which does not set forth in a clear and conspicuous manner the following statements:

"CAUTION: Keep out of reach of children. If taken internally, induce vomiting; consult physician. Avoid prolonged or repeated contact with skin. In case of contact, flush skin with water. After mixing with liquid hardener, use in well ventilated area; avoid vapors."

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

RADIATOR SPECIALTY COMPANY ET AL.

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

Docket 7662. Complaint, Nov. 24, 1959—Decision, Sept. 21, 1962*

Order requiring Charlotte, N.C., manufacturers of non-metallic sealing compounds designed for repairing and sealing leaks in automobile radiators and in steam and hot water heating systems, to cease representing falsely in advertising in magazines, by circulars distributed to the trade and the general public, and by use of their trade name "Solder Seal", that their products were solders, were metallic, and formed a metallic seal or bond.

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 Radiator Specialty Company, a corporation and I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth, 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 Radiator Specialty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1400 West Independence Boulevard, in the city of Charlotte, State of North Carolina.

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*As amended March 8, 1961.

Respondents I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, advertising, offering for sale, sale and distribution of sealing compounds designed for repairing and sealing leaks in automobile radiators and in steam and hot water heating systems. Said compounds are designated by respondents as "Solder Seal Radiator Repair", "Boiler Solder Seal Type R–H", "Solder Seal Boiler Repair", "Liquid Boiler Solder Seal", "Liquid Solder Seal Radiator Repair", "Solder Seal Block Seal" and "Liquid Solder Seal Block Seal". Some of these products contain small quantities of metallic substances but all consist principally of organic and non-metallic materials.

Respondents use the trade mark "Solder Seal" on the containers of all of said products.

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 North Carolina to purchasers thereof located in various other States of the United States and in the District of Columbia, and have maintained, and now maintain, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents advertise their said products in magazines of national circulation and by means of circulars distributed to the trade and the general public. These advertisements list said products under their names, as aforesaid, and set out the trade mark "Solder Seal".

Through the use of said names, said trade mark and various statements and representations contained in said advertising matter, respondents represent and have represented, directly or by implication:

1. That their said products are solders comprised of metals or alloys used to join metals.

2. That said products are metallic and when used form a metallic seal or bond.

3. That their "Solder Seal Radiator Repair" will effect a permanent repair.

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact:

1. Respondents' said products are not metallic solders and do not have the characteristics and effectiveness of metallic solders. Their effectiveness depends principally on their organic and non-metallic ingredients.

2. Respondents' said products are not metallic and they do not form a metallic seal or bond.

3. Respondents' "Solder Seal Radiator Repair" will not effect a permanent repair.

PAR. 6. By the aforesaid practice, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the nature, composition and effectiveness of their products.

PAR. 7. In the course and conduct of their business respondents are now, and at all times mentioned herein have been, in substantial competition with corporations, firms and individuals in the sale, in commerce, of products similar to those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has been, and is being done to competition, in commerce.

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

Mr. Frederick McManus for the Commission.

Thigpen & Hines, of Charlotte, N.C., by *Mr. Richard E. Thigpen, Jr.*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the making of certain representations in connection with products designed for use in repairing breaks and stopping leaks in automobile radiators and

steam and hot water heating systems. Hearings have been held at which a substantial volume of evidence, both in support of and in opposition to the complaint, was introduced. Proposed findings and conclusions have been submitted by the parties and have had the careful consideration of the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not warranted by the record or as not material.

2. The corporate respondent, Radiator Specialty Company, is a North Carolina corporation with its principal place of business at 1400 West Independence Boulevard, Charlotte, North Carolina. It is engaged in the manufacture and sale of an extensive line of chemicals, chemical compounds, rubber goods, and tools and devices used in the automotive and plumbing and heating trades. There is no issue over the elements of interstate commerce and competition. The company sells its products throughout the United States and is in substantial competition with other concerns engaged in the interstate sale of products designed for the same uses as its own products.

3. Respondents I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth are president, vice president, and secretary, respectively, of the corporation. At the close of the Commission's case-in-chief a motion to dismiss the complaint as to J. J. Duckworth in his individual capacity was granted by the hearing examiner. (Tr. 125–126) Similar motions as to the other individual respondents were denied, without prejudice to the right of the respondents to renew the motions at the conclusion of the proceeding. Later in the present decision this matter will be further considered.

4. The principal controversy in the proceeding centers around the use by respondents of the trade mark or trade name "Solder Seal" in connection with the products here involved, and particularly the use of the word "solder" in such name.

5. Respondents' business had its inception around 1926. From practically nothing the business has grown until it is now a very substantial and successful enterprise. It employs some 350 persons in its plant in Charlotte, and has some 80 traveling salesmen selling its products throughout the United States. Its trade name "Solder Seal" is a registered trade mark which is widely and favorably known in the plumbing, heating and automotive supply trades. Both the company and its products enjoy an excellent reputation.

6. The trade name "Solder Seal" unquestionably is a very valuable business asset. In fact, the name is much better known in the trade than is respondents' corporate name. The trade name is used by respondents not only in connection with specific products, but generally

to identify all of the company's products. The name appears on the company's catalogs, advertising circulars, price lists, stationery, bank checks, calling cards, etc.

7. The specific products of respondents which are here involved are: "Solder Seal Radiator Repair", "Liquid Solder Seal Radiator Repair", "Solder Seal Radiator Pressure Seal", "Boiler Solder Seal", "Liquid Boiler Solder Seal", "Boiler Solder Seal Type R–H", "Block Seal" and "Liquid Block Seal". The complaint, as originally issued, charged that through use of the trade name "Solder Seal" and otherwise respondents had represented, contrary to fact:

1. That their said products are solders.
2. That said products are metallic and when used form a metallic seal or bond.
3. That their "Solder Seal Radiator Repair" will effect a permanent repair.

8. Admittedly there is no evidence in support of the third charge (as to the permanency of the repairs effected through use of "Solder Seal Radiator Repair"), and that charge was dismissed by the hearing examiner at the close of the Commission's case in chief. (Tr. 133–135)

9. As to the first charge, particular attention is called to the fact that in conformity with an agreement of counsel this charge was amended by an order of the hearing examiner issued March 8, 1961. At noted above, the original complaint charged that respondents had represented "That their said products are solders". In challenging the correctness of this claim the original complaint stated:

Respondents' said products are not solders and do not have the characteristics and effectiveness of solders. Their effectiveness depends principally on their organic and non-metallic ingredients.

As amended, the complaint charges respondents with representing:

That their said products are solders comprised of metals or alloys used to join metals.

and the corresponding "denial" portion of the complaint, as amended, reads:

Respondents' said products are not *metallic* solders and do not have the characteristics and effectiveness of *metallic* solders. Their effectiveness depends principally on their organic and non-metallic ingredients. (Emphasis added)

10. It will be observed that whereas the original complaint took the flat position that the products in question are not solders, the amended complaint says only that the products are not "metallic" solders. Thus the complaint, as amended, appears to recognize that the products are or may be solders; the only contention is that the products are not "metallic" solders.

11. Testifying at the instance of Commission counsel were two well-qualified experts in the field of metallurgy, Dr. William A. Pennington of the University of Maryland and Dr. Russell W. Mebs of the National Bureau of Standards. To these experts soldering means the joining or bonding of two metals by means of a third metal or metal alloy, the operation being accomplished through the application of heat. The witnesses do not recognize a "non-metallic" solder; to them a solder must be a metal or metal alloy.

Upon examining the formulas for respondents' products the witnesses stated in substance that while the products, or some of them, do contain small amounts of metallic ingredients, none of the products can properly be regarded as a metal or metal alloy, nor as a metallic substance.

12. The record contains definitions of soldering taken from professional manuals. In the Metals Handbook, Volume I, of the American Society for Metals, the terms "brazing" and "soldering" are treated in conjunction with each other and therefore the definitions of both are set out below:

Brazing is defined as:

> Joining metals by flowing a thin layer, capillary thickness, of non-ferrous filler metal into the space between them. Bonding results from the intimate contact produced by the dissolution of a small amount of base metal in the molten filler metal without fusion of the base metal.

Soldering is defined as:

> Similar to brazing, with the filler metal having a melting temperature ranging below an arbitrary value, generally 800 degrees Fahrenheit. Soft solders are usually lead-tin alloys.

The American Welding Society Soldering Manual, 1959, defines soldering as a:

> Joining process wherein coalescence is produced by heating generally below 800 degrees Fahrenheit and by using non-ferrous filler metal that has a melting point below that of the base metal. The filler metal is distributed between properly fitted parts by capillary attraction. The temperature range differentiates soldering from brazing (above 800°F) which is thoroughly discussed in the American Welding Society Brazing Manual.

13. On the other hand, the definitions of "solder" in Webster's New Collegiate Dictionary, 1951, are much broader. These definitions are:

> Noun: 1. A metal or metallic alloy used when melted to join metallic surfaces. Solders which melt readily are soft solders; others fusing at a red heat are hard solders. 2. Hence, anything which unites or cements.
>
> Verb: 1. To join by solder. 2. To unite securely, to cement. 3. Hence to mend, patch; often with up. 4. To be or become united by or as by a solder.

While Webster's New International Dictionary, Second Edition, goes into the matter in greater detail, the definitions given are similar to those just quoted.

14. An expert testifying on behalf of respondents was Mrs. Daphne R. Leeds. Mrs. Leeds is a lawyer who has specialized in the field of trade mark law, having practiced some 25 years in that field. She served as Assistant Commissioner of Patents in the United States Patent Office from 1953 to 1960. Unquestionably she is a well-qualified authority on the subject of trade marks and trade names. In her opinion the word "solder" has acquired a secondary meaning and now means to the public simply a sealant or sealing agent. She does not regard respondents' trade name "Solder Seal" as deceptive or misleading.

15. As already pointed out, the complaint itself, as amended, appears to recognize that respondents' products are solders; the only charge is that the products are not "metallic" solders.

16. There is thus presented here a situation in which a word has a dual meaning. To a metallurgist solder means a metal or metallic substance. To others, and particularly the general public, the word may well mean nothing more than a sealant or sealing agent. The word as used by respondents in their trade name therefore is not false, but, in the absence of clarification or qualification, it does have the tendency and capacity to mislead or confuse, because of its dual meaning.

17. In such a situation an order requiring the absolute excision of the word from respondents' trade name clearly would be unwarranted and oppressive. The trade name is a very valuable business asset. Excision should never be required if some less drastic remedy will afford reasonable protection to the public. *Jacob Siegel Company* v. *F.T.C.*, 327 U.S. 608.

All that would seem to be required here is that when the trade name is used in connection with any of the products disclosure be made that the product is non-metallic.

18. It is urged by respondents that no order at all is required, because, respondents say, the products are not sold to consumers, but to professionals—wholesalers, automotive parts dealers, plumbers, heating engineers, repairmen, etc.,—and that such persons are not misled as to the nature of the products. There is no assurance, however, that some of the professionals may not be misled, or at least confused, by the unqualified use of the trade name. Moreover, while it is unquestionably true that generally speaking the products are not sold to consumers, one exhibit (Com. Ex. 27, p. 10) indicates that at least

one of the products is displayed in retailed stores and sold to the general public.

19. Next presented is the matter of the second charge in the complaint—that respondents have represented, contrary to fact, "That said products are metallic and when used form a metallic seal or bond." It is apparent from an examination of the containers in which respondents package certain of the products that this charge has been sustained. The product "Boiler Solder Seal" is referred to on the container as a "metallic" liquid concentrate (Com. Ex. 1). Also as a "metallic" powder (Com. Ex. 2). "Boiler Solder Seal Type R-H" is described as a "metallic" powder (Com. Ex. 3). "Liquid Solder Seal Radiator Repair" is described as a "metallic" radiator repair (Com. Ex. 4). On another container it is stated that the radiator repair product "seals metal with metal" (Com. Ex. 6). The container for the product "Block Seal" bears the statements "The original metal-base formula" and "Repairs metal with metal" (Com. Ex. 9).

As heretofore pointed out, none of the products can properly be regarded as metal or as a metallic substance. It therefore follows that the products, when used, do not form a metallic seal or bond.

20. In fairness to respondents, it should be noted that a stipulation entered into between the corporate respondent and the Commission years ago contained a provision that the company would cease and desist from:

(a) Failing to disclose that the product "Solder Seal" brand "Radiator Repair" is a metallic powder. (Resp. Ex. 29C, Stipulation No. 7680, dated Oct. 31, 1947, approved by Commission Feb. 10, 1948)

It thus apears that in the case of one of the products the stipulation required that the word "metallic" be used.

21. The record further shows that since the issuance of the present complaint respondents have taken steps to eliminate from their containers and advertising any reference to their products as "metallic" products.

22. There remains the question whether respondents I. D. Blumenthal and Herman Blumenthal should be included in the order to cease and desist in their individual capacities as well as in their capacities as officers of the corporation. They are president and vice president, respectively, of the corporation and formulate and control the overall policies and practices of the business. Also, they, along with the wife and children of Herman Blumenthal, own all of the capital stock of the corporation.

If the corporation were an insubstantial or fly-by-night concern, or if there were any reason to question the good faith of the corporation or its officers, the hearing examiner would not hesitate to hold the Blumenthals in their individual capacities. But such is not the case. The corporation is a very substantial and reputable business enterprise, and there is no reason to doubt that any order issued against the corporation will be complied with in good faith by the corporation and all individuals connected with it.

In these circumstances there is an entire absence of public interest in holding the Blumenthals in their individual capacities. To do so would serve no useful purpose, but on the contrary might well reflect unfavorably upon the reputations of the two individuals. It is therefore concluded that the complaint should be dismissed as to the parties in their individual capacities. This, of course, does not affect the inclusion of the individuals in the order in their capacities as officers of the corporation.

23. The acts and practices of the respondents as herein found have the tendency and capacity to mislead a substantial number of purchasers and prospective purchasers of respondents' products as to the nature of such products, and the tendency and capacity to cause such persons to purchase the products as a result of the erroneous and mistaken belief so engendered. In consequence substantial trade is or may be diverted unfairly to respondents from their competitors.

24. Respondents' acts and practices thus are to the prejudice of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That the respondents, Radiator Specialty Company, a corporation, and its officers, and I. D. Blumenthal, Herman Blumenthal and J. J. Duckworth 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 respondents' products "Solder Seal Radiator Repair", "Liquid Solder Seal Radiator Repair", "Solder Seal Radiator Pressure Seal", "Boiler Solder Seal", "Liquid Boiler Solder Seal", "Boiler Solder Seal Type R-H", "Block Seal" and "Liquid Block Seal", or any other products of substantially similar composition, do forthwith cease and desist from:

1. Representing through the use of trade names, trade marks, or in any other manner, that any of said products is a solder, unless

it is clearly disclosed that the product is non-metallic; provided, however, that if a product contains a metallic substance the percentage thereof may be stated.

2. Representing, directly or by implication, that any of said products is metallic or that when used it forms a metallic seal or bond.

It is further ordered, That the complaint be dismissed as to the charge that respondents have represented, contrary to fact, that their product "Solder Seal Radiator Repair" will effect a permanent repair.

It is further ordered, That the complaint be dismissed as to respondents I. D. Blumenthal, Herman Blumenthal, and J. J. Duckworth in their individual capacities.

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 constitutes an appropriate disposition of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed May 25, 1962, be, and it hereby is, adopted as the decision of the Commission.

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.

In the Matter of

GREEN'S 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-241. Complaint, Sept. 21, 1962—Decision, Sept. 21, 1962

Consent order requiring Gary, Ind., furriers to cease violating the Fur Products Labeling Act by, among other things, failing to show the name of the manufacturer, etc., on labels on fur products; failing, in newspaper advertising, to disclose the names of animals producing furs, and to set forth the disclosure "secondhand" where required; representing falsely that fur products were being closed out "at less than half price", and that uncalled for layaway furs could be bought for the balance due when the prices listed as "original" were fictitious; and 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 Green's Furs, Inc., a corporation, and Herman Zweiban, Ethel Zweiban and Robert Fox, individually and as officers 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 Green's Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 656 Broadway, Gary, Ind.

Individual respondents Herman Zweiban, Ethel Zweiban, and Robert Fox are officers of the said corporate respondent and control, direct, and formulate the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

The corporate respondent and the individual respondents retail fur products.

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 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 that were not labeled with any of the information required under the said Act and said Rules and Regulations, and fur products with labels which failed to show the name or other identification issued and registered by the Commission of one or more of the persons who manufactured any such fur product for introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

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

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 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 respondents which appeared in issues of the Gary Post-Tribune, a newspaper published in the city of Gary, State of Indiana.

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

PAR. 6. In advertising fur products as aforesaid, respondents falsely and deceptively advertised certain of said fur products 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 set forth the disclosure "secondhand", where required, in violation of Rule 23 of said Rules and Regulations.

PAR. 7. In advertising fur products for sale as aforesaid respondents represented through percentage savings claims such as "We refuse to carry over a single fur garment—and are closing out each item in stock at less than half price", 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 and Rule 44(a) of the Rules and Regulations.

PAR. 8. Respondents, by the means hereinbefore alleged, in advertising that certain uncalled for lay away fur products could be purchased for the balance due, falsely and deceptively advertised such fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act by representing through comparative prices under the designations of "originally sold for" and "balance due" that such fur products were originally sold for certain stated prices, whereas in truth and in fact, the prices listed as the "originally sold for" prices were fictitious in that they were in excess of the prices at which respondents originally sold such fur products.

PAR. 9. 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. 10. 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 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 Green's Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 656 Broadway, Gary, Ind.

Respondents Herman Zweiban, Ethel Zweiban, and Robert Fox are officers of the said corporation and their address is the same as that of the 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 Green's Furs, Inc., a corporation, and its officers, and Herman Zweiban, Ethel Zweiban and Robert Fox, individually and as officers 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 "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 set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required to be disclosed under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

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

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. Fails to show in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Product Labeling Act.

B. Fails to disclose that fur products are secondhand when such is the fact.

C. Represents, directly or by implication, 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.

D. Represents, directly or by implication, that fur products offered for sale were previously sold by respondents at prices higher than respondents sold such fur products.

E. 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.

IN THE MATTER OF

SAMUEL MURROW AND COMPANY ET AL.

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

Docket C-242. Complaint, Sept. 21, 1962—Decision, Sept. 21, 1962

Consent order requiring Chicago wholesaler-retailers of wool and fur products to cease violating the Fur Products Labeling Act by labeling fur products with excessive prices represented thereby as regular selling prices, labeling imported furs as originating in the United States, failing to show on labels the name of the manufacturer, etc., and the country of origin of imported furs; failing, in newspaper advertising, to disclose that fur products contained artificially colored fur and to reveal when the fur was natural, falsely representing in advertisements that prices of fur products had been drastically reduced when so-called "regular" prices listed were fictitious; and failing to keep adequate records as a basis for price and value claims; and to cease violating the Wool Products Labeling Act by affixing fictitious price labels to wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 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 Samuel Murrow and Company, a corporation, and Irving Silverman, 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 Wool Products Labeling Act of 1939 and 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 Samuel Murrow and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 318 West Adams Street, Chicago, Ill.

Respondent Irving Silverman is president of the said corporate respondent and controls, directs and formulates 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.

Respondents are wholesalers and retailers of wool and fur products.

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 misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that labels affixed thereto represented the country or origin of the furs contained in such fur products as the United States when in truth and in fact the furs contained in such fur products were imported, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

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

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

2. To show the country of origin of the imported furs contained in fur products.

PAR. 6. 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 inasmuch as required item numbers were not set forth on labels, 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 of aforesaid fur products but not limited thereto were advertisements of the respondents which appeared in issues of the Christian Science Monitor, a newspaper published in Boston, Massachusetts, and the New World, a newspaper published in Chicago, Illinois, both having a wide interstate circulation.

Among such false and deceptive advertisements of fur products but not limited thereto were advertisements which failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur when such was the fact, in violation of Section 5(a) (3) of the Fur Products Labeling Act.

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 such fur products were not described as natural when such fur products were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 9. In advertising fur products for sale as aforesaid, respondents falsely and deceptively advertised said fur products in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the said Rules and Regulations by representing, directly or by implication, through such statements as "All winter coats, fur trimmed and untrimmed, have been drastically reduced at give-away prices you will not be disappointed", and by affixing labels to fur products containing fictitious prices and misrepresenting the regular retail prices of such fur products, that prices of fur products were reduced from regular or usual prices, when in fact the so-called regular or usual prices were fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business.

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

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 12. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have 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 product" is defined therein.

PAR. 13. Certain of said wool products were misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such wool products in that the prices represented on such labels as the regular prices of the wool products were in excess of the retail prices at which the respondents usually and regularly sold such wool products in the recent regular course of business, in violation of Section 4(a)(1) of the Wool Products Labeling Act.

PAR. 14. The acts and practices of the respondents as set forth in paragraphs 12 and 13 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.

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, the Fur Products Labeling Act, and the Wool Products Labeling Act of 1939, 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 Samuel Murrow and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 318 West Adams Street, Chicago, Ill.

Respondent Irving Silverman is president of the 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 Samuel Murrow and Company, a corporation, and its officers, and Irving Silverman, 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 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. Falsely or deceptively labeling or otherwise identifying such products as to the regular prices or values thereof by any representation that the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

B. Falsely or deceptively labeling or otherwise identifying such products as to the country of origin of the furs contained in such fur products.

C. 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.

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

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. Fails to set forth in words and figures plainly legible 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 describe fur products as natural, when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

C. 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.

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

3. Making claims and representations of the type 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 respondents Samuel Murrow and Company, a corporation, and its officers, and Irving Silverman, 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 introduction into commerce, or the offering for sale, sale, transportation and delivery for shipment, in commerce, of any wool product as "wool product" and "commerce" are defined in the Wool Products Labeling Act do forthwith cease and desist from:

1. Misbranding wool products by:

A. Falsely or deceptively labeling or otherwise identifying such products as to the regular prices or values thereof by any representation that the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

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

CRESTMARK MANUFACTURING COMPANY, INC., ET AL.

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

Docket C-243. Complaint, Sept. 21, 1962—Decision, Sept. 21, 1962

Consent order requiring Paterson, N.J., manufacturers of jewelry and jewelry findings, including bell caps, to cease representing falsely in advertising that such products were "finished in the heaviest of 18 Karat gold plate or rhodium plate", when in fact they had only a thin coating of gold or gold alloy applied by electrolysis and none were plated with any rhodium.

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 Crestmark Manufacturing Company, Inc., a corporation, and Stanley H. Lieberman and Naomi Lieberman, 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 Crestmark Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 567 East 23d Street, Paterson, N.J.

Respondents Stanley H. Lieberman and Naomi Lieberman are officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business 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 manufacturing, advertising, offering, for sale and sale of jewelry and jewelry "findings", including "bell caps", 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 and transported from their place of business in the State of New Jersey to purchasers thereof located in the various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the sale of their jewelry findings, and particularly bell caps, respondents in their advertising have made certain statements and representations. Typical, but not all inclusive of said statements and representations, are the following:

All of our products are finished in the heaviest of 18 Karat gold plate or rhodium plate on hot nickel, to give the maximum wearing qualities and the longest non-tarnishing life.

All of Crestmark's material is available in both 18 Karat Hamilton Gold and Rhodium Plate.

Here are Crestmark's catalog prices on brass bell caps plated in 18 Karat Gold or Rhodium.

These are our standard brass bell caps coated in 18 Karat Gold or Rhodium.

PAR. 5. By means of aforesaid statements and representations, and others of similar import not specifically set forth herein, respondents represented, and now represent, directly or by implication, that their products, and particularly the bell caps, are plated with a substantial surface of gold alloy applied by a mechanical process or that said products are plated with rhodium applied by a mechanical process.

