fictitious price accompanied by the words "Comparable Value" and (c) misrepresenting the operation of plants or offices in London, Paris, Rome and Canada. Specifically respondents are charged with misrepresenting or failing to disclose the true identity of the materials from which their wallets are fabricated by (a) stamping or causing to be stamped on certain wallets the words "Saddle Pigskin" when in fact such wallets are not made of top leather, but of corium split pigskin, (b) inserting a printed card in their wallets stating they are of leather except for those portions made of other materials simulating leather, but frequently this card is placed where it cannot be noticed readily by prospective purchasers, and (c) describing certain of their wallets on cards attached as "Leather" and "Genuine Leather" when they are made of split leather.

After being served with the said complaint, respondents appeared by counsel and thereafter filed their answer which in effect (a) admitted the use of the words "Saddle Pigskin" on wallets not made of top leather prior to January 12, 1959, (b) denied the improper positioning of descriptive cards so they cannot be noticed readily, (c) admitted the use of the words "Leather" and "Genuine Leather" on wallets made of split leather prior to January 12, 1959, (d) admitted attaching a ticket to their wallets imprinted with a price and the words "Comparable Value" but denied that their wallets were not of a like grade and quality, and (e) admitted the use of representations that they maintained offices or plants in Canada, Jamaica, Puerto Rico, Paris, New York, London, and Rome, but denied that they falsely represented the scope of these operations since they reflected any changes, as made from time to time, by rubber-stamping over previously painted stationery and other material the fact of the elimination of Canada, Jamaica, Rome and the substitution of Lausanne for the latter.

A pre-hearing conference was held in this case on July 17, 1961 at which by stipulation of the parties exhibits CX 1 to CX 17 inclusive for the Commission, and RX 1 to RX 3 inclusive for respondents, were admitted into evidence and the testimony of Stanley Miller as a witness for the Commission was received. Thereafter, on August 21, 1961 the undersigned was substituted as hearing examiner. At the outset of hearings conducted before the undersigned examiner on September 27 to 29, 1961, in New York, New York, both parties moved that the transcript of the hearings held on July 17, 1961, along with the exhibits introduced therein be, and the same were, made a part of the record herein. At such hearing additional testimony and other evidence were offered in support of the complaint and in opposition to the allegations set forth in the complaint. Proposed findings of fact, conclusions of law and briefs were filed by counsel supporting the complaint and by counsel for respondent on November 27, 1961.

Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent Nash, Inc., is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 316 Barrow Street, Jersey City 2, New Jersey.

2. The individual respondents Daniel J. Nash and Jack Hammel are officers of the corporate respondent and in said capacity formulate, direct and control its acts and practices.

3. Respondents are now, and for some time last past have been, engaged in the manufacture, distribution and sale of wallets, billfolds, purses, and other small leather and plastic accessories to jobbers and retailers for resale to the public.

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

5. Respondents in the past and as late as March and April of 1959 stamped or caused to be stamped on wallets and billfolds of their manufacture the words "Saddle Pigskin", thereby representing that said wallets were made of top grain leather when, in fact, they were made of split leather. This practice is deceptive and tends to mislead purchasers.

6. Respondents in the past and as late as the summer of 1959 failed to properly disclose on inserts or attachments, where such information may be readily seen by prospective purchasers, that constituent parts of of the items involved are, if such is the case, made from materials other than those represented. Certain wallets manufactured by respondents and shipped as late as June 1960, contain printed notices affixed to the price and value tags. Said notices are inserted in the pockets of the wallet so that only the price and value portion thereof are visible while the concealed portion bears the statement "Inner linings are rayon with simulated leather lining in the card case." However, plastic binders prominently positioned on the exposed face of the card case state, among other things, that the wallets are of "Luxurious Leather" and are "Silk Lined." This practice is patently ambiguous and tends to deceive purchasers.

Respondents since the latter part of 1959 and currently place in the interior portion of their wallets light weight paper inserts bearing the inscription in small type "This product is made of the type of leather stamped thereon, except for the pockets, linings, partitions, stays and lacings (where used) which are of other materials."

7. Respondents in the past and as late as October 1959 used cards placed prominently in the pass cases of their wallets bearing the inscription "Leather" and "Genuine Leather," thereby representing that said wallets were made of top grain leather when, in fact, they were made of split leather or deep buff. Top grain leather is the top layer whereas deep buff and split leather are the second and third layers respectively. The use of the words "Leather" and "Genuine Leather" without qualification in connection with wallets made of split leather or deep buff is deceptive and tends to mislead and deceive purchasers. *Matter of Louis Hoffman, Trading as L. Hoffman*, 31 F.T.C. 793 (1940); *Matter of Samuel Brier, d.b.a. Samuel Brier & Company and Quakertown Luggage Company, Inc.*, 24 F.T.C. 905 (1937).

Currently and since late 1959 respondents have been using cards similarly placed which state "Made of leather as stamped."

8. The respondents maintained a warehousing operation in Canada, but discontinued it late in 1959; a shopping service office, design and purchasing office in Rome, Italy, which was shifted to Lausanne,

Switzerland sometime in 1959; and a manufacturing plant in Jamaica, B.W.I., but discontinued that operation sometime in 1959. The corporate respondent expended considerable sums each year in maintaining these foreign offices and purchased considerable amounts of materials from each of the particular foreign countries through its local offices therein. When the offices and warehouses in Canada, Italy and Jamaica were discontinued, the corporate respondent had on hand a substantial amount of expensive business stationery, but took timely steps and at least as early as January 4, 1960, to obliterate and overstamp the names of the foreign cities of the discontinued operations. Under these circumstances the charge that respondents misrepresented their foreign operations has not been sustained and counsel supporting the complaint has not proposed any such finding.

9. The Federal Trade Commission initiated its investigation of respondents by letter dated May 13, 1958, bringing to their attention the failure to disclose that certain parts of their wallets were not leather and the fictitious pricing of such wallets, while affording them the opportunity for voluntary compliance. On May 15, 1958, counsel for respondent replied stating a desire to cooperate and requesting more particulars. On June 2, 1958, the Federal Trade Commission furnished respondents' counsel details as to the disclosures required where parts of wallets are made of materials other than leather and requested respondents to indicate if they were complying and whether such wallets bear price tickets that do not represent the usual and regular selling price of same. Counsel for respondent acknowledged said letter on June 4, 1958, and advised he would take it up with respondents. By letter dated June 19, 1958, respondents' counsel submitted cards reading "Plastic Stay and Pocket", "Rayon Lined", "Plastic Lacing and Stay" which were to be placed in the wallets in such a position that when the wallet is unfolded, these notices as to materials other than leather are in plain view and promised further information as to the pricing question. The Commission acknowledged this letter on July 15, 1958, and respondents' counsel replied thereto promising the requested information on August 4, 1958. By letter dated August 5, 1958, respondents' counsel stated that summer vacations at the plant had delayed the information. The Commission on August 25, 1958, requested prompt submission of the information and respondents' counsel replied August 27, 1958, stating the information would be furnished shortly after Labor Day.

Again on September 18, 1958, the Commission called upon respondents' counsel for a sample of the required disclosure on wallets and whether the same were made of split leather. In addition, an as-

surance was requested from respondents that they would not attach pretickets to their wallets except in those instances where a customer actually sells their wallets at the ticketed price. In response thereto respondents' counsel on September 26, 1958, transmitted a letter dated September 25, 1958, from the corporate respondent which stated, in part, that respondents did not attach and would not attach any price tickets or labels to their wallets which prices were in excess of the usual and regular retail selling price thereof. Respondents qualified this statement stating that it did not apply on "special" deals because on occasion and for a particular customer or to meet a demand of a particular situation, they would quote their usual selling price to the customer so that the customer could lower his usual selling price to the retail trade without affecting the normal higher value of the wallet. By letter dated October 1, 1958, respondents' counsel enclosed two specimen wallets pointing out indications of materials other than leather contained therein and advising that respondents are being asked about the split leather referred to in the Commission's letter of September 18, 1958. The Commission advised respondents' counsel that the disclosures in the two wallets submitted did not meet the legal requirements, pointing out in detail the shortcomings of the disclosures submitted. The letter also stated that irrespective of special deals or otherwise, price tickets cannot be placed on merchandise where such prices are in excess of the usual and regular retail selling prices of such articles. In conclusion, the Commission again requested assurance from respondents that they would comply with the Commission requirements including the pricing requirements and requested that such assurance be submitted within ten days.

On November 14, 1958, respondents' counsel advised the Commission that the busy time of the year and Christmas rush was at hand, but he would try to start changes in respondents' operations. Thereafter, on December 8, 1958, respondents' counsel enclosed a printed-card-disclosure indicating how said card would be inserted in the wallets. In response thereto, by letter dated December 18, 1958, the Commission advised respondents' counsel that the card disclosure could not be adequately evaluated unless contained or positioned in a wallet. Assurances were again requested from respondent that they would comply with the pricing requirements of the Guides Against Deceptive Pricing. In response thereto, respondents' counsel on December 22, 1958, advised that he would be back in his office on January 9, 1959, and by letter dated December 29, 1958, requested a conference in Washington in early February 1959.