PAR. 6. In truth and in fact, none of respondents' products are plated with gold or gold alloy applied by a mechanical process but, on the contrary, there is a thin coating of gold or gold alloy placed thereon by electrolysis. Further, none of respondents' products contain or are plated with any rhodium.

Therefore, the statements and representations set forth in paragraph 4 were, and are, false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 8. 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.

PAR. 9. The aforesaid acts and practices of respondents as herein alleged were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair 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, Crestmark Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 567 East 23rd Street in the city of Paterson, State of New Jersey.

Respondents Stanley H. Lieberman and Naomi Lieberman 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 the respondent Crestmark Manufacturing Company, Inc., a corporation, its officers, and the respondents Stanley H. Lieberman and Naomi Lieberman, 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 of jewelry and jewelry findings, including bell caps, or any other products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Using the term "gold plate", or "gold plated" or any other word or words of similar import or meaning to designate, describe or refer to any article which does not have a surface plating of gold or gold alloy applied by a mechanical process; provided, however, that any product or part thereof, on which a substantial coating of gold or gold alloy has been affixed by an electrolytic process may be marked or described as "gold electroplate" or "gold electroplated".

2. Using the term "rhodium plate", "rhodium plated" or any other word or words of similar import or meaning, to designate, describe or refer to any article which does not have a surface plating of rhodium or rhodium alloy applied by a mechanical process; provided, however, that any product or part thereof, on which a substantial coating of rhodium or rhodium alloy has been affixed by an electrolytic process may be marked or described as "rhodium electroplate" or "rhodium electroplated".

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

HILTON WATCH & CLOCK CO., INC., ET AL.

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

Docket 8402. Complaint, May 18, 1961—Decision, Sept. 25, 1962

Order requiring Chicago watch distributors to cease pre-ticketing watches with fictitious prices, giving deceptive guarantees, misrepresenting base metal bezels as chrome or gold, representing watches in cases imported from

Hong Kong as Swiss watches, falsely representing watches as "25 jewel", "shock proof", "water protected", etc., and themselves as manufacturers of the watches they distributed.

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 Hilton Watch & Co., Inc., a corporation, and Warren Winkler and Adolph Winkler, individually and as officers of said corporation, and Winkler Watch Company, a corporation, and Milton Winkler, 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 Hilton Watch & Clock Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 75 West 45th Street, in the city of New York, State of New York. Respondent Winkler Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business at 29 East Madison, Chicago, Ill.

Respondents Warren Winkler and Adolph Winkler are officers of the corporate respondent Hilton Watch & Clock Co., Inc., and Milton Winkler is an officer of the corporate respondent Winkler Watch Company. They formulate, direct, and control the acts and practices of the respective corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the respective corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of watches to consumers and to 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 States of New York and Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia 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 their products, have engaged in the practice of using fictitious prices in connection therewith, by attaching, or causing to be attached, tickets to their said watches upon which certain amounts are printed, thereby representing directly or by implication that said amounts are the usual and regular retail prices of said watches. In truth and in fact, the said amounts are fictitious and in excess of the usual and regular retail prices of said watches.

PAR. 5. Respondents state in their advertising that their watches are "Fully Guaranteed" and respondents distribute with their said watches a guarantee certificate which does not reveal the limitations and conditions of the guarantee, including the condition that a service charge is made for repairs. The respondents further represent on their guarantee certificates that their watches contain a shock absorbing device known as "Incabloc" and that their watches are advertised in leading nationally distributed magazines.

Respondents make substantial service charges for repairs made under their guarantee. Furthermore, not all the respondents' watches contain the "Incabloc" device or any other shock absorbing device and respondents do not advertise their watches in leading nationally distributed magazines.

PAR. 6. Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and a bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watch cases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

The practice of respondents in offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which has been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal composition of said bezels is misleading and deceptive and has a substantial tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal or stainless steel.

Respondents market some of their watches in watch cases with bezels which have the appearance of being "rolled gold plate", "gold filled" or solid gold, and respondents do not disclose that these bezels are composed of a stock of base metal to which has been electrolytically applied a flashing or coating of precious metal of a very thin and unsubstantial character. This practice is deceptive and confusing to the consuming public unless the thin and unsubstantial character of the flashing or coating is disclosed by an appropriate marketing.

PAR. 7. Certain of the watches offered for sale and sold by respondents are in cases imported from Hong Kong. When delivered to respondents' customers for resale said watches have the word "Swiss" on the dials. There is no disclosure of the fact that the watch cases are imported from Hong Kong.

The practice of respondents in offering for sale and selling watches the cases of which are imported from Hong Kong, as aforesaid, without disclosing the country or place of origin of said watch cases is misleading and deceptive, because in the absence of a disclosure of the country of origin of said watch cases, the public understands and is led to believe that the said cases are either of domestic or Swiss origin.

There is a preference on the part of many persons in this country for watch cases of domestic and Swiss origin over watch cases manufactured in Hong Kong.

PAR. 8. Respondents misrepresent the gold content of their watch cases by referring to them as "gold plated," "gold plate" or "gold filled" in their advertising. Such representations are deceptive because the gold deposited thereon is not a substantial surface plating of gold alloy applied by a mechanical process but is an electrolytic application.

PAR. 9. Respondents represent in advertising through use of terms such as "chrome top" that certain of their watch cases contain tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome steel or as stainless steel. In truth and in fact said bezels are not composed throughout of chromium or chromium steel and contain only a surface coating or plating of chromium. The practice of respondents in this respect is misleading and deceptive and watch cases or parts thereof composed throughout of chromium or chromium steel are of greater utility than watch cases which are only surface coated or plated with chromium or chromium alloy.

PAR. 10. Respondents further deceptively represent that their watches are "shock-proof" or "shock-protected". In truth and in fact their watches are not "shock-proof" or "shock-protected" in every respect.

PAR. 11. The respondents distribute watches containing 17 jewel movements made in, and imported from Switzerland, to which movements have been added a device containing 8 synthetic jewels. The watches are represented, advertised, offered for sale and sold by respondents as "25" jewel watches, to retailers and consumers.

PAR. 12. By means of the statements that the said watches are 25-jewel watches, respondents represent that said watches contain 25 jewels, each of which serves a mechanical purpose as a frictional bearing, that each jewel provides a mechanical contact at a point of wear. In fact, the additional jewels in the device are not functional, and these watches are not 25-jewel watches as represented and advertised.

PAR. 13. Respondents in their catalogs, letterheads, circulars and other printed matter, which are distributed to prospective purchasers, have represented, and do represent, that the building depicted in such advertising matter is owned by them and that their watches are manufactured in said building by them. Respondents in fact do not own the building depicted nor are their watches manufactured in said building. Respondents in fact are not manufacturers of watches.

PAR. 14. Respondents in the course and conduct of their business for the purpose of inducing the sale of their said watches have caused, and now cause, to be marked upon their watch cases the words "water resistant" or "water protected", and have advertised certain of their watches as "water resistant" and "water protected". In truth and in fact said watch cases are neither water resistant nor water protected.

PAR. 15. 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 watches of the same general kind and nature as that sold by respondents.

PAR. 16. 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 such erroneous and mistaken belief. As a consequence thereof substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

PAR. 17. 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. Harry E. Middleton, Jr., of Washington, D.C., supporting the complaint.

Noble & Moyle, *Mr. Ben Paul Noble*, of Washington, D.C., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

In a complaint issued May 18, 1961, all the respondents were charged with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of The Federal Trade Commission Act.

After due service, respondents appeared herein by counsel and filed an answer, in effect a general denial since they admitted only that they were engaged in the sale and distribution of watches to consumers and to retailers for resale to the public, and that the corporate respondents were organized and did business as alleged in a portion of the first paragraph of the complaint.

After various preliminary proceedings, this case came on for hearing before me in New York City on February 12, February 13, February 15, and February 16, 1962. Counsel supporting the complaint then was forced to request a continuance and recess to the city of Chicago, Illinois, because of the failure of the individual respondents to attend the hearing. This was done in spite of the announced policy of the Commission that a hearing be held in one place and at one continuous session and in spite of a provision to that effect in the pretrial order to which counsel for the respective parties had agreed. Having been led to believe that the individual respondents would attend in Chicago, Illinois, I granted the request of both attorneys that the hearing continue in that city.* It was reconvened in Chicago on February 26, and we attended in that city both on that day and on the day following. The sole purpose for continuing the hearing to Chicago was frustrated because the individual respondents failed to attend despite persistent efforts on the part of both their own attorney and of counsel supporting the complaint to get them so to do. Except for the fact that counsel for the respondents diligently participated in the examination and cross-examination of witnesses called in support of the complaint, made numerous motions before, during and after the hearing, and obtained permission to have incorporated in the record of this case testimony of a witness in another case, no defense was offered and no testimony was given by any of the individual re-

*Since this case had been commenced prior to the promulgation of the rules currently in effect, it was not necessary for me to certify the necessity for such continuance to the Commission.

spondents either as individuals or in their capacity as officers of the corporate respondents. Their failure to attend and to testify, while it does not cast this case into the mold of a default proceeding, does result in giving whatever support evidence appears in the record of this case greater probative value than it would have if the respondents had offered any sworn testimony in opposition thereto.

This is another in a long series of watch cases. It embraces the entire gamut of issues found in previous cases, including fictitious pricing (preticketing), false guarantees, and misrepresentations as to shock absorbing qualities, water resisting characteristics, nature of metal content, foreign origin, jewel count, and status as manufacturers.

Whether the failure of the individual respondents to attend upon the hearing is due to their lack of interest in what the outcome may be is a matter for speculation. The continued advocacy on their behalf by their attorney would indicate the contrary. On the other hand it developed, first during the hearing in New York and later during that portion of it held in Chicago, that the corporate respondent, Hilton Watch & Clock Co., Inc., (which on the record was considered to be synonymous with Hilton Watch Company) is no longer in business, and that the Winkler Watch Company had made a common law assignment for the benefit of creditors using the style, "Winkler Watch Company, Inc., a/k/a Hilton Watch Company." (Because the order herein will be directed to the corporate respondents as well as to the individuals, it is expressly noted here that there is no evidence in the record that either of the corporations has been dissolved.)

The hearing has been closed and proposed findings of fact and conclusions have been submitted by all counsel. After careful consideration, all proposed findings not hereinafter specifically found or concluded, to the extent that they are modified or amended and thus accepted by me, are rejected as being irrelevant, unnecessary or not supported by the evidence.

The motion made on the part of the respondents, following the conclusion of the hearing, to strike certain exhibits is hereby denied. All other motions made during the hearing, the granting of which would be inconsistent with the findings and conclusions hereinafter made, are likewise denied.

Now, having considered the entire record, I hereby make the following

FINDINGS OF FACT

1. Respondent Hilton Watch & Clock Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. It formerly maintained its office and prin-

cipal place of business at 75 West 45th Street, in the city of New York, State of New York. Respondent Winkler Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. It formerly maintained its office and principal place of business at 29 East Madison Street, Chicago, Illinois. Recently both corporations moved to 343 South Dearborn Street, Chicago, Illinois. Although these corporations were separate legal entities, their activities, insofar as this case is concerned, were so intertwined as to justify a disregard of the corporate veils.

2. Shortly before or during the time that the hearing of this case was in progress, the corporate respondent, Winkler Watch Company, made a common law assignment for the benefit of creditors, naming itself as "Winkler Watch Company, Inc., a/k/a Hilton Watch Company."

3. Warren Winkler is president and Adolph Winkler is secretary-treasurer of Hilton Watch & Clock Co., Inc. Warren Winkler is president and Milton Winkler is vice president of Winkler Watch Company. They formulated, directed and controlled the acts and practices of the respective corporate respondents, including the acts and practices hereinafter set forth. Their addresses were the same as those of the respective corporate respondents.

4. For many years respondents have been engaged in the sale and distribution of watches to consumers and to retailers for resale to the public and, although they have made an assignment for the benefit of creditors, there is no evidence that the corporate respondents have been dissolved and there is no reason to believe that the respondents will not engage in said business in the future.

5. In the course and conduct of their business, respondents have caused their products, when sold, to be shipped from their places of business in the States of New York and Illinois to purchasers located in other states of the United States. They have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in The Federal Trade Commission Act.

6. Respondents have engaged in the practice of setting fictitious prices for the purpose of inducing the purchase of their products. They do this by attaching or causing to be attached price tickets to their watches or placing such tickets in watch packages or using literature related thereto. The prices on these tickets or in the literature are printed in a manner calculated to represent, or to be susceptible of being understood as representing, that the fair and reasonable and therefore the true selling prices of such watches are the amounts stated. Respondents thereby represent, directly or by implication, that such

amounts are the usual and regular retail prices of said watches. In truth and in fact the said amounts are exaggerated beyond any reasonable and fair relationship to the true worth of the watches, are in excess of their usual and regular retail prices, and are fictitious.

7. Respondents have stated in their advertising that "Every Hilton Watch is insured for 12 months against any kind of . . . breakage, including all parts, crystal or watch band." They also have distributed with their watches a paper containing, at different places on it, inconsistent and incomplete statements describing a guarantee. This paper (and not the first-mentioned insurance statement) is delivered with many of the models sold by respondents. It limits the guarantee to "original defect"(s) in one part of it and in another part to "mechanical defects." These two parts are each decorated to resemble a bond or other financial instrument. The part which is entitled "Hilton Guarantee" does not limit its effect as to time. The other, beginning in large letters, "This certifies that," limits the time of guarantee to one year.

8. Respondents have represented that all their watches contain a shock absorbing device known as "Incabloc." In fact, many of the models sold by them did not contain such device.

9. Certain of the watches offered for sale and sold by respondents were in cases consisting of two parts, that is to say, a back and bezel. (A bezel is the grooved rim or flange on the face of the watch, in which the crystal is set.) The back had the appearance of stainless steel and was marked, "stainless steel back." The bezels were composed of base metal, not stainless steel, which had been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some were finished in a color which simulated silver or silver alloy or stainless steel. Such watch cases were not marked to disclose that the bezels were composed of base metal or metal other than stainless steel.

10. Respondents represented in advertising, through use of terms such as "chrome top," that others of their watch cases contained tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome or stainless steel. In truth and in fact, said bezels were not composed throughout of chromium or chromium steel and contained only a surface coating or plating of chromium.

11. Respondents' practices in offering for sale and selling watches the cases of which incorporated bezels composed of base metal which had been treated or processed to simulate or to have the appearance of precious metal or stainless steel as aforesaid, without disclosing their true metal composition, and of falsely representing that watch tops and bezels were composed of chromium or stainless steel, were mislead-

ing and deceptive. They had the tendency and capacity to lead a substantial segment of the purchasing public to believe that the bezels actually were composed of precious metal or of chromium or stainless steel.

12. Respondents marketed some of their watches in watch cases with bezels which had the appearance of being "rolled gold plate," "gold filled" or "solid gold." They did not disclose that these bezels had been composed of a stock of base metal to which had been applied electrolytically a flashing or coating of precious metal of a very thin and unsubstantial character. This practice is deceptive and confusing to the consuming public unless the thin and unsubstantial character of the flashing or coating is disclosed by an appropriate marking.

13. Some of respondents' watches are in cases which have the appearance of gold and are advertised as gold plate, when in fact they are made of anodized alumium and contain no gold.

14. Respondents represented their watch cases as "gold plated," "gold plate" or "gold filled." Such representations were deceptive because the gold deposits thereon were merely electrolytic applications and were not substantial surface platings of gold alloy applied by mechanical process.

15. Respondents, without qualifying statements, represented that their watches were "shock proof" or "shock protected." In truth and in fact, the watches were not "shock proof" or "shock protected" in every respect because such as were protected from shock were protected only as to their movements and, in no case, were the hands, the crown, the pallet, the pivots other than the balance, the stem, tube, and crystal not subject to damage from shock.

16. Respondents advertised and offered for sale their watches as Swiss watches and thereby represented that they were manufactured in Switzerland. Certain of said watches were cased in cases imported from Hong Kong and respondents did not visibly disclose thereon that the cases had been so imported.

17. Respondents' practice of offering for sale and selling watches, advertised as Swiss watches, in cases imported from Hong Kong, without disclosing visibly the country or place of origin of the watch cases was misleading and deceptive because, in the absence of disclosure of origin of said watch cases, a substantial segment of the public may understand and may be led to believe that such watches are set in cases of Swiss origin.

18. A substantial segment of the American purchasing public prefers watches made wholly in Switzerland. Numerous purchasers are prejudiced against purchasing watches whose cases are manufactured

in Hong Kong. All these are in numbers sufficient to warrant remedial action by the Federal Trade Commission under The Federal Trade Commission Act.

19. Respondents distributed watches containing 17 jewel movements, made in and imported from Switzerland, to which movements had been added a device containing 8 synthetic "jewels." The watches were represented, advertised, offered for sale and sold by respondents as "25 jewel" watches to retailers and consumers. Respondents thereby represented that said watches contained 25 jewels each of which served a mechanical purpose as a frictional bearing and that each jewel provided a mechanical contact at a point of wear. In fact, the 8 additional "jewels" in the device were not functional and these watches were not "25 jewel" watches as represented and advertised.

20. Respondents, in catalogs, letterheads, circulars and other printed matter distributed to prospective purchasers, have represented that a large and imposing building depicted therein or thereon was the "home of the world famous Hilton watches" and that their watches were manufactured in that building by them. Most if not all of the watches sold and distributed by respondents were not manufactured there. Respondents in fact are not manufacturers of watches.

21. Respondents, in the course and conduct of their business, for the purpose of inducing the sale of their said watches, have caused to be marked upon their watch cases the words "water resistant" or "water protected." They have advertised certain of their watches as "water resistant" and "water protected." Numerous watch cases so designated or advertised are neither water resistant nor water protected.

22. 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 watches of the same general kind and nature as sold by respondents.

And, from the foregoing, the following are my

CONCLUSIONS

1. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, would have, and will have 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 such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, is being, and would be unfairly diverted to

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

2. The acts and practices of respondents as herein found were, are, and would be all to the prejudice and injury of the public and of respondents' competitors and constituted, now constitute, and would 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.

After careful consideration of the entire record, I have concluded that it is necessary and appropriate to effectuate the intent and policy of the Act to enter the following

ORDER

It is ordered, That respondents Hilton Watch & Clock Co., Inc., a corporation, and its officers and Warren Winkler and Adolph Winkler, individually and as officers of said corporation, Winkler Watch Company, a corporation, and its officers, and Milton Winkler, individually and as an officer of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or any other merchandise in commerce, as "commerce" is defined in The Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by preticketing or by implication, that any amount is the regular or usual retail price of merchandise when such amount is in excess of the price at which the merchandise is usually and regularly sold at retail in any trade area or areas where the representations are made.

2. Representing, directly or by implication, that watches are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly, completely, and conspicuously disclosed.

3. Representing that their watches are "shock proof" or "shock protected" or otherwise representing that their watches possess greater shock resistance than is the fact.

4. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal without clearly and conspicuously disclosing on such cases or parts, the true metal composition of such treated cases or parts.

5. Using the term "gold plate," "gold plated," or "gold filled," or any other word or term of similar import or meaning, to desig-

nate, describe or refer to any watch case or part thereof which does not have a surface plating of gold or gold alloy applied by a mechanical process, provided, however, that any product, or part thereof, on which a substantial coating of gold or gold alloy has been affixed by an electrolytic process may be marked or described as gold electroplate or gold electroplated.

6. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of thin and unsubstantial character without clearly and conspicuously disclosing on such cases or parts, in understandable English language, the thin and unsubstantial character of the flashing or coating.

7. Using the term "chrome" or any other term of similar meaning, to designate or describe an article or part thereof, which consists of a plating of chromium over other metal unless said term be accompanied by a clear and conspicuous disclosure that the article is plated.

8. Representing, directly or by implication, that their watches contain a designated number of jewels such as "25 jewels" unless such watches actually contain the stated number of jewels, each and every one of which serves a mechanical purpose as a frictional bearing.

9. Representing in advertising on letterheads, billheads or in any other manner, that respondents are manufacturers of watches or that watches sold by them are made in any particular factory unless, at some future time, they actually become manufacturers or unless such watches are actually made in that factory.

10. Representing that their watches are water resistant or water protected unless such representations are made with respect to watches which actually are water resistant or water protected.

11. Offering for sale or selling watches represented to be "water resistant" unless such watches are so constructed, and are of such a composition, as to provide protection against water or moisture to the extent of meeting the test designated test number 2 of the Trade Practice Conference Rules for the watch industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, part 170.2(c); (16 CFR 170.2(c)).

12. Offering for sale, or selling, watches the cases of which are in whole or in part of foreign origin without clearly and conspicuously disclosing on such cases or parts the foreign country or place of origin.

13. Representing that a watch contains an "Incabloc" or other device, when such is not the fact.

ORDER VACATING PRIOR ORDER, DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner having filed his initial decision in this matter on May 29, 1962, wherein he ordered respondents to cease and desist from those practices found to violate the Federal Trade Commission Act; and service of said initial decision having been completed on all parties herein; and

It appearing that although the time for filing of a petition for review of said initial decision by respondents had expired, the Commission, on respondents' motion filed June 25, 1962, granted respondents an extension of time within which to file said petition; and

It further appearing that a petition for review of the initial decision was filed by respondents on July 3, 1962, and that said petition was granted by Commission order issued July 24, 1962; and

It further appearing that although the time for filing of exceptions to the initial decision and brief in support thereof by respondents had expired, the Commission on respondents' motion filed August 30, 1962, granted respondents an extension of time to and including September 17, 1962, within which to file said exceptions and brief; and

The respondents having failed to file their exceptions to the initial decision and brief in support thereof, as provided by § 4.21(a) of the Commission's Rules of Practice, within the time allowed:

It is ordered, That the aforesaid order of the Commission, issued July 24, 1962, granting the respondents' petition for review be, and it hereby is, vacated and set aside.

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

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

IN THE MATTER OF

SANDURA COMPANY

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

Docket 7042. Complaint, Jan. 15, 1958—Decision, Sept. 26, 1962

Order requiring the Philadelphia manufacturer of "Sandran" vinyl plastic floor and wall coverings and counter tops to cease using restrictive trade practices which unreasonably restrained competition in the interstate sale of its products, including restricting the geographical areas of sale and purchase of its dealers and distributors, fixing and requiring maintenance of its resale prices, refusing to sell to dealers or distributors suspected of non-cooperation, and policing and enforcing its said policies by a variety of practices, as in the order below more specifically set forth.

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 Sandura Company, a corporation, referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent 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 17th and Sansom Streets, Philadelphia 3, Pa.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacturing and selling of vinyl plastic products, including floor coverings, wall coverings, and counter tops, under the brand name "Sandran". Respondent markets such products nationally through approximately fifty distributors and many hundreds of dealers. Respondent sells to certain dealers (such as mail order houses and chain stores) and to its distributors who resell such products to other distributors and to dealers for resale. Its dealers sell to other dealers and to consumers. In many instances said dealers also install such products.

PAR. 3. In the course and conduct of its business respondent is now and has been at all times referred to herein engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships such products, or causes such products to be shipped, from states wherein it does business to purchasers located in other states, and there is and has been at all times mentioned herein a continuous and substantial current of trade in commerce in such products between and among the several states of the United States and the District of Columbia.

PAR. 4. Respondent, in the course and conduct of its business, in commerce, as aforesaid, is and has been at all times mentioned herein in competition with other corporations, individuals, partnerships, and firms likewise engaged in the sale and distribution in commerce of similar products.

PAR. 5. Respondent markets its products on the distributor level through a system of closed territories. In some territories, generally those located in the more populous sections of the country, only one distributor is allowed to sell, while in others more than one distributor is allowed to sell.