By letter dated January 6, 1959, the Commission notified respond-

ents' counsel that since the information was not furnished that the corporate respondent was complying with the Federal Trade Commission's requirements, the file was being referred to the Bureau of Investigation. On or about January 12, 1959, Mr. Milton H. Gross, representing respondents' counsel, and Mr. Stanley N. Miller, an employee of respondents, conferred in Washington with staff members of the Federal Trade Commission. Subsequent thereto, by letter of January 30, 1959, respondents' counsel transmitted several wallets representative of how disclosure cards were inserted or attached thereto. It was also stated that when "Split Leather" is used it is so identified. It was further stated that "with respect to price designation in the form of labels, tickets or cards in connection with the sale of wallets, Nash, Inc. no longer furnishes price labels with or in connection with the sale of its wallets unless the customer strongly insists on such labels. In any case, where such price tickets, labels or cards are furnished at customer's request, the indicated price does not and will not exceed the usual customer selling price of the product in the area, or where the customer requests a particular price ticket and the product is actually retailed by the customer at the designated price, in which latter case the ticket will not be identified with Nash, Inc."

By letter dated February 11, 1959, the Commission acknowledged receipt of eight wallets and five invoices. The use of the term "Genuine Leather" was questioned and it was requested that its use be discontinued. In response thereto, respondents' counsel by letter dated March 3, 1959, stated that "Split Leather" will not be designated as "Genuine Leather" after January 30, 1959. Respondents' counsel on March 19, 1959, submitted a wallet marked "Calfskin Split", as stamped thereon. On March 24, 1959, the Commission acknowledged receipt of respondents' letter of March 3, 1959, and advised that the information would be given consideration in further treatment of the matter. Similarly on March 27, 1959, the Commission acknowledged respondents' March 19, 1959, letter.

10. Field investigation of this matter was initiated on July 15, 1959, and the record shows that respondents cooperated with the investigator for the Commission giving him free access to their plant, records, documents, etc.

11. Respondents urge that since the practices set forth in findings 5, 6 and 7 hereinabove were discontinued more than a year prior to the filing of the complaint herein on December 6, 1960, and they do not intend to resume them, no order is necessary. As set forth above the Federal Trade Commission initiated its investigation on May 13, 1958, of respondents' practices in stamping and otherwise identifying

the materials contained in their wallets. Correspondence between the respondent and the Commission dragged on for more than a year without complete assurances from the respondent as to the correction of these practices, finally culminating in the commencement of a field investigation in July 1959. The record demonstrates that the greater portion of the complained of practices set forth in findings 5, 6 and 7 hereof were discontinued, modified or abandoned by the respondents at least by the fall of 1959 and that they do not intend to resume them. This action on the part of respondents is commendable.

It is well settled that a discontinuance of the practices which the Commission may find to constitute a violation of the law does not render the controversy moot. *F.T.C.* v. *Goodyear Tire and Rubber Company*, 304 U.S. 257 (1938). It is also well established that even though a respondent has discontinued an unlawful practice, even prior to the issuance of a complaint, that this, in and of itself, does not prevent the Commission from issuing a cease and desist order. *Marlene's, Inc.* v. *F.T.C.* 216 F. 2d 556 (CA 7 1954); see also Initial Decision, *Swanee Paper Corporation*, Docket No. 6927 [1] (1959) where the abandonment defense was rejected, although it took place ten months prior to the issuance of the complaint. The Commission may, however, in its broad discretion dismiss a complaint because of discontinuance if unusual circumstances arise warranting dismissal. *Ward Baking Co.*, 54 F.T.C. 1919 (1956); *Argus Cameras, Inc.*, 51 F.T.C. 405 (1954).

In *Art National Manufacturers Distributing Co., Inc.*, et al., Docket 7286 the Chairman speaking for the Commission recently stated,

> * * * One such plea is respondents' claim that they have discontinued or abandoned several of the practices indicted by the complaint and have no intention to again engage in them. To resolve such questions we generally look to the timing and circumstances surrounding the alleged discontinuance. In this case it is admitted that the practices were not discontinued until the Commission attorney investigating this matter informed respondents of their questionable nature. Such discontinuance after the commencement of proceedings will not support a conclusion or give assurance that the practices will not be resumed and under such circumstances we have consistently refused to dismiss complaints. E.g., *Ward Baking Company*, 54 F.T.C. 1919 (1958); *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961) [58 F.T.C. 49]. Respondents here have presented no grounds which would justify our departure from past holdings and we accordingly reject their plea of abandonment.

The facts and circumstances which exist in this case do not justify dismissal of the charges contained in Paragraph 4 of the complaint on the ground that respondents have discontinued these practices. The

[1] Adopted by Commission March 1960; aff'd. on this point *sub silentio* 291 F. 2d 833 (CA 2 June 1961).

plea of voluntary discontinuance is much like Don Quixote's helmet. It appears impressive but it affords little protection. The respondents did not discontinue these acts and practices until after the Commission began its investigation and after the Commission's "hand was on respondents' shoulder." *Snap-On Tools Corporation*, Docket No. 7116 (November 1, 1961) [59 F.T.C. 1035]. The record is devoid of any evidence upon which to base a conclusion that the practices have been surely stopped with no likelihood of resumption. No unusual circumstances are shown to exist in this proceeding which would justify dismissal of this portion of the complaint on the grounds of abandonment.

12. Respondents engage in the practice of attaching, or causing to be attached, to some of their wallets or billfolds, tickets upon which a price is printed, and since sometime in 1959 the price has been accompanied by the words "Comparable Value," thereby representing, directly or by implication, that said wallets or billfolds are of like grade and quality in all material respects to other wallets or billfolds currently offered for sale and sold at the price appearing on the tickets in the trade area where the representations are made. Many of respondents' wallets preticketed as "Comparable $7.50 Value" actually sell for $2.99.

13. Counsel supporting the complaint offered in evidence three of respondents' wallets: one preticketed with a tag of "$7.50" and two with tags reading "Comparable $7.50 Value" which had been purchased for $2.99, in July 1959 and in July 1961 respectively. According to the unanimous testimony of four impartial witnesses, who have a combined total of over 55 years as wallet and leather goods buyers in four leading New York City department stores, the aforesaid wallets were worth considerably less than the alleged "Comparable $7.50 Value," and were not comparable in value or quality to items which they sell at retail for $7.50. One witness placed a retail value of $2.99 on all three of these wallets, one witness valued two at $5.00 and one at $3.95, and another witness valued all three at between $2.49 and $2.99. This testimony, if accepted, would mean that the "Comparable $7.50 Value" ticketed price used by respondents was grossly in excess of the price at which wallets of like grade and quality are usually sold in the trade area where the representations are made.

14. Respondents question the expertise of the four witnesses called in support of the complaint because of alleged discrepancies between them in values placed on various wallets, identified and unidentified as to the manufacturer, shown to them by respondent on cross-examination. Respondents' point out that discrepancies exist between the

experts and the actual retail prices at which competitors' wallets were purchased by witnesses acting on behalf of respondents. Respondents further note that discrepancies exist between values placed by the experts on wallets of recent manufacture by respondents and respondents' witnesses who testified that such wallets were $7.50 and $10.00 values. In the opinion of the examiner the facts relied upon by respondents are not a sufficient justification for concluding that the four buyers called by counsel supporting the complaint were not qualified experts as to the retail value of the wallets at issue. All four witnesses appeared to have a good understanding as to what it is that contributes to the value of a leather wallet. None of the four expert witnesses heard the testimony of the others or had an opportunity to discuss his or her testimony with the others, yet their estimates as to the retail value of the various wallets shown them were substantially in line with one another. A chart of the expert testimony relating to paragraph five of the complaint is attached hereto and made a part of this finding [p. 608].

This chart graphically demonstrates the cross-examination to which these four witnesses were exposed and the overall accuracy and consistency of their testimony with respect to the valuation not only of the wallets of other manufacturers purchased by respondent, but as to those wallets of recent manufacture by respondents, which were unidentified when shown to them. For example, with respect to RX 14, a competitor's wallet which allegedly retails at $7.50, the four experts valued this wallet at $4.95, $5.00, $5.00 and $3.50 respectively, and respondents' witness Miller valued it at only $1.98 to $2.98. Again with respect to RX 15 which allegedly retails at $8.95 the four experts valued it at $4.00, $3.99, $3.95 and $2.00 to $2.50, while respondents' witness Miller valued it at $5.00. Similarly with respect to RX 10 and RX 11, the experts valued both of these at $6.00, $5.00 and $4.00 respectively. The mere fact that they differed in their testimony or that they valued wallets at less than their alleged retail purchase price by one of respondents' witnesses does not destroy the efficacy of their testimony. Especially when the wallets RX 12, RX 15 and RX 19 so undervalued were purchased at Adlins Stationery Store in Jersey City, New Jersey; Union News Co., Pan American Gift Shop, Idlewild Airport, New York; and a gift shop at O'Hare Airport, Chicago, all of whose markups are unknown and obviously are not competitive with the large New York department stores. As noted in the chart, some of the discrepancies between the four experts can also be attributed to variances in the markups in their respective department stores.