Respondent maintains a system of "franchised" dealers whereby distributors are allowed to sell only to those dealers who have been approved, or "franchised", by respondent, and whereby dealers, in selling to other dealers, are allowed to sell only to those who have been approved or "franchised".

From time to time respondent issues and distributes to its distributors lists of prices to be used by said distributors in determining resale prices, and further issues and distributes to its franchised dealers prices to be used by said dealers in determining their resale prices. Respondent's communications to its distributors and dealers concerning resale prices include prices to be charged for installing such products, the manner in which "gifts" shall be used in combination with the sale of such products, and directions that, should trading stamps be issued by a dealer, a sufficient amount to cover the cost of such stamps should be added to the resale price of such products. Respondent requires its distributors and dealers to resell, or resell and install, such products at prices which are in accordance with its wishes.

Respondent's distributors agree or understand that they are not to resell such products outside their assigned territories. Respondent's distributors agree or understand that they are not to resell such products to distributors and dealers who are not customers of respondent or have not been franchised or who have had their franchises revoked. Respondent's dealers likewise agree or understand that they are not to resell to such dealers. Further, said distributors and dealers agree or understand that they are not to resell such products at prices other than in accordance with the wishes of respondent. Upon accepting a franchise, a dealer agrees that upon the revocation of his franchise or upon his discontinuance of the Sandran line of products respondent shall have the right to repurchase his stock of such products.

Respondent enforces its resale price maintenance system by, among other methods, enlisting the services of organizations which send shoppers into dealers' establishments and report to respondent the prices at which such products are offered, by furnishing distributors and dealers with lists of franchised dealers and revising said lists from time to time to show additions and deletions, and by means of reports from its salesmen, dealers, and distributors. Distributors and dealers who do not maintain resale prices or who sell to proscribed distributors or dealers are cut off or have their franchises revoked. After a suitable period of "penance" and upon respondent's being assured that no further violations of its system will occur, a revoked franchise may be reinstated.

PAR. 6. In the manner above described, and otherwise, respondent has entered into and maintained agreements with its distributors and dealers which have had and do have the tendency of unduly hindering and restraining competition, including price competition, between and among said distributors and dealers in the sale of respondent's products. Said agreements and respondent's acts and practices in furtherance of them have had and now have the undue tendency and effect of:

1. Establishing and maintaining prices at which distributors and dealers resell said products, beyond the exception provided by the McGuire Amendment to Section 5(a) of the Federal Trade Commission Act.

2. Establishing and maintaining prices at which dealers install such products.

3. Establishing and maintaining selling territories wherein competition between distributors is entirely eliminated or severely restricted.

4. Boycotting, or threatening to boycott, distributors and dealers who resell, or resell and install, such products at prices other than those in accordance with the wishes of respondent.

5. Boycotting, or threatening to boycott, distributors and dealers who resell such products to other distributors and dealers who are not customers of or are not franchised by respondent.

PAR. 7. The said agreements and respondent's acts and practices in furtherance of them have had and now have a dangerous tendency unduly to hinder and restrain competition and trade in the sale and distribution of such products.

PAR. 8. Said agreements and acts and practices, as alleged, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Brockman Horne supporting the complaint.

Howrey, Simon, Baker & Murchison, by *Mr. Harold F. Baker*, of Washington, D. C., and *Norris, Lex, Hart & Ross*, by *Mr. Alfred W. Putnam* and *Mr. E. Brooks Keffler, Jr.*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on January 15, 1958, charging it with engaging in unfair acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). A copy of said complaint, with notice of hearing, was duly served upon respondent. Said complaint charges respondent, in substance, with (a) establishing and maintaining exclusive selling territories which result in eliminating or severely restricting competition between the distributors of its products, (b) establishing and maintaining prices at which distributors and dealers resell and install its products and (c) boycotting or threatening to boycott distributors and dealers who resell or install respondent's products at prices other than those specified by respondent, or who resell such products to distributors and dealers who are not customers of or franchised by respondent. Respondent appeared by counsel and filed answer to the complaint in which it denied, in substance, having engaged in the illegal practices charged.

Hearings on the charges were thereafter held before the undersigned hearing examiner on various dates between June 24, 1958, and July 28, 1960, in Philadelphia, Pennsylvania; Richmond, Virginia; Chicago, Illinois; New York, New York; and Washington, D.C. At said hearings testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of the evidence in support of the complaint counsel for respondent filed a motion to dismiss the complaint herein on the ground that upon the facts and the law counsel supporting the complaint had failed to establish any right to the relief requested. The undersigned denied said motion by order dated October 5, 1959.

At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order were filed by counsel supporting the complaint on April 14, 1961, and by respondent on May 8, 1961. A reply to respondent's proposed findings and conclusions was filed by counsel supporting the complaint on May 22, 1961. Thereafter, pursuant to leave granted, a supplemental memorandum of law was filed by respondent on July 10, 1961, and a reply thereto was filed by counsel supporting the complaint on July 13, 1961, with reference to a decision of the United States District Court for the Northern District of Ohio, issued subsequent to the filing of proposed findings herein and involving issues similar to those in the instant proceeding. Proposed findings of fact which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After having carefully reviewed the entire record in this proceeding, and the proposed findings, conclusions and order, and the supporting briefs and memoranda filed by the parties, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following:

FINDINGS OF FACT

I. The Business of Respondent, Interstate Commerce and Competition

1. Respondent 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 17th and Sansom Streets, Philadelphia 3, Pennsylvania.[1] It is engaged in the manufacture, sale and distribution of certain vinyl plastic products, including coverings for floors, counter tops and walls. Its products are sold under the trade marks "Sandran" and "Crown Vinyl."

2. Respondent and its predecessor, the John S. Clement Co., Inc., have been in the floor covering business since at least 1923, at which time they were manufacturing an enamel surface, felt base floor covering. For about eleven years respondent and its predecessor, the Clement Co., operated their own plant for the manufacture of enamel

[1] In its proposed findings respondent asserts that while it was located at the above address, its present address is Benson-East, Township Line and Old York Road, Jenkintown, Pennsylvania. There is no evidence in the record to reflect this change of address.

surface, felt base floor coverings. After the destruction of this plant by fire in 1934, respondent entered into contracts with several of its competitors whereby the latter undertook to manufacture for it the product which respondent was then selling. Such arrangements continued until 1955, when respondent ceased selling enamel surface, felt base floor covering.

3. During the period following World War II respondent developed a new type of vinyl floor covering known as a rotary vinyl or rotovinyl. The product consists of a vinyl plastic which is poured over a specially manufactured paper sheet decorated by modern rotogravure printing techniques, and it is bonded to an asphalt saturated felt base. The product is sold in two forms, *viz*, in rolls varying from 65 to 125 linear feet and in pre-cut lengths referred to as "rugs." In 1946, respondent built a factory for the manufacture of its new product, which it called "Sandran." The actual marketing of the product did not begin until 1949. It also developed a vinyl counter top and wall covering, using the same techniques, which it likewise sold under the name Sandran. In 1956 respondent brought out a premium quality vinyl floor covering, with a considerably heavier vinyl coating than the original Sandran, which it designated as "Crown Vinyl." Sandran floor covering is the principal product manufactured and sold by respondent, accounting for 85 percent to 90 percent of its sales.

4. Respondent experienced certain difficulties in the manufacture of its product during the early years. At first Sandran suffered from discoloration in the traffic areas. When this difficulty was overcome, there arose a problem caused by the delamination of the top of the floor covering from the backing. It took several years before all these difficulties were overcome, and during this period respondent's sales declined from approximately $7,000,000 in 1950 to $3,500,000 in 1954. Following the low point in 1954, respondent's sales picture gradually improved so that by 1957 its sales had reached almost $12,000,000 and in 1959 were approximately $24,000,000.

5. Respondent competes with a number of other manufacturers of hard surface floor coverings. Its products compete with a variety of other floor coverings such as enamel surface felt base, linoleum, asphalt tile, rubber tile, and other vinyl floor coverings. While the various types of floor coverings fall into different price brackets, with the enamel surface felt base covering being the cheapest, and the asphalt and rubber tile among the most expensive, and Sandran falling in between, there is, nevertheless, considerable competition between Sandran and the other types of floor coverings as respondent and its distributors endeavor to induce consumers to "trade up" from lower

quality floor coverings, or to convince consumers that Sandran or Crown Quality are comparable to the more expensive types of floor covering.

6. Respondent was one of the earliest manufacturers of roto-vinyls. Other companies have since produced vinyl floor coverings, but for the most part manufacture their products by a calendared process in which the ingredients, including the vinyl, are made into the form of a dough and pressed through rollers. Respondent's method of manufacture enables it to get much clearer and more attractive design patterns than the other methods of manufacturing vinyls and other types of floor covering.

7. Respondent's largest competitors in the floor covering industry are Armstrong Cork, Congoleum-Nairn and Pabco, each of which manufactures a broad line of floor coverings. Another group of competitors consists of large diversified companies, such as Johns-Manville, Goodyear and Goodrich, which make various types of floor coverings in addition to other non-related products. Respondent manufactures a relatively short line of products and ranks in the category of the smaller firms in the industry. Its sales represented 1.1 per cent of the industry total in 1954 and 4.8 per cent in 1958. Unlike some of its larger competitors, which manufacture all or most of the ingredients from which their floor coverings are made, respondent purchases a substantial part of the ingredients which go to make up its floor coverings. Part of these are purchased from its larger competitors.

8. Respondent's products are distributed through 55 wholesale distributors located from coast to coast, who in turn resell the products through approximately 8,000 floor covering and other small retail establishments, department stores and mail order houses located throughout the country. Respondent also makes direct sales to mail order houses, for distribution through their own order offices.

9. It is admitted, and the evidence discloses, that respondent ships its products, or causes such products to be shipped, from states wherein it does business to purchasers located in other states. It is further found that there is and has been at all times mentioned herein a continuous and substantial current of trade in commerce in such products between and among the several states of the United States and the District of Columbia. It is, accordingly, concluded that in the course and conduct of its business, respondent is now and has been at all times referred to herein engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

10. As above found, respondent in the course and conduct of its business is in competition with other persons, firms and corporations

likewise engaged in the sale and distribution of similar products. Certain of said persons, firms and corporations likewise are engaged in the sale and distribution of their products in commerce. It is, accordingly, concluded and found that respondent in the course and conduct of its business, in commerce, is in competition in commerce with other persons, firms and corporations selling and distributing similar products.

II. The Alleged Unlawful Practices

Respondent's Marketing System

1. As above found, respondent distributes its products primarily through wholesale distributors who, in turn, resell the products through normal retail outlets where they are purchased by the ultimate consumer. Respondent also makes sales, the extent thereof not being revealed by the record, to mail order houses which resell to the consuming public through their order offices.

2. When respondent first began marketing Sandran around 1949, it sold through multiple distributors in a number of the areas where its product was being distributed. Thus, it had three distributors in Philadelphia and in Northern New Jersey, and two each in New York, Chicago, Detroit and Indiana. This contrasted with the pre-World War II period when respondent distributed its enamel surface felt base floor covering through single distributors in the various localities where its product was sold. While respondent had exclusive distributors in each territory during the earlier period, there was no formal limitation on the area within which each distributor could sell. However, the distributors were located relatively far apart so that, as a practical matter, there was little competition between them. In instituting a system of multiple distributorships in the sale of Sandran, respondent was motivated by the fact that this would result in more extensive distribution of its products, which was then relatively novel in the floor covering industry. During this period respondent placed no limitations on the establishments through which its Sandran floor covering could be resold by its distributors.

3. Following the difficulties experienced with its new product and the resultant decline in sales, which was accompanied by considerable financial difficulties, respondent decided to change its distribution system. Around 1953, it began the practice of issuing franchises to retail dealers, and permitted its distributors to resell its product only through such franchised dealers. Prominent among the reasons which caused respondent to set up its dealer franchise system was the fact that the floor covering industry was then going through a period of

cut-throat competition at the retail level, with Sandran selling for as low as 98¢ or 89¢ a square yard. As respondent's president testified: "We felt that this situation had to be cleaned up." In 1955, respondent decided to eliminate its system of multiple distributors, except in New York and Philadelphia, and establish a distributor franchise system pursuant to which it franchised only a single distributor in an area and required such distributor to sell entirely within a defined area. An important factor in respondent's decision was the conviction that a system of exclusive distributorships would make the dealer franchise system more effective. It was also desirous of limiting price competition among its distributors, which was being reflected in dealer prices.

The Dealer Franchise System

4. Beginning in 1953, respondent instituted the practice of franchising dealers. In that year it franchised dealers in New York, Chicago, and Baltimore, these being the cities in which some of the worst price cutting was going on. The franchising system was gradually extended to dealers in other localities until by about 1955 Sandran was sold only through franchised dealers. Although respondent sold its Sandran products through distributors and not directly to the retailers, it retained the primary responsibility for granting and revoking dealer franchises. Distributors were permitted to resell Sandran only through dealers who were franchised by respondent. The franchises were issued in the name of respondent, rather than in that of the distributor from whom the dealer purchased respondent's products.

5. A brochure entitled "THE SANDRAN DEALER FRANCHISE and What It Can Do for You," issued by respondent to prospective dealer applicants in January 1955, advises them that the plan had been successful in the areas where it had been instituted and states that:

> We intend to put the SANDRAN DEALER FRANCHISE PLAN into effect throughout the country NOW. It is our belief that reputable dealers will welcome an opportunity to promote a floor covering on which they can make a profit *and on which they are protected from unfair and unethical competition.* [Emphasis supplied.]

The brochure refers to the plan as "Sandran's 'Profit-Protecting' Franchise Plan," and contains statements purporting to have been made by dealers in New York and Chicago to the general effect that the plan "has eliminated bad business practices and has given the legitimate dealer a very good profit." Among the "Special Features" of the plan listed for "Town & Country dealers" is that it, "Protects you against competition from big city dealers in your vicinity." Foremost among the "bad business practices" and the "unfair and unethical competition" at which the plan was aimed was price cutting.

6. The "Sandran Dealer Franchise" itself contains the following introductory statement:

The SANDURA COMPANY, INC. (called "Sandura") is concerned that there should exist between it and its distributors and dealers, a mutual feeling of respect, confidence and trust. It believes that a manufacturer and his distributors and dealers are completely interdependent. It further believes that where they can be bound together in a relationship which offers each a long range opportunity to reap the benefits of cooperation based on mutual regard for each other's problems and profits, the maximum of personal and business satisfaction will result.

The franchise recites that the named dealer was appointed "for the implementation of this policy." It also contains two sets of obligations, one on the part of respondent and one on the part of the dealer, to which each "agrees." These are stated to be: "In consideration of the granting of this FRANCHISE." Insofar as they are material to this proceding, respondent's commitments include the following:

a. To plan distribution of Sandran only to franchised dealers.

b. To make known to each franchised dealer the names of other franchised dealers located within his trading area.

c. To refer all consumer inquiries only to franchised dealers.

d. To make advertising material and merchandising assistance available only to franchised dealers.

The dealer's commitments include the following:

a. To carry an adequate stock of Sandran.

b. To participate actively in promoting and displaying Sandran.

c. *To refrain from all unfair competitive practices*, including but not limited to the substitution of products other than SANDRAN without disclosing the substitution to a consumer.

d. Not to sell, lend, exchange or give, directly or indirectly, Sandran to any non-franchised dealer.

e. Affording respondent the right, in the event of the termination of the franchise, to buy at the dealer's original purchase price all Sandran then in the stock of the dealer.

7. In addition to the distributor's sales organization, which calls upon respondent's franchised dealers in his assigned territory, respondent has its own sales organization which maintains contact with such dealers. Respondent's sales organization is divided into regions, with a sales manager in charge of each region. In addition, there are four to eight salesmen working under the supervision of such sales manager within each territory. Respondent's salesmen call on dealers, take orders from the dealers which they turn over to respondent's

distributor in the area, assist the dealers with promotional activities and help administer the franchise program.

8. Twice a year respondent issues a price schedule to its distributors. This includes not only respondent's current prices to its distributors, but "Suggested Net Billing Prices to Dealers" to be charged by the distributors. Respondent uses a zone system of prices, with eight different zones and slight differences in price between the various zones.

9. In addition to recommending the prices at which its distributors should resell Sandran products to dealers, respondent also periodically recommends to its dealers the minimum prices at which they should sell Sandran products to the public, and the charges which should be made for the installation of Sandran sold in rolls. This is done both directly by respondent and through the distributor. Thus, in June 1954, it advised its distributors that: "In a few days the consumer price on Sandran will be $1.39 per square yard in most zones throughout the country." This represented a reduction of approximately 30¢ per square yard below the former retail price, and was stated to have been made possible "only by the complete cooperation of our distributors." Presumably the new reduced retail price was called to the attention of the franchised dealers since in July 1954 respondent, in a letter to its franchised dealers, advised them that the "new low price of $1.39 per square yard" would give them an opportunity to "trade up" their customers from felt base floor covering (which was then allegedly selling for approximately $1.00 per yard) to the more durable and better appearing Sandran which "should sell readily at $1.39." In July 1955 respondent advised its dealers in the New York City area that, "our recommendation for fall is that $1.39 per square yard plus 20¢ per square yard for installation constitutes a *minimum fair retail price* for Sandran Floor Covering."

10. When respondent reduced its recommended retail price from $1.69 to $1.39, dealers in some sections of the country were reluctant to reduce the price of Sandran since they had previously bought it at prices which contemplated resale at $1.69 per yard. While respondent had a price protection arrangement with its distributors, which resulted in a reduction to them of the stocks of Sandran on hand when the new lower price went into effect, no such protection was afforded to the dealers and some of them, accordingly, were reluctant to reduce their existing stocks from $1.69 to $1.39 per yard. In the Chicago area respondent began to institute newspaper advertising in the local papers in order to force the dealers to reduce their price to that recommended by it. As respondent's president testified:

"[W]e actually went out and with this local advertising * * * forced the dealers' price down [so] that the dealers actually put their prices down to $1.39."

11. The evidence pertaining to respondent's policy with respect to dealer resale prices generally involves efforts on respondent's part to induce the dealers to maintain the minimum prices recommended by it rather than, as in the instance cited above, to reduce their prices to a lower minimum recommended by respondent. The record contains a number of instances in which dealers who sold below the recommended minimum price were either disfranchised or were threatened with disfranchisement. Where it was learned that a dealer had been selling below the recommended minimum price, respondent's salesman in the area and the distributor's salesman, alternately or together, called upon the dealer and sought to induce the dealer not to sell below the recommended price. Where the dealer persisted in ignoring this advice, his franchise was taken away and respondent frequently bought out his remaining stock of Sandran floor covering in order to assure itself that he would not continue to undercut the market.

12. Information that dealers were selling below the recommended price came to respondent not only from competing dealers who felt aggrieved by the situation, but from a "Secret Shopper Service" which respondent engaged in 1954. These shoppers called upon the dealers to ascertain not merely whether they were properly displaying and promoting Sandran, but also whether they were selling it at the recommended retail price and were making the recommended charge for installation. In some areas, such as Chicago and New York, where there was widespread price cutting due partly to the sale of bootleg Sandran through non-franchised outlets, respondent also organized dealer committees in an effort to control the situation. These committees sought to encourage the dealers not only to maintain the existing recommended prices, but to refrain from selling Sandran to non-franchised outlets.

13. Respondent's president sought to create the impression in his testimony that the disfranchisement of price cutters was limited to "persistent or flagrant" price cutters, i.e., those who continuously cut prices or who cut them substantially below the recommended price. In the opinion of the examiner it makes little difference, so far as the issues in this case are concerned, whether respondent permitted occasional or minor deviations from its recommended minimum prices, or required strict adherence to such prices. It may be noted, however, that the record contains instances where respondent sought to dis-

franchise dealers for selling Sandran even a few cents cheaper than the recommended price. Thus, a dealer in Brooklyn who was caught selling Sandran for a "few cents cheaper" was threatened with the loss of the Sandran line. He was finally permitted to keep it after he promised that he would not again cut his price. Another Brooklyn dealer actually lost his franchise for a period of time for the reason that "we used to sell it a little cheaper than it was supposed to be sold."

14. Indicative of the part played by the distributor in the program to maintain dealer prices is the testimony of another dealer in Brooklyn that upon being advised by a customer that Sandran was being offered by one of his competitors at 20¢ below the recommended price of $1.39, he called respondent's distributor to ascertain whether he could meet this price and was told that "the price and policy are the same as before." The dealer was subsequently disfranchised ostensibly for not carrying a sufficient stock of Sandran. When he endeavored to buy Sandran through another dealer in order to accommodate a customer, he was unable to do so because the other dealer was afraid he would lose his franchise if he sold to the non-franchised dealer. The Brooklyn dealer referred to above, whose franchise was lifted for a period of time for selling "a little cheaper," was first "warned" not to do so by the distributor from whom he was buying. Later respondent terminated his franchise.

15. During the first few years of the dealer franchise program, dealers were given a franchise for a period of six months and if it was found that their performance under the franchise was satisfactory, both with respect to the quantity of merchandise purchased and their observance of the requirement that they refrain from "all unfair competitive practices," the franchise was renewed. The requirement that dealer franchises be periodically renewed gave respondent an additional weapon in eliminating dealers whom it suspected of price cutting, but with respect to whom it lacked sufficient proof to terminate the franchise as a breach of the dealer's commitment to refrain from unfair competitive practices. Thus, the evidence discloses that in the Chicago area respondent received information from one of the dealers that a number of other dealers were cutting the price on Sandran. Respondent's president, upon being advised of this situation, made the following suggestion to his company's sales representative in Chicago:

> Perhaps we should organize a renewal of the Sandran Secret Shopper campaign to run during January and February [1957] in the Chicago area. This would give us a lot of valuable information about the activities of our Franchised

Dealers at the time of the year when our efforts ought to be being directed toward an appraisal of those whose Franchises should be discontinued as we move into the early weeks of 1957.

16. When a dealer was disfranchised for price cutting, it was respondent's usual policy to suspend his franchise for a period of six months or a year of so-called "penance." After this period had expired and if the dealer promised not to engage in price cutting or other unfair competitive practices, it was the practice to restore his franchise. However, during the period of time when the franchise was revoked or suspended, the dealer was unable to obtain any of respondent's products directly from the distributor, and other dealers were specifically advised to remove him from the list of authorized franchised dealers to whom they could sell or exchange Sandran.

17. Respondent periodically issues lists to its franchised dealers containing the names of all other franchised dealers in their trade area. From time to time the dealers are advised of additions to or deletions from said list, and periodically complete revised lists were issued. Where dealers' names are removed from the authorized list of franchised dealers, the other dealers in the area are periodically reminded of their obligation not to sell to such a dealer. Indicative of such a notification is a letter sent to dealers serviced by respondent's Providence distributor in December 1956, in which the dealers were asked to remove the name of a particular dealer from their list and were also given the following instructions:

We wish to also call your attention to Paragraph 4 of your franchise agreement—

"Not to sell, lend, exchange, or give directly, or indirectly, Sandran to any non-franchised dealer."

18. In the event a dealer or distributor were to sell Sandran to an unauthorized dealer it would be possible for respondent to trace the source of the unauthorized sale. Each roll or package of Sandran is stamped with a so-called "register number" before it leaves the factory. The documents accompanying the shipment of the merchandise contain an indication of the register numbers. Respondent maintains a record of such numbers. Distributors, in filing monthly inventory reports with respondent, refer to the register number of the goods. Respondent's president claimed that such numbers were used for quality control purposes, rather than to permit the tracing of unauthorized sales by distributors or dealers. Irrespective of what the purpose was, there can be no doubt that such register numbers lend themselves to the latter use and that distributors and dealers were aware of this possibility in making sales.