CHART OF TESTIMONY RELATING TO PARAGRAPH FIVE OF COMPLAINT

		Wallets introduced by Commission during Case in chief.			Wallets introduced by Respondents during cross examination of Commission experts and during presentation of defense. All except RX 7, 3, 10, 11 and 13 are competitors' products.															
Witness	For	CX 12 Nash	CX 13 Nash	CX 14 Nash	RX 6 Lord Buxton $7.50 ret.	RX 7 Nash	RX 8 Nash	RX 9 Lord Buxton $7.50 ret.	RX 10 Nash	RX 11 Nash	RX 12 Lord Buxton $10.00 ret.	RX 13 Nash	RX 14 Swank $7.50 ret.	RX 15 Amity $8.95 ret.	RX 16 Gimbel's $1.99 ret.	RX 19 Justin $7.50 ret.	RX 20 Kenton $3.00 ret.	RX 21 Tempo $3.00 ret.	RX 50 Aristocrat $3.00 ret.
Sona Grechen Buyer, Altmans 15 yrs. experience	Commission	Each Exhibit worth less than $7.50 Retail Value.			$7.73	$5.50 to $5.95.	$5.00 to $5.95.	$7.95	Prefers quality of RX 9 to each of these.		$7.95	$5.95	$4.95	$3.95 to $4.00.					
Michael Cesario Buyer, Gimble's 20 yrs. experience	Commission	$2.99	$2.99	$2.99	$7.50	$5.00		$7.50	$5.95 to $6.00.	$5.95 to $6.00.			$3.00	$3.99	$1.99				
Julius Herrmann Buyer, Macy's 14 yrs. experience	Commission	$5.00	$5.95	$5.00		Rates RX 8 as higher than RX 7 but both higher than CX 12.			$5.00	$5.00			$5.00	$5.95		No estimate of value.	$2.98	$2.98	
Ira Friedenberg* Buyer, Ohrbach's 6 yrs. experience	Commission	Each Exhibit is valued from $2.49 to $2.99.			$4.00	$2.50 to $3.00.	$2.50 to $3.00.	$3.00	$4.00	$4.00	$5.00		$3.50	$2.00 to $2.50.					
Stanley N. Miller** Employee Salesmanager Nash, Inc.	Respondent	Exhibits sold to Woolworth's at $21.00 or $21.60 per dozen.			$7.50 - a little more.	Rates RX 7 worth $7.50.	Rates RX 8 worth $10.00.	$7.50	Rates RX 10 worth $7.50.	Rates RX 11 worth $10.00.	$7.50	Rates RX 13 worth $10.00.	$1.98 to $2.98.	$5.00		$7.50			
Daniel J. Nash*** Owner Nash, Inc.	Respondent	Exhibits sold to Woolworth's at $21.60 per dozen.				Sold by others than Woolworth for $7.50.	Sold by others than Woolworth for $10.00.		Sold by others than Woolworth for $7.50.	Sold by others than Woolworth for $7.50 or $10.00.		Sold by others than Woolworth for $7.50 or $15.00.	Much less value at $7.50 than all of Nash wallets.	Less value at $8.95 than RX 1..		Much less value at $7.50 than RX 12 and 13.			$3.30
James Coyle Employee Designer Nash, Inc.	Respondent	Rated CX 12 slightly higher than RX 13.			Rates RX 7 and 8 better value than RX 6.			Rates RX 9, 10 and 11 the same.											
Ludwig Lowenstein**** Leather Sales Agent to Nash, Inc.	Respondent					Rates leather value of RX 7 and 8 higher than CX 12 and RX 6.		Rates wearing quality of RX 9, 10 and 11 about the same.											
Henry H. Kramer Employee Purchasing Agent Nash, Inc.	Respondent	CX 12, 13 and 14 are much lower in price than RX 7, 8, 10, 11 and 13. *****				Rates RX 7 and 8 as higher priced than RX 6 and CX 12 as cheapest.		Rates RX 9, 10 and 11 about same and better than CX 14.			Prefers RX 13 to RX 12 but there is little difference.								

*Ohrbach's mark-up is 20 to 35% rather than the 40 to 45% of the other three stores and is, consequently, reflected in the lower appraisals.
**Testified that RX 7, 3, 10, 11 and 13 contain $7.50 comparable value tickets when sold to Woolworth's.
***Testified RX 11 is presently sold to Woolworth's for $21.00 a dozen.
****Could not compare value of leathers except pigskin - RX 7, 8 and CX 12.
*****Material in CX 14 used in lower price range than RX 9, 10 and 11.