19. In 1957 respondent modified its dealer franchise program to the extent that it ceased the periodic termination and reissuance of new franchises to its dealers. By that time it had acquired so many dealer outlets that it became impractical to periodically renew their franchises. Accordingly, during 1957 it began issuing franchises of unlimited duration. It also modified its former requirement that a dealer, in order to be franchised, had to agree to handle a specified number of rolls of Sandran floor covering. While this involved, as a letter to its Chicago dealers indicates, a "slight liberalization of our basic Franchise philosophy," respondent concurrently inaugurated a "much more careful scrutiny of the ways in which dealers who have a Sandran Dealer Franchise are capitalizing on it." Despite the purported liberalization of respondent's policy in the franchising of dealers, there was no change in its policy of disfranchising dealers who persisted in price cutting. Thus, the evidence discloses that in the middle of 1958 two of respondent's Chicago dealers were disfranchised for persistent price cutting.

20. It was the position of respondent's president, during the course of his testimony, that respondent's disfranchising of dealers who engaged in price cutting was due to the company's "unilateral policy" of not doing business with persistent and flagrant price cutters, rather than to any breach of the dealer's obligation to "refrain from all unfair competitive practices," as provided for in the Sandran Dealer Franchise. In fact, he at first claimed that price cutting was not considered to be an unfair competitive practice for purposes of the franchise. However, he later conceded that "we consider that [price cutting] an unfair competitive practice," but asserted that "we do not require that the dealer agree with us that he is not going to be a price cutter in order to get this franchise." It is clear from the witness' testimony as a whole that he was merely engaging in an exercise in semantics.

While the decision to disfranchise a dealer may have resulted from a unilateral decision by respondent, such decision was an outgrowth of the dealer's breach of the commitment made by him not to engage in price cutting. It is true that the franchise did not specifically spell out price cutting as one of the unfair competitive practices. However, there can be no doubt that it was considered to be such a practice, a breach of which might result in a loss of the dealer's franchise. In fact, it is clear from the testimony as a whole that respondent, its dealers and its distributors regarded price cutting as one of the cardinal unfair competitive practices, to eliminate or curtail which the franchise system was instituted.

21. The emphasis in the testimony on the unilateral character of respondent's actions and the absence of any agreement, suggests the conscious or unconscious influence of the line of authorities culminating in the District Court's decision in the *Parke, Davis* case (164 F. Supp. 827). However, as the Supreme Court's decision in that case has since made clear (362 U.S. 29), the existence of any actual agreement is not a sine qua non to a finding of an illegal combination to maintain prices. Whether or not the relationship between respondent and its dealers and distributors rises to the dignity of a legal agreement is a matter of small moment. It is clear from the documentary manifestations of the relationship and from the manner of its practical operation that it is one which is pregnant with mutuality, and that it involves more than purely unilateral action on respondent's part.

22. Despite the emphasis in the testimony on the unilateral nature of respondent's actions, respondent in its proposed findings, does not seriously challenge the allegations of the complaint and the evidence in support thereof, with respect to its use of resale price maintenance agreements and the enforcement thereof. It asserts that "[a]ssuming that respondent has attempted to enforce its resale price maintenance agreements," such agreements are exempt by virtue of the McGuire Act and that consequently the enforcement thereof is legal.

The only evidence of any fair trade agreements in the record involves, (a) the State of Illinois where agreements were signed with certain dealers effective December 15, 1956, requiring them to sell Sandran floor covering and the Crown Quality covering at stipulated minimum fair trade prices; and (b) the New York City Metropolitan Area, where respondent's New York distributor entered into a fair trade agreement on March 7, 1957, requiring a Brooklyn dealer to sell Sandran and Crown Vinyl at not less than the stipulated minimum prices in the New York City Metropolitan Area (defined as including certain counties in Northern New Jersey). The latter agreement recites that the parties "desire to avail themselves of the benefit of the Fair Trade laws of the state of Dealer's address." The record does not disclose the existence of any fair trade agreement with a dealer in New Jersey. The legality of respondent's resale price maintenance arrangements, and particularly the application of the McGuire Act thereto, will be reserved for later discussion.

The Distributor Franchise System

23. As previously noted, respondent in 1955 instituted a policy of exclusive distributorships, in lieu of the policy of using multiple distributors which it had instituted when it began marketing Sandran

floor covering. Over the next few years it began eliminating multiple distributors in all cities except in New York and Philadelphia. The new distribution system not only involved the use of a single distributor within a general market area, but limited the distributor to a defined geographic territory within the area, thus eliminating all semblance of competition between distributors in all areas other than New York and Philadelphia.

24. Insofar as it is in writing, respondent's distribution program is set forth in two documents. One is a document entitled "Sandran Distributor Franchise," which is signed by respondent and "Accepted" by the distributor; the other is an attachment thereto entitled "Sandura Distributor Relations Policy." The Sandran Distributor Franchise, by way of preamble, contains a quotation from the Dealer Franchise, previously quoted, in which reference is made to respondent's belief in the "interdependence" between the manufacturer and his distributors and dealers, and the desirability of binding them together in a "longe range" relationship "based on cooperation with a mutual regard for each other's problems and profits." The franchise recites that the attached Distributor Relations Policy was developed with this concept in mind. The franchise further recites that the statement of policy "is not intended as a legally binding agreement" and that the failure of either party to live up to it "does not entitle either party to legal action not available to it were this Statement of Policy not published." Despite the provision that the Statement of Policy is not intended as a legally binding agreement, the franchise recites that—

> * * * it is with the understanding that in accepting a Sandura Distributor Franchise the distributor also accepts the principles outlined in this Policy that a SANDRAN Distributor Franchise is hereby granted to and accepted by [the named dealer].

The Sandura Distributor Relations Policy, which is attached to the franchise, contains two subsections. One of these contains a list of things which the distributor "has a right to expect" from the company; and the other indicates what the company "has a right to expect from a Franchise Distributor." The portion describing what the distributor has a right to expect from the company contains the following pertinent provisions:

> a. A continuing opportunity to profit from the distribution of the SANDRAN line in the territory for which he is franchised.
>
> b. A definition of the territory for which he is franchised, and knowledge in advance about any other Distributor franchised for the sale of SANDRAN Products in any part of that territory.

c. Cooperation from Sandura in the development of sales promotions and advertising plans needed to attain sales goals established for his territory.

d. Assurance that termination of his Franchise to distribute the SANDRAN line in his territory or any part of it will be discussed with him in advance of commitment being made to any other distributor, and will only be based on the Company's judgment that the Distributor is unable or unwilling to cooperate within the spirit of this Policy, or on the fact that his efforts in cooperation with those of Sandura are failing to produce the sales goal set for his territory.

The portion of the Distributor Relations Policy specifying what respondent has a right to expect from a franchise distributor contains the following pertinent provisions:

a. A continuing opportunity to distribute the SANDRAN line through the Franchise Distributor, and to benefit from cooperative efforts to develop the Distributor's territory.

b. Sufficient executive thought and attention to the development of sales of all SANDRAN Products to attain sales goals established for his territory.

c. Vigorous sales promotion of the SANDRAN line within, but limited to, the territory for which he is franchised.[2] This includes participation in a fair share of the cost of local or national programs advertising SANDRAN to consumers in his territory.

d. Lawful cooperation with other Franchise Distributors in the interest of ethical, progressive, profitable distribution of the SANDRAN line.

e. Acceptance of the philosophy that the Dealer is also entitled to participate in a program which assures him a profitable and satisfying operation on the SANDRAN line; and vigorous promotion of the SANDRAN Dealer Franchise Plan as the best instrumentation of that philosophy.

f. Information necessary to assure Sandura that the Distributor's financial resources are adequate for the volume of credit required and such other information about his SANDRAN operations as may be requested.

g. The right to repurchase, at cost, the distributor's Sandran inventory in case of a cancellation of the franchise.

25. In addition to the Sandran Distributor Franchise and the accompanying statement of policy respondent issued, at six month intervals, statements outlining the terms and conditions of sale to its wholesale distributors. The first of such statements in the record is dated July 1, 1955, and is entitled "Sales Policy for Wholesale Floor Covering Distributors—Fall 1955," and the others are entitled "Terms and Conditions of Sale to Wholesale Floor Covering Distributors," followed by the date of issuance. Each states that it "governs the sale of all Sandran products to Floor Covering Distributors in the United States and shall be considered to form a part of all orders which you place" for the ensuing six month period.

The first announcement of sales policy, dated July 1, 1955, refers to the initiation of the Dealer Franchise Plan two years previously,

[2] A later version of this policy statement, adopted in 1958 after the inception of this proceeding, does not contain the words, "but limited to."

and states that respondent has "consistently recommended to Sandura Distributors that they direct their sales effort toward retailers who refrain from unfair trade practices in the sale of Sandura products." It further states that experience with the dealer franchise plan has shown that "dealers will promote, display, and sell with extra emphasis a fast-moving, high-quality line distributed under a sales program which protects them from unfair and unethical competition and permits them to make a sound merchandising profit."

Each statement of "Sales Policy" and "Terms and Conditions of Sale" contains a list of the current prices charged by respondents to its distributors, according to the zone in which they are located, for the various Sandran products purchased by them. Also included is a list of "Suggested Net Billing Prices To Dealers" by the distributor, and "Suggested Net Billing Prices on Purchases from Distributors" by mail order houses and chain stores.

The statements also include a price protection clause, which protects the distributor against changes in price, providing for a 100 per cent refund of any price differential in the event of a reduction in prices. In order to avail himself of this protection, the distributor is required to furnish respondent with a monthly inventory report and to supply it with individual copies of invoices to dealers where requested to do so.

26. The change-over from multiple distributors to single distributors, which began in 1955, was substantially completed by the middle of 1956. Each distributor was assigned a specific and defined territory. He was given a map in which the assigned territory was marked out by metes and bonds. Such areas were referred to as "closed" territories, since they were completely closed to all distributors other than the distributor to whom they were assigned by respondent. Certain areas of the United States were left unassigned and were known as "open" territories, which meant that distributors in the adjoining areas were free to sell in the territory. Eventually, as respondent increased the number of its distributors and/or the size of the territory of existing distributors, more and more areas were withdrawn from the "open" category and made "closed" territory.

27. The establishment of respondent's network of exclusive closed territory resulted in a number of conflicts between certain of its distributors as a result of particular distributors seeking to sell Sandran in the territories assigned to other distributors. These disputes were particularly pronounced in the case of territories which were originally open and were later closed in favor of a particular distributor. Such conflicts precipitated action on respondent's part to induce the

wandering distributor to stay out of another distributor's territory. Such action ran the gamut from simple persuasion to the more forceful variety, with the ever-present threat, express or implied, that if the distributor did not cease and desist from the error of his ways he would be disfranchised.

28. Indicative of the conflicts arising from the closing of territories are those involving Neo Sales, Inc., of Ohio. Neo's territory consisted of a portion of Ohio between Akron, Cleveland and Columbus, in which three cities it maintained warehouses. Neo also sold or attempted to sell in the areas around Springfield-Dayton, Ohio, Lima, Ohio, and Erie, Pennsylvania, some or all of which had been open territory but were later closed in favor of other distributors. Springfield-Dayton was closed in favor of the Cincinnati distributor; Lima in favor of the Ft. Wayne, Indiana distributor; and Erie in favor of the Buffalo, New York distributor.

In connection with its foreclosure from the Springfield area, the manager of Neo's Floor Covering Division advised respondent's sales manager by letter dated June 16, 1955, that—

> * * * to stock Sandran in Columbus we must have a potential in line with the necessary inventory. I do not see how it would be possible to stock Columbus if Springfield and the surrounding area were taken from us.

Another letter was written the same day by Neo's president to respondent's president referring to the loss of the Erie, Pennsylvania, and the Springfield and Dayton, Ohio areas after the adoption of the system of closed territories, in all of which areas Neo was doing business, and stating that:

> The adoption of the policy of closed distributor territories is of great concern to us and certainly this will tend to decrease our interest and our sales.[3]

In connection with Neo's efforts to sell in the Lima, Ohio area, which was part of the closed territory of the Fort Wayne distributor, the record discloses that respondent's sales manager, in November 1955, learned from his salesman in the Fort Wayne area that Neo had been trying to sell in Lima. The sales manager advised his company's salesman in Ohio of this fact, and requested that the latter inform Neo that Lima was "not in their closed territory and that it is in a

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[3] Following the above letter, respondent's sales manager talked to Neo's floor covering manager by telephone, as a result of which the latter agreed that "it is advisable we clean up a few details as to what Neo Sales wants as far as territory is concerned," and further stating that "we are very much in favor of the closed territories and franchise dealer plan." It is obvious from the memorandum of the telephone conversation and from the surrounding circumstances that the second letter was written by Neo's floor covering manager under the subtle pressure of a possible loss of its distributor franchise if he did not "clean up" the record as to what his company wanted.

closed territory of Fort Wayne and Indianapolis." He also requested that, in talking to Neo's representative, the salesman get—

> * * * a statement from him that he will control this and definitely stop any of his sales force going out of the closed area now set up for them per the map you have. * * * [T]his is very important for we are committed definitely to a policy of closed territory. If this policy is to work it must be remembered that *all parties concerned must join in and enforce this thinking.* [Emphasis supplied.]

Following further correspondence and conferences between respondent's Ohio salesman and Neo Sales with respect to the areas in which Neo Sales could or should sell, respondent's salesman advised his company's sales manager in January 1956 that Neo's floor covering division manager—

> * * * has accepted the territorial restrictions which were set up. However, *he is agreeing only because he feels they were rammed down his throat.* [Emphasis supplied.]

Later in the month of January 1956, in response to a letter from Neo's floor covering manager which apparently alluded to Neo's territorial complaints, respondent's president advised Neo as follows:

> There have been many difficult problems involved in setting up Franchise wholesale territories since our policy in this regard was first announced a year ago. *There are very few cases on record where a Distributor voluntarily gave up even a small segment of territory that he had been covering* and in most cases differences of opinion over territorial boundaries have engendered a degree of warmth and a volume of correspondence that far outweighed the importance of the territory in question in relation to the total opportunity which a Distributor had in the heart of his territory.
>
> We have made some mistakes in setting up territories and frankly are not even all in complete accord in here as to where all territorial boundaries should be set even at this moment. However, we have felt we must take the attitude that where Distributors have gone ahead in good faith based on our assurance of certain territorial boundaries, we must not compound even our own mistakes by insisting that they accept changes. [Emphasis supplied.]

The foregoing correspondence all involves conflicts arising from Neo's efforts to sell in adjoining territory. However, the record also contains evidence of Neo's being sinned against by reason of another distributor's attempting to sell in its territory. Thus, the record discloses a complaint by Neo with respect to the Cincinnati distributor's attempt to sell in Portsmouth, Ohio, which was in Neo's territory. In the course of advising respondent that the Cincinnati distributor had "again chose to overlook the value of closed territories" by selling to a customer in Neo's territory, the latter in a letter to respondent's sales manager stated:

We feel that this is completely wrong and that you should do as you threatened as before, invoice Triangle [Cincinnati distributor] for the profit which he made on this transaction and credit our account in the same amount.[4]

Following the above correspondence, respondent's sales manager advised his company's salesman covering the Cincinnati distributor's territory as to the complaint made by Neo and that the Portsmouth area was no longer in the Cincinnati distributor's territory. He requested his salesman to inform the Cincinnati distributor as follows:

I wish you would spend some time with Marvin [the Cincinnati distributor], explain to him that *we cannot tolerate his shipping goods into Columbus-Cleveland closed area.* After your conversation with him, I wish you would write me concerning his reaction and as to *whether or not he has agreed not to ship into this area.* [Emphasis supplied.]

29. In addition to the above conflicts between distributors selling in Ohio, Indiana, and northwestern Pennsylvania over the matter of closed territories, the record also contains evidence of territorial disputes between distributors in several other areas. For example, the record discloses territorial conflicts involving Indiana and Michigan distributors, and Boston and Providence distributors. It also discloses dissatisfaction on the part of the Richmond distributor when his territory was closed. The examiner finds it unnecessary to make detailed findings regarding these other areas since he considers the evidence discussed above sufficiently representative. It is likewise the view of the examiner that the evidence adduced by counsel supporting the complaint may be regarded as representative of the territorial conflicts and other problems arising from the system of closed territories.

Respondent suggests that the "border incidents" as to which evidence was adduced by counsel supporting the complaint were "relatively few," and that it cannot be assumed such incidents were typical. It refers, in this connection, to the testimony of some of the distributors called by it, as indicating a lack of conflicts, arising from the territorial system. In the opinion of the examiner it was not incumbent upon counsel supporting the complaint to produce exhaustive evi-

[4] Respondent urges that no finding be made, based on this letter, on the ground that when it was originally introduced in evidence, it was received only for the purpose of showing the complaint by Neo and not for the truth of the statements made in the letter. The examiner's ruling to this general effect was based on the fact that the letter was introduced during the testimony of the recipient (respondent's sales manager), and that the writer was not then available for cross-examination concerning the statements made by him. However, the writer was subsequently produced by counsel supporting the complaint and the letter may now be properly considered for all purposes. It is true, as respondent points out, that the writer could not recall any such threats having been made and was extremely vague as to what he was referring to. However, the examiner believes that the letter, written contemporaneously with the events at issue, is clear on its face and is more reliable than the recollection of the writer (who was a reluctant witness) over two years later.

dence of the type discussed above. Sufficient evidence was introduced by him to show that the establishment of respondent's system of closed territories resulted in significant competitive difficulties among respondent's distributors. Such difficulties were particularly pronounced in the populous Eastern section of the United States, where respondent had a greater number of distributors and such distributors were closer together, than in the less populous areas or those where the distributors were more widely separated, as was the case with some of the distributors called by the respondent.

30. The evidence offered by counsel supporting the complaint, in addition to establishing the existence of significant conflicts between distributors, also discloses that respondent's territorial system prevented dealers from doing business with distributor with whom they wished to maintain business relation. In some instances, dealers were prevented from placing orders for Sandran with distributors with whom they were doing business on other lines. Thus, a dealer in Foxboro, Massachusetts, who was doing business with respondent's Providence, Rhode Island distributor on other lines, was requested by respondent to place his orders from Sandran with respondent's Boston distributor, inasmuch as the Foxboro store was located in the Boston distributor's closed territory. A dealer in Richmond, Virginia, who was unhappy doing business with respondent's distributor in that area and sought to place orders with respondent's Baltimore distributor, was advised by the latter that he could not accept such orders since the dealer was outside of his territory. Other instances of this kind involve the inability of Neo Sales of Ohio to sell Sandran to a dealer in Erie, Pennsylvania, to whom he was selling other products, and the inability of respondent's distributor in Detroit to sell to an Ohio dealer located in the area serviced by respondent's Fort Wayne distributor. In the latter instance the distributor, in declining the order, advised the dealer as follows:

> We regret to advise you but in accordance with Sandura Co., Inc., closed distributor territory plan we are unable to make shipment of this order, as you are not in our territory.

31. The evidence pertaining to the inability of dealers to do business with distributors of their choice demonstrates the close connection between respondent's dealer franchise program and its distributor franchise program. This is made particularly evident in the following statement made by respondent in a letter to the Foxboro, Massachusetts dealer previously mentioned, explaining why it was necessary for him to do business with the distributor in whose territory he was located:

An important factor in making the Sandran Dealer Franchise program effective is our Sandran Distributor Franchise which assigns to each distributor a specific territory. I am sure you can understand why such a program is quite important for the successful operation of the Dealer Franchise program.

32. Respondent has suggested that the closed territory—exclusive distributor program was set up, following its product difficulties, principally because of the insistence of many of its distributors that they be given exclusive territories in order to handle respondent's line of products and to make the necessary advertising expenditures. From the evidence discussed above, as well as other evidence in the record, it is clear that there were a number of distributors who did not insist upon or wish closed distributor territories. The examiner is convinced that an important factor in respondent's decision to establish closed-exclusive distributor territories was its conviction that such a system was necessary to more effectively police the dealer franchise system and to help it maintain its suggested resale prices.

33. Indicative of the difficulties experienced by respondent in maintaining its suggested resale prices in areas where it had multiple distributors is the situation in its Indiana territory. Even after the inception of its program of exclusive distributorships in all areas except New York and Philadelphia, respondent continued for several years to use two distributors in Indiana. One of these distributors was Asbestos Insulating & Roofing Company of Fort Wayne, Indiana (known as AIRCO) and the other distributor was Senate Distributing Company, Inc., of Indianapolis. Both distributors were assigned the same territory.

Respondent's difficulty in getting its two distributors in the same area to maintain its suggested minimum resale prices, and its efforts to maintain such prices is reflected in the following excerpt from a letter sent by respondent's sales manager to AIRCO, dated October 31, 1955, after a visit to the latter's territory:

We discussed the danger of price cutting in your soliciting orders particularly down toward the Indianapolis area and felt that this danger was as much Senate's responsibility to help correct as it was yours. *You fellows have followed very closely in trying to prevent price cutting* and have tried to follow a program of equalizing freight and keeping a minimum price for the minimum number of rolls. I have suggested to Bill Joyce [respondent's salesman in the area] that he take the twenty-five roll amount as a minimum number of rolls to be sold to any dealer in the area at dealer's cost less 10. Anything under this twenty-five amount of rolls will be sold at the full 90.4¢ per square yard for the full price in both Counter Top, Wall Covering and Rugs. Bill has *agreed to go over this with Indianapolis [Senate] and make sure that they understand it* and should any accounts have been offered anything at less than this, they will be notified that as of a certain date this is the minimum pricing situation. I am sure that *if both you and Senate keep to this pricing* *agreement, that the harmony can be obtained in the area* and both of you will have a chance to make a profit on the business that you sell. Should there be any violation or any thought of violation in either yours or Senate's mind, I am sure that the thing to do is to go to Bill Joyce and let him straighten it up, as quickly as possible. [Emphasis supplied.]

About six months later, in May 1956, respondent's sales manager suggested to AIRCO the possibility of splitting the Indiana territory between the two distributors, with each to have a separate closed territory and a portion to remain as open territory. Following discussions between AIRCO and respondent's sales manager, in which the former apparently indicated its desire to continue with the existing arrangement, respondent's sales manager advised AIRCO by letter dated June 27, 1956, that "the closed territory allocated to Senate Distributing Company and Asbestos Insulating & Roofing Co. is to be considered as dual throughout and both Distributors will work it as you have in the past." This solution was made subject to the following specific understanding:

This is with the understanding that each of you will observe prices and promotions in that no special prices or no special delivery setups will be put into effect without the other being notified in advance and in agreement. When any situation of this type comes up it should be handled through our Bill Joyce.

The record does not disclose whether AIRCO observed the condition specified in the above letter or not. It does appear, however, that in September 1956 it was requested to furnish respondent's representative in the area with copies of its invoices to dealers of Sandran products, pursuant to paragraph 3 of the Terms and Conditions of Sales referred to previously. Whether this was due to the fact that it was suspected of price cutting to dealers does not appear. However, the record does disclose that respondent on at least one occasion admittedly obtained distributor's invoices "for the purpose of receiving information whether or not an individual distributor is selling at our recommended resale price." In any event, in the middle of 1957, AIRCO lost its franchise and Senate became the sole distributor in the Indiana area. While the circumstances under which AIRCO lost its franchise are not revealed by the record, the testimony of an AIRCO representative discloses that he was informed by respondent's sales manager and by its sales representative in the area that the purpose in setting up closed distributor territories and franchising dealers was to try "to establish so dealers would not cut the price, hold a price so that everybody made a fair profit."

34. Outside of the evidence discussed above pertaining to the Indiana territory, the record discloses that respondent's distributors generally do not sell for less than the resale prices recommended by it.

Thus it appears that respondent's distributors in Richmond, Virginia, and Milwaukee, Wisconsin, resell Sandran products at the recommended resale price.[5] Respondent's Chicago distributor likewise adheres to the recommended minimum resale prices in his area, except that he may sell slightly *above* that price. Even in the New York area, where respondent has dual distribution, its suggested minimum resale prices are observed. The only evidence of variation from the recommended prices is in the direction of a one-cent addition to the minimum by one of the distributors. Shortly thereafter, the other distributor likewise increased his dealer price by one-cent above the recommended minimum. The explanation by respondent's president for permitting continuation of dual distribution in New York was that the two distributors "pulled well in harness." In one of the few other areas where dual distribution was permitted for a period of time, viz., Indiana, the distributors did not, as above noted, pull well in harness, in that they engaged in price cutting. Eventually one of them was dropped.

Respondent's Contentions

35. The basic facts with respect to respondent's use of a distribution system involving closed territories are not seriously in dispute. There are some differences as to the inferences and conclusions to be drawn from the basic facts, particularly with respect to whether respondent's closed territorial system is unilateral or bilateral in character, and as to the extent of its enforcement. However, respondent's defense rests primarily on the alleged economic justification of the method of distribution which it adopted, and its contention that in view of its relatively insignificant position in the floor covering industry the distribution system adopted by it poses no threat to competition and is, therefore, not illegal. Before discussing respondent's basic defense and the legal sufficiency thereof, the examiner will first consider respondent's preliminary contentions, viz., (a) that the closed territorial system is unilateral in nature and not the product of any agreement with its distributors, and (b) that adherence to the system on the part of the distributors was purely voluntary and not the product of any coercion by respondent.

36. In connection with respondent's first contention that the establishment of its system of closed territories was the result of its own "unilateral action," rather than the product of any agreement with its distributors, the examiner is not unaware of the fact that the

[5] The Richmond distributor, when asked whether the prices he received from respondent were "suggested prices" or whether he had to sell at those prices, replied: "That was the price they gave us to sell by."

franchise arrangement between respondent and each of its distributors recites that the so-called Distributor's Relations Policy "is not intended as a legally binding agreement." This, however, is not dispositive of the issue, which should be determined by the realities of the relationship between the parties and not by respondent's characterization of it. As in the case of its relationship with its dealers, the documentary manifestations of respondent's relationship with its distributors bespeaks mutuality. The franchise is required to be "Accepted" by the distributor. In accepting it, the distributor acknowledges that he "also accepts the principles" outlined in the Distributor's Relations Policy. Among the reciprocal commitments and undertakings contained in the latter document is that assumed by the distributor to promote the Sandran line "within but limited to, the territory for which he is franchised."

Irrespective of the wording of the documents involved, there can be no question but that the distributors recognized the arrangements with respondent as reciprocal ones, whereby respondent granted them an exclusive franchise (except in New York and Philadelphia), and the distributors in turn undertook to confine their sales of respondent's products to an assigned territory. Thus, the Boston distributor, when asked whether there was an understanding that he would confine his sales to the assigned territory, testified:

> There was a tacit understanding. We naturally—well, I don't know if naturally is the correct word; we assumed we would sell within that territory; we wouldn't sell beyond that area.

The same witness's testimony at another point indicates that the arrangement involved more than a tacit understanding. Testifying that when he indicated to respondent that he wanted an exclusive territory in the Boston area, he was advised by respondent that "if you feel you should have an exclusive in Boston, by the same token the Rhode Island distributor should have an exclusive there, and we agreed to that, and that resulted in a general division of the territory as represented in this exhibit."

While respondent does suggest that the relationship with its distributors does not constitute an agreement but involves "unilateral" action on its part, it concedes that: "Whether or not the provisions of the Statement of Policy are construed to be an agreement, they conform to the actual practices of the respondent." [6] The actual practices do, in fact, involve an undertaking or agreement on the distributor's part to stay within his assigned territory, except to the extent that there may be open territory which has not been closed in favor of another distributor. Respondent concedes that it—

[6] Respondent's Proposed Findings, p. 70.

* * * makes every reasonable effort to persuade the distributor not to sell outside the territory for which he is franchised. It does this through persuasion and *in some cases by asking a distributor to agree to stop jumping his territory.*[7] [Emphasis supplied.]

37. Irrespective of whether the territorial arrangements between respondent and its distributors can be regarded as constituting an agreement in the legal sense, it is clear that they involve more than voluntary compliance on the distributor's part with respondent's unilateral requests. Respondent's suggestion that its efforts to persuade distributors to stay within their assigned territories involved no coercion hardly squares with the statement of its salesman to its sales manager in January 1956, that Neo's manager had finally agreed to accept the territorial restrictions imposed by respondent "only because he feels they were rammed down his throat," nor with the request by respondent's sales manager to its salesman that the latter inform the Cincinnati distributor that "we cannot tolerate his shipping goods into Columbus-Cleveland area," and requesting to be informed "whether or not he has agreed not to ship into this area;" nor does it comport with the statement of respondent's president that: "There are very few cases where a distributor voluntarily gave up even a small segment of territory."

Respondent cites the absence of evidence of the cancellation of any distributor's franchise by reason of that distributor refusing to stay within his territory, as indicative of the lack of coercion in the program. The record does disclose that certain distributors who had sold outside of their territory did have their franchises cancelled for the ostensible reason that they were not realizing the potential of their own territory. Even if it be assumed that no franchises were actually cancelled due to extra-territorial selling, this is merely a tribute to the effectiveness of respondent's sales organization in pressuring recalcitrant distributors to get back within their assigned territory. It cannot be denied, moreover, that the distributors were ever mindful of the possibility of losing their franchise, in considering the suggestions of respondent's representatives that they not sell in adjoining territory. This became a very real consideration after respondent's product had caught on and consumer demand began to build up following the overcoming of the initial product failure.

It is concluded and found that (a) the division of territory by respondent between and among its distributors involved mutual undertakings, understandings, and arrangements whereby respondent assigned to each distributor (except those in New York and Phila-

[7] Id. at p. 71.

delphia where there were two distributors) an exclusive geographic area, and each distributor understood and agreed that he was to confine his sales efforts to that territory and not to sell in any other territory, except for such other territories as might be "open" and unassigned to another distributor, and (b) that respondent undertook to police and enforce such understandings and agreements, and that the distributors who sought to sell outside of their own territory in the closed territory of another distributor were required by respondent not to do so under penalty of being disfranchised.

37. Respondent's defense of economic justification is essentially that as a result of its product failure and the financial losses attendant thereon, it lost a number of its distributors, and that in order to obtain new distributors and build back its volume, it was necessary to award each distributor an exclusive territory. It points out, in this connection, that during this period, it lacked funds to engage in extensive advertising and that in order to encourage the distributors to share advertising costs and aggressively sell in all portions of their territory, it had to give them an exclusive area. Another factor which it is claimed required it to award exclusive territories to distributors is the fact that, unlike its larger competitors who manufacture a broad line of products, respondent has a relatively limited line, and in order to make it worthwhile for a distributor to handle the line he must be assured an exclusive territory. Other factors cited in justification of a closed territorial system is the facility which it affords in administering respondent's distributor sales incentive program and in the handling of dealer complaints. Finally, it is emphasized that the evidence fails to establish any injury to competition but that, on the contrary, respondent's system of exclusive distribution enabled it, as a small company producing a limited line of floor coverings, to stage a comeback and to become an effective competitor in an industry which is overshadowed by a few large companies.

38. It may be accepted as a fact, for purposes of this proceeding, that respondent's product failure and financial losses, accompanied by a loss of distribution, required it to offer distributors some inducement for handling its line. It does not follow, however, that it was a matter of economic necessity for it to offer such inducement in the form of a system of closed territories. In fact, the evidence offered by counsel supporting the complaint establishes that certain of the distributors preferred greater flexibility than such a system offered. While some of the distributors called by respondent indicated that they would not have taken on the line if they had not been offered an exclusive distributorship, it is by no means clear that they insisted

that their activities be confined to a specifically defined geographic area.

It is suggested by respondent that such areas caused no problems among distributors since they generally conformed to "natural trading areas." However, the evidence discloses that certain of the distributors were doing business on other lines beyond the confines of the areas assigned by respondent, and had also been doing business in respondent's products beyond the territory assigned to them until they were requested to desist therefrom. To this extent their assigned territories certainly did not conform to their own trading areas. The requirement that they not sell respondent's products to certain customers to whom they were selling other lines placed them at a competitive disadvantage, and necessitated certain of the dealers doing business with a distributor other than the distributor of their choice.

It is further to be noted that the economic justification for the system of closed territories has considerably lessened since the institution of the program. Sandran is now an established product with a substantial consumer demand. Certain of the distributors who may have insisted on exclusive distributorships and, possibly, closed territories, would probably settle for less in order to retain their franchise as a Sandran franchise distributor.[8]

With respect to respondent's argument that there has been no lessening of competition in the industry as a whole as a result of the establishment of respondent's exclusive distributorship program, this may be accepted as a fact for the purposes of this proceeding. It may also be accepted as a fact that respondent has been strengthened as an economic entity vis-a-vis its larger competitors. It does not follow, however, that the arrangement has been without its adverse competitive impact. Such impact involves competition between and among distributors, in the obtaining of dealer accounts. The lack of such competion was described by a dealer in Northern New Jersey, where respondent originally had three distributors but later eliminated all but one of them, as follows:

> [I]n other lines you buy other lines, you have two or three salesmen fighting for that particular order * * *. And in Sandran if he [the distributor's salesman] doesn't like you, you don't get any special offers, you don't get anything on the off market. I mean, there is no competition fighting there.

39. While it may be that respondent was seeking to offer potential new distributors an incentive for handling its line, the Examiner is also satisfied that an important consideration in the establishment of

[8] One of the distributors who testified that he would not want to continue with Sandran on a non-exclusive basis indicated that this would be his position "if I were in a bargaining situation."

the system of closed territories was the desire to eliminate price competition between distributors. In addition, the system of closed territories was calculated to enable respondent to better control its dealer franchise system and to enforce its recommended minimum retail prices. It it clear from the evidence previously discussed that this was likewise an important consideration in the establishment of the system of closed territories.

40. Despite considerable argument that its system of closed territories is the result of its own unilateral action rather than of an agreement with its distributors, respondent contends that the system is legal irrespective of "whether a distributor confines his sales to a given area by agreement or voluntarily."[9] Its position is one of *per se* legality. The position of counsel supporting the complaint, on the other hand, is one of *per se* illegality. To a consideration of the conflicting legal positions the examiner now turns.

THE LEGAL QUESTIONS

A. *The Legality of Closed Territories.*

1. Respondent's position basically is that its territorial arrangements with its distributors involve a mere "ancillary restraint" to the sale of property, and that such arrangements have been held to be legal both at common law and under the Sherman Act when they do not unreasonably restrain trade. The test which respondent claims to be applicable has been defined as follows:

> The doctrine of ancillary restraint * * * permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the market-place; and (3) is not imposed by a party or parties with monopoly power.[10]

Respondent cites a number of authorities purporting to apply the doctrine of ancillary restraint to various types of exclusive distribution arrangements, and contends that the rule in such cases is "virtually one of *per se* legality."

2. It is the position of counsel supporting the complaint that the so-called "rule of reason," which is followed under the doctrine of ancillary restraint, is inapplicable here. His contention basically is that respondent's arrangements with its distributors are part and parcel of an over-all scheme for the fixing of prices and apportioning of territories, and are therefore *per se* illegal, without regard to the rea-

[9] R. 1160.
[10] *U.S.* v. *Columbia Pictures Corp.*, 189 F.Supp. 153, 178 (SD NY, 1960).

sonableness of the arrangements or respondent's industry position. Counsel supporting the complaint relies on the line of authority dealing with horizontal division of territories and fixing of prices, and the application thereof to vertical arrangements between a manufacturer and his distributors or dealers.

3. Until the recent decision of the United States District Court for the Northern District of Ohio in *U.S.* v. *The White Motor Co.*, 194 F. Supp. 562 (April 21, 1961), none of the decided cases had squarely disposed of the issue here presented. In that case the defendant truck manufacturer's distribution system, under which each distributor was restricted as to the territory in which it could sell to dealers, was held to be a *per se* violation of § 1 and § 3 of the Sherman Act, as involving a combination to fix resale prices and allocate sales territories. The facts cited by the defendant purporting to establish the economic necessity of the arrangement and a lack of adverse competitive impact in the truck manufacturing industry were held to involve "considerations [which] have no materiality to the issues before the court" (at 571). In the supplemental memorandum of law filed by it respondent seeks to distinguish the *White Motor* case but contends that, in any event, the holding should not be followed since it is not based on a correct analysis of the law. Counsel supporting the complaint, of course, contends that the situation here involved is not significantly distinguishable from that in the *White Motor* case, and that its holding is sound and should be followed.

4. In the opinion of the examiner the conclusions reached by the court in the *White Motor* case are correct and have application to the instant proceeding. Respondent's effort to distinguish *White Motor* on the ground that the defendant was in partial competition with its distributors is without merit since this was not the basis of the court's holding and, moreover, respondent here is likewise in partial competition with its distributors to the extent it sells directly to mail order houses. Given the established line of precedent dealing with price fixing and allocation of territories, and the application of these by the Supreme Court to vertical arrangements, it is difficult to see how the court could have reached any conclusion other than the one that it did. The examiner is in agreement with the district court that the authorities cited by the defendant, which are substantially the same as those cited by respondent here in support of its contention that the doctrine of reasonable ancillary restraints is controlling, are not in point.

5. It is now hornbook law that certain restraints are illegal *per se* without regard to their reasonableness or the competitive positions

of those involved or the amount of commerce restrained. It is well settled that this includes agreements or combinations to fix prices. It is also generally accepted that the *per se* rule extends to concerted action to divide territories or allocate customers. *U.S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 291, aff'd 175 U.S. 211, 241; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497; *Butchart* v. *U.S.*, 295 Fed. 577, 579; *U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 427; *U.S.* v. *Consolidated Laundries Corp.*, 291 F. 2d 563; *U.S.* v. *General Dyestuff Corp.*, 57 F. Supp. 642; *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 181; *U.S.* v. *National Lead Co.*, 63 F. Supp. 513, 523, aff'd 332 U.S. 319; and *U.S.* v. *Imperial Chemical Industries*, 100 F. Supp. 504. Proof of market dominance in cases falling within this category has not been considered to be an essential element of the offense, any more than in price fixing cases. As stated in the *Imperial Chemical Industries* case (at 593):

> There is no intimation in any decision that elimination of competition is to be given a more favorable judicial consideration when achieved by route of territorial division rather than by way of price fixing, or that proof of industry domination is required in one case though not required in the other.

6. It is likewise no longer open to question that combinations which are illegal *per se* when engaged in solely by competitors are no less so because they involve a vertical, rather than merely a horizontal, combination. Thus, it is accepted that vertical combinations between a manufacturer and his distributors and/or dealers to fix minimum resale prices are illegal *per se*. *Dr. Miles Medical Co.* v. *Park*, 220 U.S. 373; *F.T.C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441; *U.S.* v. *Bausch & Lomb*, 321 U.S. 707; and *U.S.* v. *Parke, Davis & Co.*, 362 U.S. 29. For the most part these cases have involved price fixing. However, in the *Bausch & Lomb* case there was also involved an attempted limitation on the customers to whom the product in question could be resold. In holding the vertical arrangement illegal *per se*, the Supreme Court stated (at 721):

> A distributor of a trade marked article may not lawfully limit by agreement, express or implied, the price at which or *the persons to which its purchasers may resell*, except as the seller moves along the route which is marked by the Miller-Tydings Act. [Emphasis supplied.]

7. In the instant proceeding the limitation on the persons to whom respondent's distributors may resell its products is twofold, first, as to the class of customers (as in the *Bausch & Lomb* case), viz., franchised dealers, and secondly, as to the geographic area within which such customers must be located. In the opinion of the examiner the latter is no less illegal than was the limitation proscribed by *Bausch*

& Lomb. Clearly, if the distributors had joined together and divided the country into geographic areas in which they would not compete one with the other, such arrangement would be illegal *per se* under the authorities above cited. The fact that the moving force in the instant case is the manufacturer, does not make the combination any less offensive if the teaching of the cases involving resale price maintenance combinations means anything. As the court stated in the *Dr. Miles Medical* case (at 408):

> [T]he * * * [manufacturer] can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions and thus to achieve the same results, by agreement with each other.

In the *White Motor* case, the court was unable to find any legal distinction between a horizontal and a vertical combination to allocate territories and customers, and held the rule laid down in the *Dr. Miles Medical* case to be applicable to the territorial restrictions contained in the manufacturer's separate agreements with its distributors and dealers.

8. The cases cited by respondent are not, in the opinion of the examiner, dispositive of the issue herein involved. A number of the cases are of rather ancient vintage and do not take into account more recent developments in the law, as enunciated in cases such as *Bausch & Lomb and Parke Davis.* The cases relied upon by respondent which most nearly involve the issues here under consideration are those involving the granting of franchises to automobile dealers by automobile manufacturers, particularly *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 889, aff'd per curiam, 239 F. 2d 176, and *Packard Motor Co.* v. *Webster*, 243 F. 2d 418. These cases involve either the granting of an exclusive franchise by the manufacturer or the limiting of the number of franchise dealers in an area. None of them involves a network of exclusive dealerships, accompanied by an agreement or requirement that the dealers restrict their sales to an assigned territory.

It may be noted that several of the writers on the subject, some of whom respondent cites as supporting its position, have recognized that these cases do not involve the precise issue which is here under consideration. Professor Handler, who has been a prominent exponent of the theory of *per se* legality which respondent here espouses, has recognized that the cases cited by respondent fall generally under the category of "exclusive selling" and that they involve "exclusive distributorships or franchises," rather than "restrictive territorial" arrangements.[11] While a few of the earlier cases cited by respondent

[11] Handler, *Annual Antitrust Review,* 11 THE RECORD (1956) 369, 377–378.

purport to involve "territorial security clauses," these cases, according to Professor Handler, "deal with a solitary agreement between a manufacturer and a single dealer rather than a network of dealer agreements [and] are not necessarily dispositive of the issue." [12]

Mr. Stanley Robinson, whose recent article "Restraints on Trade and the Orderly Marketing of Goods" [13] respondent cites as supporting its position, likewise recognizes the distinction which exists between exclusive distributorships and restrictive territorial arrangements. The former type of arrangement, into which fall most of the cases cited by respondent, is discussed by Mr. Robinson under the hearing: "Requiring The Seller To Deal Exclusively With The Buyer." [14] The matter of imposing a territorial limitation on the buyer is discussed separately under the heading: "Confining The Buyer To A Specific Territory." [15] While citing abundant authorities in support of the legality of "exclusive selling," Mr. Robinson recognizes that insofar as territorial limitations on the buyer are concerned there has been "very little case law on this subject * * * in recent years." [16] The reason for this, as noted by Mr. Robinson, is that: "Manufacturers resorting to this practice have, without a court test, been succumbing to Sherman Act assaults by the Department of Justice." [17]

9. In fairness to respondent it should be noted that while the above writers have recognized the distinction between exclusive selling and territorial limitations on the buyer, which is somewhat obscured in respondent's argument, they nevertheless argue that the doctrine of ancillary restraint should be applied in both types of cases. Both of them recognize the persuasiveness of the argument that—

> * * * the legality of a division of territory should not depend on whether it springs from a multiplicity of separate vertical agreements between a manufacturer and his dealers, or from a horizontal agreement among the dealers; either way, the effect on competition is identical.[18]

Both also recognize that this position was sustained in the *Dr. Miles Medical* case, insofar as price maintenance is concerned. However, they contend that the law should be otherwise. As stated by Mr. Robinson, in referring to the reasoning in *Dr. Miles Medical*, quoted above:

> But this reasoning is not ineluctably a sound basis for decision. There are many areas of antitrust whether the effect of a transaction is not dispositive of its legal-

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[12] Id. at 378.
[13] 45 Cornell L.Q. 254 (1960).
[14] Id. at 255.
[15] Id. at 261.
[16] Id. at 262.
[17] Ibid.; and see footnote 34 thereof, citing a considerable number of cases (involving nationally-known companies) which were disposed of by consent decree.
[18] Id. at 267; and see Handler, *supra*, at 379.

ity. A manufacturer and dealer may not agree on resale prices, but the franchise of the dealer may be terminated if he cuts prices contrary to the wishes of his supplier.[19]

Cited in support of this argument are the Supreme Court's decision in the *Colgate* case (*U.S.* v. *Colgate & Co.*, 250 U.S. 300) and the lower court's decision in the *Parke Davis* case (*U.S.* v. *Parke, Davis & Co.*, 164 F. Supp. 827).

While it may be that there is little practical difference in effect between a transaction where a manufacturer unilaterally establishes prices and disfranchises non-complying dealers, and one in which the same result is achieved by a combination between the manufacturer and his distributors or dealers, the courts have recognized this difference as sufficient to hold one transaction legal, as involving the mere exercise of the manufacturer's right to choose those with whom he will deal, and the other illegal as extending beyond this right of purely unilateral action. The difference is precisely that which the Supreme Court in the *Colgate* case said was permissible and that which it said, in reversing the lower court decision cited by Mr. Robinson, was not permissible in *Parke Davis*.

Although *Parke Davis* involved resale price maintenance, its ratio decidendi is applicable to cases involving the assignment of territories.[20] A manufacturer may, as the automobile dealer franchise cases cited indicate, unilaterally assign exclusive distributorships but he may not, acting in combination with his distributors, require that each resell only within a specified geographic area. In the one case he is unilaterally choosing those with whom he will do business; in the other he is combining with the distributors to allocate territories.

10. Respondent contends that the legality of restrictions on the territory within which, or the classes of persons to whom, a distributor may resell a manufacturer's products has been specifically upheld by several decisions of the Commission, citing particularly *General Cigar Co., Inc.*, 16 F.T.C. 537; *Columbus Coated Fabrics Corp.*, 55 F.T.C. 1500; and *Roux Distributing Co., Inc.*, 55 F.T.C. 1386. In the opinion of the examiner the holdings in these cases are not necessarily inconsistent with the conclusions reached above. In the *General Cigar* case the basis for the dismissal of the complaint does not appear since no findings or opinion were issued by the Commission. It does appear, however, from the dissenting opinion of Commissioner McCullough

[19] Id. at 267.

[20] See *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832, 839 (C.A. 4, 1960) where Chief Judge Sobeloff, in addressing himself to the question of whether the principle of *Parke Davis* applied to a tie-in combination, observed that "it is no distinction to say that Parke Davis was concerned with price fixing whereas here we have a tie-in."

that there was no "contract between the respondent and its customers with respect to restricted territory," although they apparently co-operated in preventing sales outside the limits of an assigned territory. In the *Columbus Coated Fabrics* case the opinion of Commissioner Gwynne indicates that there was "no evidence of any agreement, either written or oral, as to these [territorial] allocations. Nor is there any substantial evidence that Columbus made efforts to require observance or to police the unilateral arrangements it made."[21] While the Commission in the *Roux* case declined to apply the *per se* rule to an arrangement limiting the class of accounts to which respondent's wholesale customers could resell, the Commission later in *The Roberts Co.*, Docket 6943 (June 30, 1960), made it clear that "the *Roux* case was not premised upon a charge of conspiracy or agreement."