But the examiner does not rely solely on the testimony of the four witnesses called in support of the complaint for his findings. Henry Kramer, an employee of respondent, testified that CX 12, CX 13 and CX 14, the wallets introduced to support the allegations of paragraph 5 of the complaint, were much lower in price than RX 7, RX 8, RX 10, RX 11 and RX 13, also manufactured by respondents and valued by some of respondents' witnesses at $7.50 and by the experts called in support of the complaint at prices ranging from $2.50 to $6.00. Even if we assume that RX 7, RX 8, RX10, RX 11 and RX 13 are respondents' current line of merchandise replacing CX 12, CX 13 and CX 14 in 1960, the testimony of the four experts unanimously valued these exhibits at less than a "Comparable $7.50 Value." The fact that RX 7, RX 8, RX 10, RX 11 and RX 13 have never been in the retail market and that the mode and basis of their selection from respondents' current production line was not indicated, casts doubts on any such assumption or inference.

Respondents' witness Kramer also testified that he rated the leather in RX 7 and RX 8 as higher priced and of better wearing quality than CX 12 and RX 10 and RX 11 better in the same respects than CX 14. This testimony was corroborated by another witness for respondent, Ludwig Lowenstein, a leather expert, who rated the grade and quality of the leather in RX 7 and RX 8 higher than CX 12. With respect to wallets made of other than pigskin, the leather expert refused to compare the quality of the leather in the various exhibits giving as the reason that to make an accurate judgment on quality and grades of leather he would have to see the entire hide, not just one wallet. Respondents' argument that the four experts were not qualified because they lacked experience in leather fabrication is therefore of little consequence since respondents' acknowledged leather expert refused to testify to any great extent regarding quality and grades of leather used in the various exhibits.

15. It is concluded and found that respondents' wallets or billfolds are inferior in grade and quality in material respects to other wallets or billfolds currently selling for the price appearing on the tickets attached to respondents' wallets in the trade area where the representations are made.

16. By indulging in the practices embraced in paragraphs 5, 6, 7 and 12 hereof, the respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead the public.

17. In the conduct of their business, the respondents have been and are in substantial competition in commerce, with corporations, firms,

and individuals in the sale of merchandise similar to that sold by the respondents.

18. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices have the tendency and capacity to mislead purchasers into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce is being unfairly diverted to respondents from their competitors and substantial injury is being done to competition in commerce.

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

CONCLUSIONS OF LAW

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. Counsel supporting the complaint has proved by reliable, probative and substantial evidence that respondents by misrepresenting or failing to disclose prominently the true identity of the materials from which their wallets are fabricated and by misrepresenting the grade and quality of their wallets by attaching thereto a ticket upon which is imprinted a fictitious price accompanied by the words "Comparable Value," put into the hands of retailers who buy wallets from them, the means whereby such persons may mislead and deceive members of the purchasing public. Respondents' aforesaid acts and practices are to the prejudice and injury of the public and respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

4. Counsel supporting the complaint has failed to prove by reliable, probative and substantial evidence that respondents have misrepresented the operation of plants or offices in London, Paris, Rome and Canada.

ORDER

It is ordered, That respondent Nash, Inc., a corporation, and its officers, and respondents Daniel J. Nash and Jack Hammel, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of wallets or billfolds, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Saddle Pigskin", "Leather", "Genuine Leather", or any other words of similar import, in connection with wallets or billfolds made of split leather, or misrepresenting in any manner the kind or quality of the materials of which their wallets or billfolds are composed.

2. Offering for sale or selling wallets or billfolds made in whole or in part of split leather without affirmatively disclosing such fact on or in immediate connection with such product in a clear and conspicuous manner.

3. Offering for sale, selling or distributing wallets or billfolds made in part of leather and in substantial part of material other than leather without clearly disclosing thereon or in immediate connection therewith that a part thereof is not made of leather.

4. Using the words "comparable value" or any words of similar import, in connection with any price, as descriptive of respondents' products when such products are not of like grade and quality in all material respects as the merchandise to which compared and which is regularly sold at the purported retail price in the trade area or areas where the representation is made.

5. Furnishing any means or instrumentality to others whereby they may mislead the public as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That the complaint insofar as it relates to the misrepresentation of the operation of plants or offices in London, Paris, Rome and Canada, as more specifically set forth in paragraph 7 of the complaint, be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner:*

This is an appeal by the respondent wallet and billfold manufacturer and two of its officers from the hearing examiner's initial decision filed December 12, 1961, in which he found respondents had

violated the Federal Trade Commission Act. The complaint in this matter, issued December 6, 1960, charges (1) respondents misrepresented or failed to disclose the true identity of the materials from which their products were manufactured; (2) misrepresented the quality of their products by advertising them as "comparable" to wallets selling for $7.50; and (3) falsely represented that the respondent company operated plants or offices in London, Paris, Rome and Canada. The hearing examiner dismissed the third of the enumerated charges but held the first two to have been sustained and directed the respondents to cease and desist therefrom.