11. In the opinion of the examiner, the cases cited by respondent must be interpreted in the light of the Supreme Court's recent decision in the *Parke Davis* case, as indeed the Commission did when it had occasion to place *Roux* in perspective in the *Roberts* case. In *Parke Davis* an illegal vertical combination to fix prices was found to exist, even though there was no actual agreement between the manufacturer and his distributors and dealers to maintain prices. The district court had dismissed the complaint on the ground that manufacturer's activities in seeking to enforce its recommended resale prices "were properly unilateral and sanctioned by law under the doctrine laid down in *U.S.* v. *Colgate & Co.*, 250 U.S. 300."[22] The lower court, in holding that Parke Davis' actions were "properly unilateral", apparently interpreted *Colgate* as holding that there can be no unlawful combination, within the meaning of the antitrust laws, without an actual agreement between the manufacturer and his distributor. The Supreme Court, in reversing the lower court, ruled that illegal agreements or combinations which violate the antitrust laws are not limited to "contractual arrangements, express or implied".[23] It cited with approval its earlier decision in *Bausch & Lomb* that there can be a combination in restraint of trade "without agreements", the court there stating with reference to the arrangement between the manufacturer and his distributors and wholesalers (321 U.S. at 723):

> Whether this conspiracy or combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial. * * * In other words, *an unlawful combination is not just such as arises from a price maintenance agreement, express or implied* * * *. [Emphasis supplied.]

[21] Id. at 1521.
[22] *U.S.* v. *Parke Davis,* 164 F. Supp. at 829.
[23] *U.S.* v. *Parke Davis*, 362 U.S. at 41.

The court in *Parke Davis* concluded that its own decisions since *Colgate* "teach that judicial inquiry is not to stop with a search of the record for evidence of *purely contractual arrangements.* * * * [W]hether an unlawful combination or conspiracy is proved is to be judged by *what the parties actually did rather than by the words they used*" (emphasis supplied).[24]

12. The principle enunciated in *Parke Davis* that agreements or combinations in restraint of trade are not limited to agreements or contracts in the legal sense is nothing new or revolutionary. The same concept was recently expressed by Professor Handler as follows:

An agreement, in antitrust parlance, *is not the same as an agreement in the law of private contracts.* A conspiracy or combination—an *agreement,* if you will—is present *where there is joint action.* [Emphasis supplied.][25]

13. It is concluded that the activities of respondent and its distributors in setting up and enforcing a system of closed territories, as heretofore described, involve joint action constituting an agreement, conspiracy or combination, within the meaning of the antitrust laws. Since such joint action involves, in effect, an allocation of territories among distributors, albeit one which has a vertical genesis, it is illegal *per se.* In any event, even if the so-called rule of reason were deemed to apply to vertical combinations solely involving territorial restrictions, there can be no doubt that where such a combination is used to fix or control prices, it is illegal *per se.* It is abundantly clear from the record in this case that the system of closed territories is part and parcel of the combination between respondent and its distributors and dealers to fix minimum resale prices at both the distributor and dealer levels.

B. *The Legality of the Resale Price Maintenance Agreements.*

1. The respondent does not seriously question that the evidence establishes a combination to maintain prices between and among itself and its distributors and dealers. As previously indicated, it has proposed no findings in this regard, and states that it may be assumed, for purposes of its argument, that it "entered into resale price maintenance agreements with its distributors and/or dealers" but that such agreements are immune under the McGuire Act. In view of the Supreme Court's decision in the *Parke Davis* case, it is not surprising that respondent should not seriously contend that the agreement between itself and its dealers and distributors does not constitute a combina-

[24] Id. at 44.
[25] Handler, *Annual Antitrust Review,* 15 THE RECORD (1960) at 370.

tion to fix prices and therefore a *per se* violation of law, except to the extent it is immunized by the McGuire Act. It is interesting to note that while respondent implicitly recognizes the multilateral nature of the arrangements between and among itself and its distributors and dealers, insofar as the price fixing charge is concerned, it insists that the arrangement is unilateral insofar as it involves the assignment of exclusive territory. The basis for the distinction between the two situations is one which escapes the Examiner.

2. In any event, while assuming the existence of price maintenance arrangements between itself and its distributors and dealers, respondent nevertheless contends that such arrangements are lawful since they fall within the McGuire Act exemption. Before considering this argument further, it may be noted that respondent contends counsel supporting the complaint has the burden of establishing that the alleged agreements are beyond the exception provided by the McGuire Act. This contention is apparently based on the fact that the complaint, in paragraph 6, contains an allegation that the agreements between respondent and its distributors and dealers to establish and maintain prices are "beyond the exception provided by the McGuire Amendment to Section 5(a) of the Federal Trade Commission Act."

In the opinion of the examiner the quoted portion of paragraph 6 is purely superfluous since the McGuire Act constitutes an exemption or exception from Section 5, and respondent therefore has the burden of establishing that it comes within such exemption or exception. It is elementary that he who claims to fall within an exception or exemption from the application of a general statute has the burden of establishing that he meets the requirements thereof.[26]

3. Respondent claims that it is protected by written fair trade agreements in three states, viz., Illinois, New York and New Jersey. As previously indicated, the record fails to establish the existence of such an agreement in New Jersey. In any event, these are the only three states where any claim is made that fair trade agreements were signed with its dealers. In its argument respondent cites the fair trade laws of New York, New Jersey, Illinois and Virginia as having been held to be constitutional when applied to non-signers, and contends that since these are the only states where dealer witnesses were called to testify regarding resale price maintenance, the McGuire defense has been established.

[26] See, for example, *The Roberts Co., supra,* where the Commission stated, in connection with the argument of respondent that its combination with dealers was clothed with legality by the McGuire Act, as follows: "Respondents have failed to establish that their conduct comes within the exemption afforded."

While it may be true that the dealer witnesses called were limited to the four states mentioned, the evidence discloses that respondent's resale price maintenance system is not limited to these states, but is applicable to its entire distributor-dealer franchise system throughout the United States. Thus, while no dealer witnesses were called for Indiana, the testimony of the Indiana distributor and the documentary evidence discloses that respondent engaged in resale price maintenance in that state. In the case of Virginia, one of the states where respondent apparently concedes that the evidence establishes it engaged in resale price maintenance, respondent overlooks the fact that it introduced no evidence that it entered into a fair trade contract with any of its dealers or distributors in compliance with the fair trade laws of that state. It should also be noted, in this connection, that the holding that the Virginia Fair Trade Act is constitutional as to non-signers was limited to a situation where the non-signer was given notice that by accepting the product he would be deemed to have agreed to a price maintenance agreement.[27]

4. Respondent suggests that even though it introduced no evidence of formal fair trade contracts in states other than New York, New Jersey and Illinois, its arrangements with dealers and distributors may be regarded as the equivalent of fair trade contracts. In the opinion of the Examiner this argument is wholly lacking in merit. The wording of the fair trade laws cited by respondent makes it clear that in order to bind non-signers, it is necessary to enter into a formal contract containing certain specific provisions provided for by state law. Thus it has been stated that the New York fair trade law can be taken advantage of "only by fixing resale prices in definite contract form, and in the absence of such a formality it cannot be claimed that there has been any such violation of the law." [28] In the State of Utah, the law specifically provides that the contract must be signed and that a copy be filed with the State Trade Commission.

Respondent relies heavily on *U.S.* v. *Socony-Mobil Oil Co.*, 150 F. Supp. 202, at 204 (D. Mass., 1957) in which the court stated that it could "find nothing in the McGuire Act which limits its exemption to fair trade agreements." The Commission has already expressed some doubt as to the correctness of this holding in the *Roberts* case, *supra*.

5. Even if it be assumed that non-formal arrangements do comply with state law, respondent's fair trade defense must fail for the reason, as stated by the Commission in the *Roberts* case, that:

[27] *Standard Drug Co. Inc.* v. *General Electric Co.*, 202 Va. 367; 117 S.E. 2d 289. (Va. Sup. Ct., 1960).

[28] CCH Trade Regulation Reporter ¶3130.34; see also *DuMont Laboratories* v. *Macy*, N.Y. Sup. Ct. 1949, 1948-9 Trade Cases, ¶62, 481.

[N]o attempt has been made to prove that the [price maintenance system] is entitled to statutory protection in each state where fair trade laws are in effect, and this is not a matter for official notice.

Furthermore, even if it be assumed that official notice may be taken of the fair trade laws of the various states, respondent's defense must fail for the reason that at least two states, Texas and Missouri, and the District of Columbia have no fair trade laws. In at least fourteen other states such laws have been held to be unconstitutional as applied to non-signers.[29] Since respondent's resale price maintenance system is nationwide, it seems clear that it is beyond the protection of the McGuire Act in those areas which have no fair trade laws and with respect to non-signers in those states where the fair trade laws have been held to be unconstitutional.

6. It is further to be noted that the fair trade laws merely confer immunity on resale price maintenance agreements falling within their scope to the extent of permitting the bringing of injunction suits or damage actions against the violators of such agreements. They do not confer immunity on a combination with distributors to enforce such agreements by boycotts or threats to boycott the offending dealers. Moreover, to the extent that respondent competes with its own distributors in sales to mail order houses, its resale price maintenance agreements with distributors would not be entitled to the protection of the McGuire Act.[30] This would be true even with respect to distributors who are not in actual competition with respondent in sales to particular mail order houses.[31]

7. Since respondent's price maintenance system is (a) in effect in states which have no fair trade laws and in states where such laws have been held to be unconstitutional as to nonsignors, (b) involves the use of enforcement methods which are not sanctioned by the fair trade laws, and (c) was in effect even before any fair trade agreements became operative, it seems clear that the system must be regarded as illegal as a whole. To the extent that any portion thereof may be salvageable under the fair trade laws, it will be necessary for respond-

[29] *General Electric Co.* v. *American Buyers Cooperative*, Ky. Ct. App. June 13, 1958 (26 U.S. Law Week 2655); *Remington Arms Co. Inc.* v. *G.E.M. of St. Louis, Inc.*, Minn. Sup. Ct., April 8, 1960 (28 Law Week 2520); *American Home Products Corp.* v. *Homsey*, Okla. Sup. Ct., April 18, 1961 (29 Law Week 2531); see also *Kinsey Distilling Sales Co.* v. *Foremost Liquor Stores*, Ill. Sup. Ct., November 26, 1958 (27 Law Week 2276).

[30] *U.S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305.

[31] See *Johnson & Johnson* v. *Janel Sales*, D.C., S.N.Y., February 16, 1961, where the McGuire Act's antitrust exemption was held not to permit enforcement against a nonsigner of a New York fair trade contract between a retailer and manufacturer which also retailed its own products, even though the manufacturer's retailing activities were not in direct competition with the signing retailer. [29 Law Week 2390.]

ent to reconstruct or reconstitute its arrangements with its dealers in compliance with the applicable laws.[32]

CONCLUSIONS

1. Respondent has entered into and maintained agreements and arrangements with its distributors and dealers which have had and do have the tendency of unduly hindering and restraining competition, including price competition, between and among said distributors and dealers in the sale of respondent's products. Said agreements and arrangements, and respondent's acts and practices in furtherance of them, have had and now have the undue tendency and effect of:

a. Establishing and maintaining prices at which distributors and dealers resell said products beyond the exception provided by the McGuire Amendment to Section 5(a) of the Federal Trade Commission Act.

b. Establishing and maintaining prices at which dealers install such products.

c. Establishing and maintaining selling territories wherein competition between distributors is entirely eliminated or severely restricted.

d. Boycotting, or threatening to boycott, distributors and dealers who resell, or resell and install, such products at prices other than those in accordance with the wishes of respondent.

e. Boycotting, or threatening to boycott, distributors and dealers who resell such products to other distributors and dealers who are not customers of or are not franchised by respondent.

2. The said agreements and arrangements, and respondent's acts and practices in furtherance of them, have had and now have a dangerous tendency unduly to hinder and restrain competition and trade in the sale and distribution of such products.

3. Said agreements and arrangements, and respondent's acts and practices in furtherance thereof, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Sandura Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering

[32] *Bausch & Lomb, supra,* at 724.

for sale, sale, and distribution of floor covering, wall covering and counter top products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist (a) from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy with others not parties hereto, or (b) from requiring such others to enter into, continue, cooperate in, or carry out any planned common course of action, understanding, agreement, combination or conspiracy with respondent or with each other, to do or perform any of the following acts or practices:

1. Establishing or maintaining prices at which such products are resold, or resold and installed, by either wholesalers or retailers by:

a. Issuing franchises or licenses to retailers and requiring that retailers secure such franchises or licenses before being permitted to purchase such products.

b. Compiling, maintaining, and circulating lists of retailers identifying those which have been so franchised or licensed and those which have had their franchises or licenses revoked.

c. Utilizing the services of salesmen or any other persons for the purpose of shopping, investigating, or exercising any other methods of surveillance over the business operations of retailers to determine the prices at which such products are sold.

d. Utilizing register numbers or any other means of identifying such products for the purpose of ascertaining the names of others who have sold, loaned, exchanged, or given such products to retailers.

e. Refusing to sell to wholesalers or retailers for the reason that such wholesalers or retailers are known to be, or suspected of being, resellers who sell, or sell and install, such products, or any other products, for less than recommended or prevailing prices.

f. Preventing in any manner wholesalers or retailers from selling, lending, exchanging, or giving such products to retailers for the reason that such retailers are known to be, or suspected of being, retailers who sell, or sell and install, such products, or any other products, for less than recommended or prevailing prices; or for the reason that such retailers are known to have, or suspected of having, sold, loaned, exchanged, or given such products to other retailers known to have, or suspected of having, sold, or sold and installed, such products, or any other products, for less than recommended or prevailing prices.

g. Utilizing any other cooperative means.

2. Franchising, licensing, or otherwise permitting certain wholesalers to sell such products to retailers whose business establishments are located within geographically defined territories and preventing, by any method, other wholesalers from selling such products to such retailers.

3. Restricting or preventing, by any method, wholesalers from selling such products to certain retailers because of the geographical locations of the business establishments of such retailers.

4. Restricting or preventing, by any method, retailers, because of the geographical locations of their business establishments, from purchasing such products from wholesalers of their choice.

5. Confining or limiting, by any method, the sales of such products by wholesalers to certain retailers because of the geographical locations of said retailers' business establishments.

6. Restricting or preventing, by any method, wholesalers from selling such products to customers of their choice or retailers from purchasing such products from suppliers of their choice.

Opinion of the Commission

By Elman, *Commissioner:*

This is an appeal from a hearing examiner's initial decision that respondent, a corporation engaged in the manufacture of certain vinyl plastic products used in covering floors, counter tops, and walls, has entered into agreements and arrangements with its distributors and dealers which tend unduly to restrain competition among them in the sale of respondent's products, in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45).

I. *The Complaint and Answer.*

The complaint in this proceeding was issued on January 15, 1958. It alleges that respondent, a corporation organized under the laws of Delaware with its principal place of business in Pennsylvania, is engaged in the manufacture and sale of vinyl plastic floor, wall, and counter coverings under the brand name "Sandran." It alleges further that respondent markets its products through a national network of distributors and dealers and that it competes in commerce with firms engaged in the distribution of similar products.

The complaint charges that respondent's system of distribution is characterized by closed territories at the distributor level and by "franchised" dealerships at the retail level. Neither distributors nor dealers, according to the complaint, are allowed to sell to dealers who are not approved, *i.e.*, "franchised," by respondents, and all are required by respondent to resell at prices dictated by it. The complaint alleges that respondent's distributors agree or understand that they are not to resell outside their assigned territories or to distributors and dealers who are not customers of, or "franchised" by, respondent; that respondent's dealers likewise agree or understand that they are not to resell to such dealers; that both distributors and dealers agree or understand that they are not to resell respondent's products at prices that do not accord with its wishes; and that each dealer agrees that, upon termination of his franchise or discontinuance of the Sandran line, respondent will have the right to repurchase his remaining stock.

Respondent is charged with enforcing its resale-price-maintenance program by obtaining price reports from organizations of shoppers, by furnishing dealers and distributors with lists of franchised dealers, and by receiving reports from its salesmen, distributors, and dealers. The complaint alleges that distributors and dealers who cut prices or sell to proscribed distributors and dealers lose the right to sell respondent's products, although, after a suitable period of "penance," a revoked franchise may be reinstated.

It is alleged that respondent has restrained competition by establishing resale prices for respondent's products and their installation, by establishing sales territories wherein distributor competition is "entirely eliminated or severely restricted," and by boycotting or threatening to boycott dealers and distributors who resell at other than the prices fixed by respondent or who resell to distributors or dealers outside respondent's authorized channels of distribution, all in violation of Section 5.

Respondent's answer admits the allegations concerning its state of incorporation and place of business, and that it is engaged in the manufacture and sale of certain vinyl plastic products under the trademark "Sandran" which it markets through distributors and dealers who collectively sell respondent's products nationally. The answer also admits that respondent does an interstate business, and that it competes with other firms. It denies all other allegations of the complaint.

II. *The Initial Decision.*

In an initial decision filed September 15, 1961, the hearing examiner determined that respondent had violated Section 5 in substantially the manner alleged in the complaint, *i.e.*, by establishing and maintaining arrangements with its distributors and dealers whereby resale-price competition is eliminated, distributors are confined by territorial restrictions, and those violating price and customer resale limitations are boycotted by respondent and its authorized outlets. The examiner reached these conclusions after a thorough and elaborate canvass of the facts. In summary, these are his findings:

Respondent has been in the floor covering business since 1923. For many years, however, it marketed only an enamel-surface, felt-base floor covering; not until the period following World War II did it develop a new type of floor covering known as a rotary vinyl or roto-vinyl. This is a vinyl plastic poured over a decorated paper sheet and bonded to an asphalt-saturated felt base. It is sold in rolls or in pre-cut lengths known as "rugs." In 1946 respondent built a factory to manufacture this new product, called "Sandran," but actual marketing did not commence until 1949. Respondent also developed a Sandran counter top and wall covering, and in 1956 it brought out a heavy, premium quality vinyl floor covering which it calls "Crown Vinyl." Sandran floor covering is respondent's principal product, accounting for 85 to 90 per cent of its sales.

Respondent experienced serious technical difficulties with its new product in the early years of production. During this period respondent's sales declined from approximately $7,000,000 in 1950 to $3,500,000 in 1954; thereafter sales increased, *e.g.*, to almost $12,000,000 in 1957 and approximately $24,000,000 in 1959.[1] In the context of competition with other manufacturers of hard-surface floor coverings, respondent's sales represented 1.1 per cent of the industry total in 1954 and 4.8 per cent in 1958. Respondent's products compete with a variety of other floor coverings—such as enamel-surface-felt-base, linoleum, asphalt tile, rubber tile, and other vinyls—some of which are priced below Sandran and some above.

Respondent ranks among the smaller firms in the industry, manufacturing a relatively short line of products while its largest competitors, *viz*, Armstrong Cork, Congoleum-Nairn, and Pabco, distribute a variety of different types. However, respondent's method of manufacture permits it to achieve clearer and more attractive design patterns than is possible with other floor coverings. It competes against lower priced products by seeking to induce customers to "trade up," and against those that are more expensive by attempting to convince consumers that Sandran or Crown Vinyl is comparable to higher priced brands.

[1] During oral argument of the appeal, the Commission granted respondent's motion to receive into the record sales figures for more recent years. They show sales for 1960 of $16,394,061 and for 1961, subject to adjustment upon audit, of $13,687,222.

Respondent's products are distributed through 55 wholesale distributors "from coast to coast," who in turn resell to approximately 8,000 retailers. Respondent also makes direct sales to mail order houses for redistribution by them. That respondent's products are in substantial competition in interstate commerce with other hard-surface covering materials is not in dispute.

Initially respondent marketed Sandran through multiple distributorships unlimited as to the retail outlets to whom they might resell. Around 1953, during its period of financial difficulty, respondent began to issue franchises to retail dealers and to require its distributors to resell only to those holding franchises. "Prominent among the reasons which caused respondent to set up its dealer franchise system was the fact that the floor covering industry was going through a period of cut-throat competition at the retail level, with Sandran selling for as low as $.98 or $.89 a square yard." (Initial Decision, pp. 763, 764.) In 1955, with the exceptions of New York and Philadelphia, respondent turned to a system of exclusive distributorships, with each distributor required to sell entirely within a defined territory. "An important factor in respondent's decision was the conviction that a system of exclusive distributorships would make the dealer franchise system more effective. It was also desirous of limiting price competition among its distributors, which was being reflected in dealer prices." (*Ibid.*)

Between 1953 and 1955, respondent extended its franchise system until Sandran was sold only through dealers franchised by it. A brochure issued by respondent in January 1955 to prospective dealer applicants advised:

> "We intend to put the SANDRAN DEALER FRANCHISE PLAN into effect throughout the country NOW. It is our belief that reputable dealers will welcome an opportunity to promote a floor covering on which they are protected from unfair and unethical competition." (*Id.*, p. 764.)

The brochure contains statements purportedly made by dealers to the effect that Sandran's so-called " 'Profit-Protecting' Franchise Plan' " " 'has eliminated bad business practices and has given the legitimate dealer a very good profit.' " (*Ibid.*) " 'Town & Country' " dealers are advised that the plan " 'Protects you against competition from big city dealers in your vicinity.' " (*Ibid.*) The " 'Sandran Dealer Franchise' " itself emphasizes the " 'completely interdependent' " relationship of manufacturer, distributors, and dealers, and expresses a belief that through " 'cooperation based on mutual regard for each other's problems and profits, the maximum of personal and business satisfaction will result.' " (*Ibid.*)

To implement this policy, respondent agrees with its dealers in the franchise document to sell only to franchised dealers, to distribute the names of the franchised dealers, to refer consumers solely to franchised dealers, and to make advertising material and merchandising assistance available only to franchised dealers. The dealer in turn commits himself to carry an adequate stock of Sandran, to promote Sandran actively, to refrain from unfair competitive practices, not to deal in Sandran with any nonfranchised dealer, and to afford respondent the right to repurchase his Sandran stock at his original purchase price should they sever business relations.

Respondent has a sales organization to assist both distributors and dealers in merchandising Sandran. Twice a year respondent issues to its distributors a schedule of "Suggested Net Billing Prices to Dealers" (Initial Decision, p. 766), and it also periodically recommends to dealers the minimum prices at which they should resell Sandran to the public. For example, in 1954 respondent cut its price for Sandran approximately $.30 per square yard, to $1.39, which it recommended to its dealers as " 'a *minimum fair retail price* for Sandran Floor Covering.' " (*Ibid.*) When dealers in the Chicago area balked at the reduction, respondent admittedly forced them to come down through a local advertising campaign.

Most of respondent's resale-price problems, however, concerned dealers who undersold the recommended price. "The record contains a number of instances in which dealers who sold below the recommended minimum price were either disfranchised or were threatened with disfranchisement." (*Id.*, p. 767) Respondent enforced its recommended price levels through its own sales agents, competing dealers, a "Secret Shopper Service," and, on occasion, organized dealer committees. Respondent's president testified that disfranchisement was limited to " 'persistent or flagrant' price cutters" (*ibid.*), but the record shows instances of the application of such discipline when the reductions were modest. The record also contains instances of distributor refusal to cut price and of dealer refusal to sell to nonfranchised dealers.

At first, respondent granted franchises for only six months; the necessity for frequent renewals facilitated respondent's policy of eliminating price-cutting dealers from its distribution system. Only by serving six months or a year of "penance" could a dealer recover his franchise. Other dealers were notified when one of their number was disfranchised, and were reminded of their obligation not to sell Sandran to him. "Register numbers" stamped on Sandran rolls or packages at the factory enable respondent to trace the dealer or distributor who makes an unauthorized sale.

In 1957 respondent somewhat liberalized its relationship with its dealers; among other things it ceased to require periodic reissuance of franchises. Concurrently, however, it undertook more careful scrutiny of dealer operations. Respondent was concerned to eliminate "unfair competitive practices," and respondent's president conceded that price cutting was such a practice. It is clear that this was the understanding of all parties to respondent's distribution system and that they agreed and combined to prevent it.

At the distributor level, respondent's program called not only for assigning a single distributor to a market area but for limiting him to a defined geographic territory. The outlines of respondent's distribution policy are set forth in the " 'Sandran Distributor Franchise' " and the " 'Sandran Distributor Relations Policy.' " The former, like the dealer franchise, recites the benefits of cooperation and expounds the philosophy of manufacturer-distributor-dealer interdependence. It states that the distributor who accepts a Sandran franchise also accepts the principles outlined in the Distributor Relations Policy.

The latter document states that the distributor has a right to expect from the manufacturer a continuing opportunity to profit from distributing Sandran in his franchised territory, definition of the territory and knowledge in advance of anyone else franchised to sell there, cooperation from respondent in developing sales promotions, and assurance that termination of his franchise will be discussed with him in advance and will be based only on his inability or unwillingness to live up to the terms of the Policy or on inadequate sales achievement. The Policy states that respondent has a right to expect from the distributor a continuing opportunity to distribute Sandran through him, sufficient application of his talents to attain sales goals, vigorous promotion of Sandran within the assigned territory, cooperation with other distributors in the profitable distribution of Sandran, promotion of the dealer franchise plan, adequate financial resources and necessary business reports, and the right to repurchase inventory on hand at cost if the franchise is cancelled.

In addition, respondent periodically issued statements governing the terms of sale to its distributors. They emphasized the desirability of selling through dealers assured of a sound profit by insulation from unethical competition. Each statement also contained suggested net billing prices for the distributors and a price protection guarantee conditioned on monthly inventory reports.

By mid-1956 most of respondent's distributors had been allocated specific "closed" territories, *i.e.*, closed to all other distributors. As respondent gained more distributors or widened their territories, more and more "open" areas were "closed." The record shows that when distributors conflicted over territorial borders or sold in each other's territories, respondent took steps to settle the boundary disputes and to induce wandering distributors to return to their own territory. On these occasions respondent would explain that, while each distributor might prefer open season everywhere, it was in their long-run common interest to observe the boundary lines. No one was entitled to a protected closed territory unless he was willing to respect the territorial integrity of his neighbors. Dealers within one territory who attempted to buy from another distributor were informed by respondent and its distributors that they could be served only by the distributor to whom their area was assigned.

Respondent considered these territorial restrictions an " 'important factor in making the Sandran Dealer Franchise program effective.' " (Initial Decision, p. 779) "The Examiner is convinced that an important factor in respondent's decision to establish closed-exclusive distributor territories was its conviction that such a system was necessary to more effectively police the dealer franchise system and to help it maintain its suggested resale prices." (*Id.* p. 779)

In Indiana, where respondent for a time retained two distributors, it was troubled by price competition between them. Both were strongly admonished not to cut prices to dealers; in fact, continued joint exploitation of the territory was permitted only " 'with the understanding that each of you will observe prices and promotions in that no special prices or no special delivery setups will be put into effect without the other being notified in advance and in agreement.' " (*Id.*, p. 780) Ultimately one of the Indiana distributors lost its franchise.

The evidence shows that respondent's distributors generally do not sell for less than the recommended prices. It further shows that the closed territorial system was a product of manufacturer-distributor agreement, and that distributor adherence to it was not purely voluntary.

On the basis of these findings the examiner concluded that respondent's tightly restricted distribution system cannot lawfully be justified and, in its territorial allocation aspects, particularly as an instrument for fixing prices, is illegal *per se*.

III. *The Issues Presented on Appeal.*

Respondent contests all of the hearing examiner's principal conclusions but few of his purely factual findings. Further, respondent commendably facilitates consideration of this appeal by admitting that it has entered "agreements wherein its distributors agree to confine their selling activities to particular geographic areas," and that "having once entered into an agreement where the distributors were to confine their selling efforts to specified areas that it attempted to persuade distributors to live up to their agreements."[2] (Respondent's Brief on Appeal, p. 10.) And, although respondent nowhere concedes that it entered into resale-price-maintenance agreements with its distributors or dealers, it confines its argument on this point to the contention that any such agreements that may exist are lawful under the McGuire Act amendment (66 Stat. 632, 15 U.S.C. 45(a)) to Section 5(a) of the Federal Trade Commission Act.

On two major factual points of controversy, however, respondent takes a firm stand. It argues first that the hearing examiner erred in the weight he attached to its argument of economic justification for confinement of distributors to closed territories, both in 1955 and at present. This restriction, it asserts, is "a condition precedent to respondent's survival in the relevant market." (Respondent's Brief on Appeal, p. 16.) Second, respondent contends that it restored to a system of closed exclusive distributor territories *solely* to preserve its ability to compete in a highly concentrated industry dominated by much larger firms. Exclusive distributorships, it argues, were not intended to be, and were not in fact, an essential element of an illegal price-fixing scheme. Respondent urges that this exclusive distributor network is pro- rather than anti-competitive. In essence, its contention is that, without the guarantee of exclusive territories, distributors would refuse to handle respondent's short and modestly advertised line; if this should happen, respondent would go out of business and the industry would lose not merely a competitor at the manufacturing level but distributors and dealers as well.

Respondent contends further that the examiner misconstrued and misapplied the precedents in finding exclusive territories illegal *per se* or as "part and parcel" of an illegal price-fixing scheme. Alternatively, respondent argues that since an order prohibiting resale-price maintenance would adequately remedy any pricing illegality, extension of it to cover distributor territories is unnecessary and punitive. Finally, it is urged that the examiner erred in finding respondent guilty of illegal resale-price maintenance.

[2] In this connection, however, respondent denies that it enforced the agreements through "improper or coercive tactics." Respondent's Brief on Appeal, p. 10.

IV. *Preliminary Considerations.*

The number and variety of the propositions contested compel some sorting out. It is helpful at the outset to construct a picture of respondent's distribution system, as described by the hearing examiner.

Instead of dealing with all interested prospects, respondent sells only through franchised distributors and dealers. The distributors are expected to resell only (1) within assigned exclusive territories, (2) to dealers approved by respondent, and (3) at or above prices recommended by respondent. The dealers are expected (1) to retail Sandran only at or above prices recommended by respondent and (2) not to sell to any dealer not approved by respondent. Respondent's dealer restrictions are enforced by persuasion and, if necessary, by coercion in the form of termination, or threat of termination, of the dealer franchise. Its distributor restrictions are enforced by persuasion and perhaps by creating fear of franchise termination, although respondent argues that it has neither the power nor the inclination to threaten such drastic action.

Thus structured, respondent's tightly knit sales organization has various anticompetitive aspects. The dealer resale-price-maintenance restrictions eliminate price competition in sales to the consuming public. This effect is reinforced by provisions for disfranchising recalcitrant dealers, preventing franchised distributors and dealers from selling to nonfranchised dealers, and reserving to respondent the right to repurchase unsold Sandran upon franchise termination. Franchised dealers may not undercut suggested minimum prices; unfranchised dealers may not obtain Sandran. Price inflexibility is the necessary consequence.

Competition in respondent's product at the distributor level—*i.e.*, any form of competition, by price, service, or otherwise, for dealer accounts—is precluded by allocation of a closed exclusive territory to each distributor. This limitation cuts in two directions. Distributors may not, through superior salesmanship or performance, win business away from less efficient or effective distributors, and dealers may not obtain a competitive advantage over rival dealers by shopping among distributors for the most favorable terms. As at the dealer level, respondent's right of first refusal of unsold Sandran prevents the product from becoming available to persons not bound by price or territory commitments to respondent.

Given such facts, the finding that respondent has violated Section 5 is inescapable. Respondent's distribution scheme consists, in substance and effect, of the alignment of many separate independent businesses in a structure directed by respondent almost as completely as if all were centrally owned. This is the antithesis of free competition.[3]

In general outline, the situation here is strikingly reminiscent of the facts described by the Supreme Court in *Dr. Miles Medical Co.* v *John D. Park & Sons Co.*, 220 U.S. 373:

> "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about." 220 U.S., at 399–400, quoting *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 42 (C.A. 6).

The Court concluded, "That these agreements restrain trade is obvious." (*Ibid.*) The agreements in *Dr. Miles* may have been more explicit than those involved here, but agreements have the same legal significance "whether express or implied from a course of dealing or other circumstances." *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99. And the arrangement condemned in *Dr. Miles* did not even include the further restraint of a territorial restriction at the wholesale level.

However, it is precisely this territorial restriction that respondent is primarily concerned to save. Within the framework of this objective, the argument is that much which we have discussed above is irrelevant, while much that is relevant has not yet been taken into account. Respondent asks that its program of territorially confined exclusive distributorships be viewed separately from its other market-

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[3] "[R]estrictions which are lawful when imposed on agents or employees of the company may be unlawful when imposed on independent businessmen. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States* v. *General Electric Co.*, 272 U.S. 476 (1926). Nor is it a novel principle of antitrust law that what a company may do within its own organization, it may not be able to do by agreement with others." *Snap-On Tools Corp.*, Docket No. 7116, Nov. 1, 1961 [59 F.T.C. 1035, 1045].

The argument that because a producer may cut off the supply of his product altogether he may rightfully impose his own terms on its distribution, see Holmes, J., dissenting in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 456, has long since been rejected. See the opinion of the Court in the same case, at pp. 451–455, and *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404–405. For a general discussion of the fallacies inherent in inferring the power to condition from the "greater" power to deny, see French, "Unconstitutional Conditions: An Analysis," 50 Geo. L. J. 234 (1961).

ing practices, on the ground that it is supported by independent economic considerations.

V. *Respondent's Territorially Restricted Exclusive Distributorships.*

Respondent emphasizes its position in the industry and the history of the development of its product. Its argument is as follows.

Respondent is a small, short-line manufacturer in a field dominated by giant firms producing a full line of hard-surface floor coverings. When "product failure" caused respondent's sales to plummet from $7,000,000 in 1950 to $3,500,000 in 1954, distributors and dealers either dropped Sandran or ceased any serious attempt to promote it. By late 1954 the production difficulties had been substantially overcome, but by that time respondent was in or near insolvency. Distributors, dealers, and the consuming public distrusted Sandran as a result of its recent deficiencies, and respondent lacked the wherewithal to finance an advertising campaign to overcome this sales resistence.

Respondent's distributor-relations problem, the argument continues, was thus a peculiarly difficult one. Not only did it have to convince distributor prospects to take on a dubious line, but it had to get them to pay for the bulk of the advertising. Since established distributors could not be obtained on these terms, new ones, without prior industry experience, were recruited. But before they would make the necessary heavy investment of capital, prospective distributors required the special inducement of a closed, exclusive territory. They would not spend to advertise and promote an unpopular product without assurance that resulting sales accrued to them.

Sandran subsequently catapulted to unprecedented heights of popularity, with sales expanding nearly 700% between 1954 and 1959. But recent figures have shown a serious decline, from approximately $24,000,000 in 1959 to $13,687,222 in 1961. The initial advantage of product innovation that respondent held over its rivals, it says, has evaporated now that others are producing similar rotary vinyl goods. Respondent therefore continues to need strong distributors who will invest heavily in sales promotion, and these distributors continue to demand closed, exclusive territories as a *quid pro quo.* Without this protection, we are told, energetic, vigorous distributors will drop Sandran and respondent will collapse.

The argument raises the spectre of respondent's inevitable demise in the event of an adverse decision in this proceeding. If an order prohibiting closed, exclusive territories would only serve to destroy respondent, it is argued, the result would be to impair rather than enhance competition in the industry. This contention bears a strong resemblance to the so-called "failing company" defense invoked in merger cases under Section 7 of the Clayton Act.[4] Assuming *arguendo* that a defense of this sort has application in a Section 5 proceeding dealing not with mergers but with closed exclusive distributorships, its significance must depend entirely on the evidence adduced in its support. A respondent seeking to bring itself within the ambit of a narrow exception to otherwise governing antitrust prohibitions must at least give convincing proof that it needs and deserves such special consideration.

We think respondent has failed to make out such a defense, even on a view of the facts favorable to it.

First, and most obviously, respondent is not failing or even close to failing. Respondent's recent sales figures may be disquieting to its shareholders, but they hardly portend imminent financial doom. By its own calculations, respondent netted $355,313 in 1960 and $352,874 in 1961. Further, according to the testimony of its president, respondent was able, in the period 1957-58, to invest approximately $1,300,000 in new plant facilities and $800,000 in additional warehouse space. In addition, respondent's advertising budget rose from nothing in 1951–53 to approximately $225,000 in 1956 for national television advertising alone. By way of contrast, the "failing company" in the *International Shoe* case, supra, note 4, had suffered losses of $6,000,000 in one year, seen a $4,000,000 surplus become a $4,000,000 deficit, and run up debts aggregating $17,000,000 which it could no longer pay as they became due. In juxtaposition with this picture of a concern truly *in extremis*, respondent's dire predictions are unconvincingly speculative.[5]

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[4] See *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 301–303; *United States* v. *Diebold, Inc.*, No. 286, decided by the Supreme Court, May 14, 1962.

It is well settled, of course, that an unlawful restraint of trade cannot be defended on the ground of "economic justification." See, *e.g.*, *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 309; *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 467–468; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 211–218. To the extent that respondent's system of closed, exclusive territories may be found unlawfully to inhibit competition, its "reasonableness" cannot be justified, economically or otherwise, and evidence bearing on the subject is irrelevant. We are here dealing only with repondent's contention that it requires closed, exclusive distributorships for survival and that prohibition of this distribution system could not benefit competition in the industry but would almost inevitably injure it. And, it should again be emphasized, in rejecting the factual sufficiency of the defense so asserted we do not imply that it would be legally sufficient even if factually supported.

[5] *Cf.*, the rejections of "failing company" defenses in *Erie Sand & Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279, 280–281 (C.A. 3); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800, 831–832 (C.A. 9); *Farm Journal, Inc.*, 53 F.T.C. 26, 47–48. See also *Diebold, Inc.*, *supra*, note 4.

Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 Harv. L. Rev. 226, 341 (1960), states that the exception is one of narrow scope meant to be reserved for firms "on the verge of bankruptcy or insolvency."

Moreover, respondent has failed to establish a causal relationship between the presence of closed, exclusive distributorships and prosperity or their absence and fiscal distress. By respondent's own admission, its difficulties in the early 1950's flowed not from an open and competitive system of distribution but from technical defects in Sandran that hampered its ability to compete with other floor coverings. Nor is the firm's spectacular recovery in the middle and latter portion of the decade clearly attributable to the introduction of closed, exclusive distributor territories. Respondent explains that its production difficulties were overcome by late 1954, shortly before it began to confer closed exclusives; if product failure accounted for respondent's business misfortunes, product success—particularly when the product constituted a superior innovation in the field—may well have been the principal contributor to the advent of better times.

This hypothesis is reinforced by subsequent events. Respondent continues to operate through geographically restricted distributorships, yet its sales have fallen off sharply. The reason, respondent suggests, is that its temporary advantage as the innovator in rotary vinyl floor coverings was lost when others commenced manufacture of similar products. If this is so, it would appear that the crucial variable affecting respondent's business fluctuations is less likely to be some element of its distribution pattern, which has lately remained constant, than the competitive merits and marketability of its products.

The record lends support to this view. One Sandran distributor testified that some of his dealers are dropping Sandran in favor of recently developed inexpensive tufted carpeting. Several other distributors explained that Sandran wall coverings and counter tops are losing the competitive struggle to new plastic laminates. Others stated that difficulties encountered in installing Crown Vinyl were hurting sales of that product. Respondent's president agreed that competition has stiffened and added as other factors underlying respondent's sales decline a tendency among distributors and dealers to reduce inventory and the presence in the market of an overabundance of cheap obsolescent goods.

Furthermore, the breadth of respondent's economic defense greatly exceeds the scope of its factual documentation. Respondent characterizes itself as a short-line, nonintegrated (that is, not producing its own raw materials) firm in an industry dominated by three integrated full-line giants controlling between 77% and 84% of the industry assets.[6] It also points out that it has always been comparatively small, ranking, by its reckoning, somewhere between 20th and 25th in the industry. But if respondent's calculations are correct, at least 20 firms manage to survive with only about one-fifth of the industry's assets at their disposal. Respondent fails to explain how this is possible. If all these "midgets" have survived only through the use of closed, exclusive distributorships, this might be evidence of respondent's need for them; no such evidence was introduced. If, on the other hand, none or only a few require this crutch, respondent's argument that without it there is no recourse but to limp to the sidelines lacks conviction. Respondent, while placing itself in a class of small struggling companies and asserting that such companies cannot exist without centrally controlled distribution systems similar to its own, has neglected to prove this proposition as to any other member of the class.

Respondent argues further that, on the one hand, closed defined territories are essential to the retention of successful and effective distributors, and that, on the other, this system does not unduly restrict the channels of distribution. Neither of these propositions squares with the record.

In the first place, this is not an industry in which long distance distribution by the wholesaler is practicable. Freight costs are high. Respondent's president estimated that they account for 8 or 9% of the billing price to its distributors. Speed of delivery is important to the dealers. Also, the expense of sending salesmen to service isolated or distant accounts is prohibitive. These factors combine to prevent comprehensive distributor competition. This means that respondent's objectives could be largely attained through the significantly less restrictive device of establishing exclusive distributorships with primary-responsibility territories. Compare *Snap-On Tools Corp.*, Docket No. 7116, Nov. 1, 1961 [59 F.T.C. 1035].

The principal objection made to this alternative is that the distributors would not accept it. It is said that they require closed, defined territories before committing themselves to the local advertising expenditures necessary to the promotion of Sandran. But the record is by no means as clear on this point as respondent would have us believe. The testimony on "exclusive" distributorships is at most ambiguous. A few distributors explicitly defined "exclusive" to mean sole, specific, and closed. But a greater number failed to differentiate between closed and primary-responsibility territories. The record

[6] The validity of these statistics is uncertain. Respondent's expert witness, Dr. Lanzillotti, conceded at one point that 60% may be a more accurate figure. He also admitted that industry concentration seems to be declining.

conveys the impression that many of the distributor witnesses equated "exclusive" simply with non-dual or non-multiple—*i.e.*, with the presence of only one distributor in a marketing area. And several distributors made it apparent that their only concern was to prevent "dual" distribution. On the whole, the evidence falls far short of showing that primary-responsibility territories would not serve respondent's objective and satisfy the majority of its distributors.

The argument is further vitiated by the fact that the question whether distributors would be given a closed territory, a primary-responsibility territory, or some other inducement to carry the Sandran line was not generally a subject for bargaining. Stephen Pohe, respondent's general sales manager, testified that a closed territory was usually voluntarily offered at the outset of negotiations with each prospective distributor. Distributor testimony reveals exceptions but corroborates this as the general rule. Thus we are without adequate concrete examples of distributor demand for closed territories to be able to accord convincing weight to respondent's assertion of their necessity.[7]

Moreover, it strains credulity to suppose that an appreciable number of distributors would drop Sandran if deprived of closed sales territories. Time and again, distributor, dealer, and company witnesses extolled Sandran's virtues. One after another they praised Sandran's superiority of appearance and cleaning ease. Nonfranchised dealers have sought eagerly to obtain the line. One distributor prized it so highly that he took it on in preference to offers of competing products by Congoleum-Nairn and Bird, two of respondent's leading rivals. Others gave up competing lines after they obtained Sandran. Respondent's president testified that many distributors and dealers stuck by respondent even during its period of grave financial distress. The danger that they, or many of their fellows, would abandon Sandran now that it is a successful, popular, and well-known product seems minimal.

If primary-responsibility exclusive distributorships seem likely to suffice for respondent's needs, the other side of the coin is that respondent's closed-territory system excessively impairs the play of competition. It is conceivable that defined territorial boundaries might so perfectly accord with the outlines of natural trading areas that normal

[7] We note further that some distributors testified to selling other floor covering materials on a primary-responsibility basis and even under dual-distribution arrangements. Respondent argues that these examples are not in point, due to its unusual financial problems. It is difficult to believe that respondent is beset by problems so peculiar to itself that no instance of dual or primary-responsibility distribution is relevant. Indeed, respondent itself relied on distributors unrestricted as to territory in its pre-Sandran years before World War II. Certainly respondent was no larger and stronger then than it is today.

distribution channels would remain unobstructed. But it is doubtful that this ideal can be attained in practice, and it is beyond doubt that respondent's system does not attain it. The record contains evidence of thwarted dealer effort to buy from preferred extraterritorial distributors and of thwarted distributor effort to gain extraterritorial dealer accounts. It shows instances of distributors forced to pull out of previously worked open territories because they were closed in favor of another distributor, as well as instances of distributors seeking to return to respondent portions of assigned territory they could not economically cover.[8]

On occasion, of course, respondent's allotment of territories corresponds to natural distribution alignments, but often it does not. This is brought into bold relief by the case of one distributor who operated from three separate branch locations yet was authorized to distribute Sandran from only one of them. Nor, we must add, do the competitive distortions engendered by respondent's artificial distribution structure affect competition solely in the sales of its products. One distributor explained that his inability to sell Sandran outside the prescribed territory caused him to lose sales on other products because dealers preferred to buy from a distributor who could serve them with a full line of floor-covering goods. Conversely, when the distributor was denied the opportunity to sell Sandran in a given location, he abandoned it altogether because it became uneconomical for him to send salesmen there with less than a complete range of products to offer.

Respondent recognizes the validity of a preference for a pattern of distribution that imposes a competitive check on the business practices of sellers, but it argues that in the floor-covering industry so great a check is provided by interbrand rivalry that intrabrand restraints are unnecessary. The contention would carry greater weight if the products involved were fungible, or at least not characterized by distinctive dissimilarity. But the record shows that such dissimilarity is the hallmark of the industry. Linoleum, vinyl plastics, asphalt tile, and other floor covering products compete only in a loose and general sense of the word. Some jobs require a heavy, highly durable item; for others a light and inexpensive one will suffice. Some products may be laid over virtually any base; others require special flooring or preinstallation preparation. It is clear, in fact, that not

[8] This is an important matter for the overburdened distributor. Respondent allocates to each distributor a sales quota based on an appraisal of the buying power in his assigned area. The distributor earns rebates from respondent based on his success in meeting his quota. A territory too large for effective sales coverage inflates his quota and diminishes his chances of earning a high rebate.

even the two grades of respondent's own product—regular Sandran and Crown Vinyl—greatly overlap each other's markets. In these circumstances, we think intrabrand competition is of considerably greater consequence than respondent represents.

Relying on the recent decision in *United States* v. *White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio), the hearing examiner concluded that respondent's method of distribution through closed exclusive territories constituted a *per se* antitrust violation. The soundness of this conclusion is, we think, a question we are not compelled to reach. It is not necessary to decide whether or not a form of conduct is always unlawful in order to be able to say that it is clearly unlawful in the circumstances presented by a particular case. As a general proposition, of course, concern over the potential anticompetitive effects of territorial dealing limitations is fully justified.[9] But, as our examination of the record has made plain, the general proposition is here buttressed by an abundance of specific facts.

Respondent has insulated its distributors from competition among themselves by defining their sales territories and convincing them of the undesirability of straying across the boundary lines. These restrictions have stymied dealer attempts to buy from more than one distributor and distributor attempts to sell to dealers already serviced by another distributor. The result has been the prevention of intrabrand competition in an industry in which such competition is important and the distortion of natural patterns of distribution not only of Sandran but of other product lines marketed by respondent's distributors. The evidence indicates that, contrary to respondent's argument, the fortunes of Sandran are tied to its merits and marketability in competition with other floor-covering materials rather than to the maintenance of closed, exclusive-distributor territories.