The Alleged Misrepresentation of Materials

The respondents' alleged failure to properly disclose the true nature of the components from which their wallets and billfolds are fabricated is charged in Paragraph 4 of the complaint. It is there alleged that respondents stamped certain wallets and billfolds with the words "Saddle Pigskin" and in certain other wallets or billfolds inserted cards containing the words "Leather" or "Genuine Leather". It is charged that by the use of these unqualified designations the respondents represented, contrary to fact, that the wallets so designated were made of top grain leather when in truth and in fact they were made of split leather.

It is also charged in Paragraph 4 that respondents' practice of indicating on printed cards that certain components such as linings, pockets and lacings are made of materials other than leather is inadequate to inform prospective purchasers since the cards are placed in the billfolds ". . . in such a manner so as not to be readily noticed. . . ."

The respondents allege as a special defense that such practices were discontinued "shortly after January 12, 1959". The hearing examiner discounted this defense and so do we. It appears that Commission personnel first contacted the respondents in respect to these misrepresentations by letter dated May 13, 1958. Thereafter conferences were had and much correspondence exchanged, but eighteen months later, in October 1959, the respondents were still representing by means of card inserts bearing the inscription "Genuine Leather" that their split cowhide wallets were made of top grain leather. Moreover, wallets bearing these misleading cards were still on retailers' shelves in 1960.

It appears that as late as June 1960, respondents were not properly and adequately disclosing that certain components of their wallets were made of materials other than leather. At that time wallets were still being shipped with the necessary disclosure printed on a card

but obscured by the wallet pocket in which the card was inserted.

While these practices were apparently discontinued some time before the complaint issued, we, nevertheless, feel that the public interest requires an order to cease and desist. The respondents' discontinuance was the result of official, although informal, action, and, therefore, cannot be said to be voluntary. Under these circumstances the public is entitled to a guarantee against resumption, a guarantee which can only be supplied by an order to cease and desist.[1]

The Quality Charge

In Paragraph 5 of the complaint it is charged that respondents attach tickets to their wallets which bear a monetary amount accompanied by the legend "Comparable Value" or "Comparable Retail", thereby representing that their wallets are equal in grade and quality ". . . to other wallets or billfolds currently offered for sale and sold at the price appearing on the tickets . . ." The complaint alleges that the respondents' wallets are, in fact, inferior in quality to such ". . . other wallets or billfolds currently selling for the price appearing on said tickets."

The record reveals that some of respondents' wallets containing tags or tickets reading "Comparable $7.50 value" are sold to retailers for $1.80 ($21.60 a dozen) and resold to consumers for $2.99.

Complaint counsel rests his case entirely on the testimony of four expert witnesses, wallet and billfold buyers for leading New York City department stores. Each of these witnesses was handed respondents' wallets and asked for an opinion as to their retail value. The resulting answers fixed the value as between a low of $2.49 and a high of $5.00. By "value" the witnesses meant the price at which the respondents' wallets would sell to consumers in their stores. Respondents' wallets were, in fact, not stocked and sold by the buyer witnesses' stores. The experts also testified that the wallets in question do not represent a $7.50 value or compare to wallets which their employers were selling for $7.50.

On the basis of this expert testimony, elicited on direct examination, the hearing examiner found that respondents' wallets were in-

[1] It is now well established law that discontinuance prior to the issuance of a complaint does not bar an order to cease and desist. See, for example, *Keasbey & Mattison Co., et al.* v. *Federal Trade Commission,* 159 F.2d 940, 951 (6th Cir. 1947); *Hershey Chocolate Corp., et al.* v. *Federal Trade Commission,* 121 F.2d 968, 971 (3rd Cir. 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission,* 111 F.2d 889, 891 (7th Cir. 1940).

Even a "voluntary" discontinuance does not necessarily preclude the issuance of an order. *Marlene's, Inc., et al.* v. *Federal Trade Commission,* 216 F.2d 556, 559–60 (7th Cir. 1954); *C. Howard Hunt and Co.* v. *Federal Trade Commission,* 197 F.2d 273, 281 (3rd Cir. 1952).

ferior to "other wallets or billfolds currently selling for . . ." $7.50 and concluded that respondents' representations were false. In so finding he apparently gave no weight at all to the effective rebuttal produced by cross-examination.

On cross-examination the experts were asked to place a value on two "other" wallets which the record shows were "currently offered and sold" for $7.50 and $8.95.[2] Their testimony fixed the retail "value" of these wallets in the same range as respondents, that is, from $2.00 to $5.00. Thus, these "other" wallets were not superior in "grade and quality" to respondents' wallets or, stated another way, respondents' wallets were not shown to be "inferior" to these "other" wallets currently selling at or higher than the comparable value price appearing on the tickets affixed to respondents' wallets.

Of course, it may be that the "other" wallets shown to the witnesses were substantially over-priced and, indeed, one is almost forced to that conclusion by the testimony of the expert witnesses. However, that is not a relevant consideration under this complaint for they were, in the language of the complaint, "currently offered for sale and sold" at $7.50 and $8.95. The same witnesses fixed the value of these "other" wallets and, thus, the only conclusion which can be drawn is that respondents' wallets are approximately equal in grade and quality to at least some other higher priced wallets.

The Commission believes that the public understands "comparable value" advertising representations to mean that the advertiser is offering goods at a price lower than that generally prevailing in the trade area for goods of similar quality. It seems to us that this is the only logical interpretation which can be made of such representations and it is doubtless the one intended by the advertiser. But the complaint was not cast in such terms and as drafted was not proved. An appropriate order dismissing this charge of the complaint will issue. The hearing examiner's contrary findings are in error and are vacated and set aside.

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

Final Order

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

[2] The hearing examiner found that these wallets "allegedly retail" for $7.50 and $8.95. This is an erroneous characterization since the record contains unrebutted proof that the wallets were purchased from prominent New York City area retailers at these prices. As a matter of fact, one of these "other" wallets was purchased from a store which employed one of the expert witnesses.

briefs and oral argument in support of said appeal and in opposition thereto; and the Commission having rendered its decision in part granting and in part denying the appeal:

It is ordered, That the following provisions of the initial decision be, and they hereby are, vacated and set aside.

1. Findings 12, 13, 14 and 15 in their entirety.

2. The phrase ". . . and 12 . . ." appearing in finding 16.

3. The phrase " . . . and by misrepresenting the grade and quality of their wallets by attaching thereto a ticket upon which is imprinted a fictitious price accompanied by the words 'Comparable Value, . . .' " appearing in numbered paragraph 3 of the Conclusions of Law.

4. Numbered paragraph 4 of the Order in its entirety.

It is further ordered, That as so modified the initial decision be, and it hereby is, adopted as the decision of the Commission, which hereby promulgates and issues this, its final order:

It is ordered, That respondent Nash, Inc., a corporation, and its officers, and respondents Daniel J. Nash and Jack Hammel, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of wallets or billfolds, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Saddle Pigskin", "Leather", "Genuine Leather", or any other words of similar import, in connection with wallets or billfolds made of split leather, or misrepresenting in any manner the kind or quality of the materials of which their wallets or billfolds are composed.

2. Offering for sale or selling wallets or billfolds made in whole or in part of split leather without affirmatively disclosing such fact on or in immediate connection with such product in a clear and conspicuous manner.

3. Offering for sale, selling or distributing wallets or billfolds made in part of leather and in substantial part of material other than leather without clearly disclosing thereon or in immediate connection therewith that a part thereof is not made of leather.

4. Furnishing any means or instrumentality to others whereby they may mislead the public as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That the complaint insofar as it relates

to the misrepresentation of the operation of plants or offices in London, Paris, Rome and Canada, as more specifically set forth in Paragraph Seven of the complaint be, and the same hereby is dismissed.

It is further ordered, That Paragraph Five of the complaint be, and it hereby is, dismissed.

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

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF

ELYSÉE FABRICS, INC., ET AL.

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

Docket C-236. Complaint, Sept. 18, 1962—Decision, Sept. 18, 1962

Consent order requiring importers in Jamaica, N.Y., to cease violating the Textile Fiber Products Identification Act by labeling, invoicing, and advertising textile fiber products falsely as to the name or amount of constituent fibers, and by use of such misleading terms as "linen weave" and "silky"; failing to disclose on labels on textiles the true generic name of the fibers present, the percentage thereof, and the order of predominance by weight; failing to set forth in catalogs the true generic names of fibers in advertised fabrics, and using therein the name "leopard" or other fur bearing animal for textiles which were not fur products; and to cease violating the Wool Products Labeling Act by failing to disclose the true generic name of fibers present in wool fabrics.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act and the Wool Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Elysée Fabrics, Inc., a corporation, and Gunther F. Ziegler, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939, and it appearing