[9] Recent commentaries point out that the *per se* approach of the *White Motor* case is not the only avenue to a holding that a closed territorial system of distribution is unlawful. Even while taking issue with *White Motor*, Professor Turner "would be inclined to support the view that territorial limitations—in light of their obvious susceptibility to anticompetitive misuse—are more restrictive than necessary to achieve the legitimate goal, in light of such less restrictive alternatives as a clause assigning each dealer a territory of primary responsibility which he agrees to use his best efforts to develop." Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal," 75 Harv. L. Rev. 655, 699 (1962). Similarly, the note, "Restricted Channels of Distribution under the Sherman Act," 75 Harv. L. Rev. 795, 828 (1962), states:

"The special business needs that would justify giving the dealer an exclusive would seem, however, insufficient to warrant this more extreme restraint (*i.e.*, territorial limitation). On the one hand, it seems unsafe to rely on interbrand competition alone to keep prices down; the territorial restriction would not have been employed if the parties had not expected the elimination of intrabrand competition to have some effect upon price. On the other hand, the exclusive franchise without more affords a large measure of protection to the legitimate interests involved, since there are almost always some barriers of interterritorial cost which protect the outlet from intrabrand cross-selling so long as its price remains reasonable."

Further, the record fails to establish that respondent has a special need for, or right to, the use of closed exclusives due to its position in the industry.

The *Dr. Miles* case holds that to sustain a restraint of trade "it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee." 220 U.S., at 406. Respondent's program of closed, exclusive distributorships fails to satisfy these criteria. It prejudices the public by preventing competitive considerations of price, service and the like from playing their normal part in distributor-dealer relationships, and it exceeds "what is fairly necessary" for the furtherance of respondent's objective of erecting a strong, vigorous distribution system for marketing its goods.[10]

VI. *The Price-Fixing Allegations.*

It is settled law that, except within the sheltered preserves delimited by the so-called "fair trade" acts, collaboration by a manufacturer with its independent outlets of distribution to fix resale prices is unlawful. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, and cases discussed therein. The manufacturer may, at least if he is not a monopolist, "announce in advance the circumstances under which he will refuse to sell" and "exercise his own independent discretion as to the parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307. But when his actions "go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act," (*Parke, Davis, supra*, 362 U.S., at 44) and hence of the Federal Trade Commission Act. See *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441. That respondent's efforts to maintain resale prices on its products "go beyond mere announcement of his policy and the simple refusal to deal" is apparent.

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[10] Respondent relies principally on *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), aff'd, 239 F. 2d 176 (C.A. 4), *cert. denied*, 355 U.S. 823, and *Packard Motor Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (C.A. D.C.), *cert. denied*, 355 U.S. 822, as support for the legality of its territorial limitations on distribution of its products. As we pointed out, however, in our recent opinion in *Snap-On Tools Corp.*, Docket No. 7116, Nov. 1, 1961 [59 F.T.C. 1035, 1048], these cases "involved the entirely different situation of exclusive franchises where the manufacturer agreed to sell to no other dealer in a designated area. No restraint upon the dealer was involved." As we also explained in *Snap-On* [59 F.T.C. 1048], the related case of *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (C.A. 2), reh. denied, 130 F. 2d 196, *cert. denied*, 317 U.S. 695, "did not . . . concern the dealer's right to sell beyond (his 'zone of influence'); and, in any event, it involved only a single transaction and not a series of agreements having the effect of eliminating competition among all dealers concerned."

Price maintenance was a major objective of respondent's dealer-franchise plan. Respondent's president testified:

It was to be basic in our plan that we would not franchise dealers who were either persistent or flagrant price cutters on our line. . . . [We felt] we could better build this dealer support if we just announced as our policy that we do not franchise flagrant or persistent price cutters on our line, that this would be a good foundation on which to build our business.

While price stabilization was respondent's policy, it was not simply a policy unilaterally adopted and enforced. Each dealer franchised to sell Sandran agreed not to engage in "unfair competitive practices" of an unspecified nature. Respondent's president admitted that it considered "persistent and flagrant price cutting" as one of these "unfair competitive practices." Distributor and dealer testimony shows that this was the common understanding among respondent's wholesale and retail outlets. Indeed, several dealers testified that they were told the prices to charge and agreed to abide by them.

Moreover, respondent's pricing policy and agreements were effectuated through an elaborate system of cooperative policing. Respondents received reports on price-cutting dealers from distributors, dealers, secret shoppers, and its own field men. On occasion respondent sent its agents, sometimes accompanied by a representative of the distributor, to persuade dealers to return to the recommended price levels. "Persistent and flagrant" price cutters were, by its president's own admission, disfranchised. Others were threatened with disfranchisement. One distributor was told by a representative of respondent that he was to sell only to dealers who resold at the suggested price levels. In one instance he was told not to sell to a specific dealer unless he met the recommended prices. This incident reflects a general pattern of manufacturer-distributor-dealer boycotts of nonfranchised dealers. When a price-cutting dealer lost his franchise, his supply of Sandran was, with rare exceptions, cut off from every source.

Respondent also issued "recommended" prices and "representative" rebate schedules for use by distributors in selling to dealers. The evidence shows that distributors sometimes deviated from recommended wholesale prices, but the deviations were almost always upward. In other words, respondent's recommended price acted as a floor for the wholesaler to build upon. It appears that the "representative" rebate schedules were closely followed. In Indiana, where respondent had two distributors for a time, it induced them to get together on a consistent dealer discount schedule in order to end prior price competition between them.

We find that respondent has entered into price-fixing agreements with its distributors and dealers and that it has enlisted them in a program of mutual activity to enforce the prices set. Under the governing authorities, a finding of unlawful resale-price maintenance is unavoidable. As in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 723, "The wholesalers accepted [respondent's] proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licenses." "By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455. See also *United States* v. *Parke, Davis & Co.*, 362 U.S. 29. Indeed, respondent's network of distribution seems to have involved more explicit agreement on prices and more thorough enforcement of them than existed in any of these cases.[11]

The only defense to the complaint's price-fixing charges seriously pressed by respondent on this appeal is that any resale-price-maintenance agreements proven come within the exception to Section 5 provided by the McGuire Act. The gist of its argument is that dealer testimony was obtained only from dealers in states having statutes that validate resale-price maintenance. Hence, it is urged, the price agreements between respondent and its dealers or distributors are *prima facie* legal. This view represents an oversimplification and misconception of the problem.

The Supreme Court has made clear that, except to the limited extent that the Miller-Tydings and McGuire Acts have exempted resale-price-maintenance agreements from the prohibitions of the antitrust laws, they have left the impact of those laws unchanged.

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce

[11] Respondent points to evidence showing that some of its outlets sold below suggested prices or leaked Sandran to nonfranchised dealers. But the record overwhelmingly establishes that these were isolated exceptions to the otherwise uniform rule. Further, as we pointed out in *Snap-On Tools, supra* [59 F.T.C. 1052]:

"An agreement to fix prices is forbidden by the Sherman Act, whether it be 'wholly nascent or abortive on the one hand, or successful on the other.' *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). And it is therefore an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission* v. *Motion Picture Advertising Service,* 344 U.S. 392 (1953)."

affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

* * * * *

And it has been said by this Court:

"A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."

The question before us is whether the price fixing agreements challenged herein move along that route. If they do not, they are illegal per se. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional per se doctrine. . . . *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309–310.

The Court has also observed that "resale price maintenance is a privilege restrictive of a free economy," 351 U.S., at 316, otherwise governed by Congressional limitations on price fixing that must be strictly construed. It is in this context that respondent's defense must be appraised.

The Court's remarks underscore what was already apparent from a reading of the statute, namely, that the McGuire Act creates a limited exception to the otherwise pervasive sweep of the prohibitions against price fixing. It is a "general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45. And see, *e.g.*, *Javierre* v. *Central Atagracia, Inc.*, 217 U.S. 502, 507–508; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U.S. 1, 10. The gravity of the offense charged and the specificity of the exemption claimed convince us that this rule is applicable here. Respondent had the burden of proving that its resale-price-maintenance agreements were sanctioned by the statute. Beyond question, it failed to tender such proof.

In the first place, respondent's statement of the scope of the evidence begs the question. It may be that dealer testimony was elicited only from witnesses doing business in fair-trade states, but the totality of both dealer and distributor testimony demonstrates an enveloping nationwide pattern of price maintenance. Respondent's network of dealer franchises and distributor territories was intended to be, and, so far as possible, was, extended uniformly across the country. Its resale-price-maintenance activity was an integral part of this national program of distribution. It was therefore incumbent upon respondent to show that its resale-price agreements with distributors and dealers were everywhere sanctioned by fair-trade laws.[12] No such showing was made or even attempted. Nor, we suspect, could it be, since there are no fair-trade acts in five states and the District of Columbia; in two other states they have been declared unconstitutional; and in seventeen others the non-signer provisions of the acts have been held unconstitutional. See CCH Trade Reg. Rep. ¶¶ 6017, 6019, 6021.

Further, respondent has not even undertaken to prove that its agreements are entitled to protection in the states from which the testifying dealers came. The question whether or not a fair-trade contract exists is a matter to be determined by state law,[13] and we are without guidance as to what the law is or how it applies in the relevant states. Similarly, we have no way of knowing if respondent's enforcement procedures, employing the boycott mechanism, would meet with the approval of the state courts. In New Jersey, for example, where respondent claims fair-trade protection, the governing statute specifically provides for an action by the producer or distributor to redress violations. N. J. Rev. Stat., Art. 2, Ch. 4, secs. 56: 4-6. It is entirely possible that the state courts would look upon this as the sole remedy under the statute. Respondent makes no showing to the contrary.

What evidence there is in the record bearing on the resale-price-maintenance point cuts against, rather than for, respondent. Its presi-

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[12] Where, as here, the evidence warrants the inference of a comprehensive pattern of violation, counsel supporting the complaint is not required to offer redundant proof. For example, in *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404 (C.A. 2), respondent argued that the Commission's case was incomplete because only fourteen housewives were called to testify although thousands of sales were made. This argument was rejected, the court stating:

"There is no indication that these were the only housewives to whom false representations were made. On the contrary, the evidence shows that all salesmen carried order blanks marked 'Special Offer,' and the brown envelopes were distributed to all buyers, indicating that these fourteen witnesses were but a few of the many deceived." 198 F. 2d, at 407.

It is equally clear, on this record, that the dealers questioned were representative of the generality of Sandran dealers and that price maintenance was standard practice in the sale of Sandran.

[13] See *Johnson & Johnson* v. *Charmley Drug Co.,* 95 A. 2d 391 (N.J. Sup. Ct., 1953). In *The Roberts Co.,* Docket No. 6943, June 30, 1960 [56 F.T.C. 1569, 1599], the Commission stated:

"Respondents rely upon the statement of Chief Judge Sweeney in *United States* v. *Socony Mobil Oil Co.,* 150 F. Supp. 202, 204 (D. Mass. 1957), *certified,* 252 F. 2d 420 (1st Cir. 1958), *dismissed,* 356 U.S. 925 (1958), to the effect that 'I can find nothing in the McGuire Act which limits its exemptions to fair trade agreements.' Even if this construction, for which no precedent is cited, be accepted as correct, it must still be established that the applicable state laws sanction the agreement actually employed. Thus Chief Judge Sweeney felt compelled to examine the Massachusetts statutes and decisions in the *Socony Mobil* opinion. The necessary predicate was not established here. The New York Feld-Crawford Act is set out in respondents' brief and we are referred to the Pennsylvania, Connecticut and California statutes, but no attempt has been made to prove that the Robco Distributor Sales Policy is entitled to statutory protection in each state where fair trade laws are in effect, and this is not a matter for official notice."

dent testified that respondent fair trades in New York. He was then asked, "Do you fair trade any other places besides New York?" His reply was, "I think we fair trade in a portion of New Jersey that is adjacent to the New York market." His testimony reveals respondent's president to be a highly knowledgeable man, well versed in the affairs of his company. His failure to indicate more than two states in which respondent fair trades, in response to direct questioning on the subject, strongly indicates that respondent's fair-trade program is indeed limited.

This conclusion is reinforced by his testimony relating to the decision of an Illinois distributor to fair trade Sandran. The hearing examiner asked respondent's president if he was consulted about this action. He answered, "They consulted with me about it and did it against my recommendations." This is hardly the attitude of one intent upon establishing a nationwide fair-trade system. It further appears that the decision to fair trade in Illinois was a last-resort measure, precipitated by the actions of a disfranchised dealer who continued to advertise Sandran at "destructive" prices even though he had no stock to sell. The clear implication is that, were it not for this irritant, neither manufacturer nor distributor would have been interested in fair trading.

Respondent has thus failed to demonstrate its right to claim the benefits of the McGuire Act exemption, and, in fact, the only affirmative evidence supports the opposite inference. The price-fixing allegations of the complaint are abundantly substantiated in the record and no defense to them has been made out.

VII. *The Dealer-Franchise System.*

As we have already pointed out, respondent's method of distributing Sandran only through franchised dealers serves as a prop for its unlawful resale-price-maintenance scheme. This determination is not, however, necessary to a finding that respondent's dealer-franchise system is illegal in itself. As the Supreme Court held in *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 466, the absence of a finding that a combination "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality" does not automatically absolve it, since "action falling into these three categories does not exhaust the types of conduct banned by the Sherman and Clayton Acts." We think the structure and enforcement of respondent's dealer-franchise program embodied elements of such additional illicit conduct.

Respondent issues franchises to its dealers. It then requires its distributors and franchised dealers not to sell its floor-covering products to nonfranchised dealers. There can be no dispute on this point. Testimony of distributors and dealers conclusively shows that they considered it a condition of their arrangement with respondent that they not sell to floor-covering dealers not franchised to sell Sandran.

Respondent enforced this system through a variety of devices. It circulated lists of franchised dealers accompanied by letters exhorting adherence to the agreement "Not to sell, lend, exchange, or give, directly or indirectly, SANDRAN to any non-franchised dealer." It checked sales from unauthorized outlets by means of secret shoppers, and, according to one distributor, by tracing goods through their factory-assigned register number. It "persuaded" reluctant dealers to adhere to their agreement. The extreme to which respondent was wiling to go to preserve this closed system is illustrated by the case of one Chicago dealer who had two floor covering stores, only one of which was franchised to sell Sandran. When the dealer sold Sandran at his unfranchised store, he was visited by a company official who informed him that this infraction would cost him his franchise at the other store. The dealer asked how the unauthorized sales were discovered and was told that a purchase had been made by a company-employed shopper.

It must be emphasized that the decision whether a dealer would be franchised was respondent's alone, as was the decision whether a franchise, once granted, should be revoked. Respondent sold its products outright to its distributors but then undertook to regulate their channels of resale and even the resale patterns of their retailer customers. Having "sold its product at prices satisfactory to itself," respondent was nonetheless unwilling to leave to the public "whatever advantage may be derived from competition in the subsequent traffic." *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 409.[14]

But implementation of respondent's program of dealer selectivity without the collaboration of its distributors and dealers would have been impossible. And so it recruited them into service. Thus, "[t]his is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." *Klor's Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207, 212. Rather, in the language of the *Klor's* case, at p. 213, it is "a wide com-

[14] "While it is true in a very general sense that one can dispose of his property as he pleases, he cannot 'go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.'" *Associated Press* v. *United States*, 326 U.S. 1, 15, quoting in part *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 722.

bination," which "interferes with the natural flow of interstate commerce."

Respondent thus developed and maintained a system for coercing dealers to sell its products to suit respondent rather than themselves. In order to obtain Sandran they had to accept respondent's terms; in order to retain Sandran they had to abide by those terms. Among them, as we have observed, were acquiescence in prices pegged by respondent and agreement not to sell to dealers not approved by respondent. What other "unfair competitive practices" were intended to be prevented is unclear. But whatever the nature of these real or imagined evils—and we must not forget that "what is desirable competition to the consumer may be outlaw traffic to the established manufacturer," *Millinery Creators' Guild* v. *Federal Trade Commission*, 109 F. 2d 175, 178 (C.A. 2), aff'd 312 U.S. 469—joint action to alleviate them may not go beyond the bounds marked out by the antitrust laws.

> The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line of unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them. *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 599.

Respondent markets a product which was for some years unique and even now is rated by many as outstanding in the field. The record shows that the right to sell this product has been considered highly important by many dealers in the trade. Respondent has preferred to extend this opportunity only on terms significantly restrictive of retail competition. It has done so by means of a manufacturer-distributor-dealer combination of massive proportions, with the result that both distributors and dealers have been restrained from selling to dealers whose only disqualification is respondent's disapproval.

This aspect of the case closely resembles the situation considered by the Supreme Court in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600. There dealers circulated lists of suppliers who competed with them at retail in order to induce fellow dealers to boycott the offending suppliers. The Court denounced this arrangement for the way in which it tended to prevent retailers who had "no personal grievance" with the supplier from trading with him. "In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations. . . . " (at p. 612). The same vice is present here. Distributors and dealers must avoid relations with dealers with whom respondent has a grievance, even though they personally have none.

This course of conduct defies justification, for no reason appears why any valid business purpose of respondent—e.g., improving the quality of dealer service or avoiding transactions with poor credit risks—could not be accomplished by less restrictive means.[15]

The facts before us parallel those in *United States* v. *Waltham Watch Co.*, 47 F. Supp. 524 (S.D. N.Y.). There the defendants were watch manufacturers, and their officers, and watch distributors and their officers. They were:

> accused of conspiring to prevent certain outlets, both wholesale and retail, from selling or dealing in Hamilton products. These outlets are blacklisted; and to prevent them from obtaining Hamilton products the defendants are charged with having conspired to coerce other outlets into refusing to deal in Hamilton products with the blacklisted concerns. This conspiracy is to be accomplished by means of tracing watches, by use of hired "shoppers", by a system of reports, and by zoning and allocation of territories. Those found dealing with the blacklisted concerns are themselves threatened with being boycotted and excluded from selling Hamilton products. . . . (At p. 531)

In finding this combination unlawful, Judge Rifkind pointed out that it went far beyond mere individual selection of customers. While the manufacturer could have refused to sell to any wholesaler or retailer, and any wholesaler could have refused to sell to any retailer or other wholesaler, he concluded, "the manufacturer and the wholesale distributors could not combine and conspire to refuse to sell to wholesalers and retailers who failed to join a boycott against certain blacklisted concerns." (At p. 532) The record shows that this is precisely what respondent conspired to do.[16]

VIII. Respondent's Distribution System as a Whole.

In the interest of clarity and completeness, we have thus far devoted principal consideration to the ways in which each of various major constituents of respondent's system of distribution is unlawful in itself.

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[15] See *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 459–461, in which the Court concluded that the appellants' objective of protecting public health and preventing product adulteration could be adequately attained through methods less restrictive than an illicit jobber license device.

[16] Judge Rifkind elsewhere explained that "a combined refusal to deal with anyone as a means of preventing him from dealing with a third person is a boycott and a boycott is prima facie unlawful" (at p. 531).

And see *United States* v. *General Electric Co.*, 80 F. Supp. 989, 1009 (S.D. N.Y.), which states "The Sherman Act condemns not only the horizontal boycott directed against a competitor's business . . . but also the vertical boycott directed at controlling the terms and manner of distribution of the subject article." Vertical combination was an important element in the boycott found unlawful in *W. W. Montague & Co.* v. *Lowry*, 193 U.S. 38. That case involved an association of manufacturers and dealers of tile in which the manuturers agreed not to sell to nonmember dealers and the dealers agreed not to buy from nonmember manufacturers and not to sell to nonmember dealers except at highly unfavorable prices.

But it is important to realize that this system of distribution is indeed a *system*, that is, a coherent whole in which each provision constitutes an integral part of the totality. It is well settled that when even lawful acts "are bound together as the parts of a single plan," "[t]he plan may make the parts unlawful." *Swift & Co.* v. *United States*, 195 U.S. 375, 396. When many of the individual acts are themselves unlawful, the danger inherent in their union is even more apparent.

The union here forged is of truly awesome anticompetitive effect. As we pointed out in Part IV, *supra*, respondent's distribution plan embodies not only the same restraints (as to price and customers) that the Supreme Court said in the *Dr. Miles* case left no "discoverable" room "for the usual play of competition," but it adds the further restraint, not present in *Dr. Miles*, of territorial restriction at the wholesale level. In *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 465, the Court explained "among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy . . .; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott. . . ." Similarly, respondent's plan narrows the outlets to which its distributors can sell and the sources from which retailers can buy, and subjects noncomplying retailers to an organized boycott.

Respondent argues that it is erroneous to consider all aspects of its distribution scheme together because they were separately conceived and never intended to serve a common purpose. On the record before us, this contention seems farfetched. Moreover, however distinct the purposes of respondent's practices, they have a common effect. Respondent requires its franchised dealers to abjure "unfair competitive practices," a concept that encompasses price cutting, on pain of loss of the franchise. Respondent also requires its distributors and dealers to refrain from selling to nonfranchised dealers. In addition, respondent sets resale prices, confines distributor sales to assigned geographic territories, repurchases unsold Sandran upon franchise termination, and utilizes a number of enforcing devices, such as circulation of franchise lists, employment of secret shoppers, etc. We have found a number of these practices bad in themselves, and as to many of them respondent has made no showing of other than anticompetitive motivation. But, all that aside, and assuming that each was individually inaugurated to serve a different purpose, their combined effect is to restrict competition in the distribution of Sandran to the greatest extent imaginable.

Accordingly, it is our duty to enter an order directed to all aspects of respondent's distribution system. Some of these practices might well have been lawful standing alone, but they have not stood alone. For example, register numbers on goods may be, as respondent claims, a useful way of tracing defective items, but, as part of an anticompetitive plan, they may also be used to trace and prevent sales through unauthorized outlets. As we have indicated, several of respondent's activities are individually tainted and its distribution program as a whole is tainted. This taint unavoidably attaches to otherwise permissible behavior. An appropriate order must prevent the resumption of the illegal practices found, and thus must prohibit not only apparent and direct means of initiating such a resumption, but subtle and indirect means as well.[17]

For the reasons set forth in this opinion, the appeal of respondent is denied.[18]

Dissenting Opinion

By MacIntyre, *Commissioner:*

We should be dispassionate with respect to the size of parties before us. But that is not to say that the size of the party is not a factor to be considered in antimonopoly cases. Objectively we should take into account the size of the party, his economic power, and the probable effect of his use of that power when we undertake to appraise the economic significance of his acts and practices.

The majority recognized, as stated in its opinion at page 809, that:

> Respondent is a small, short-line manufacturer in a field dominated by giant firms producing a full line of hard-surface floor coverings.

I fear that recognition was not objectively weighed in the majority's consideration of other circumstances in the case.

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[17] See, *e.g., Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 430; *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461.

As we stated in *Snap-On Tools Corp.,* Docket No. 7116, Nov. 1, 1961 [59 F.T.C. 1035, 1054], if and when the "collective effect upon competition" of respondent's practices "has been completely erased," "the Commission will entertain any application for modification of the order as may then be appropriate."

[18] Having found on the record that respondent has engaged in restrictive trade practices that are unlawful because they substantially and unreasonably restrain competition in interstate commerce, the Commission has no authority to grant respondent immunity from the antitrust laws on the ground that it is a "small business" enterprise competing with "giants." The same principle of evenhanded justice that forbids the Commission to find illegality solely because a respondent is a "big business" enterprise forbids us to express a sympathy for "small business" by giving it *carte blanche* to violate the antitrust laws. Nor has it hitherto been seriously suggested that the Commission's broad range of administrative discretion in pursuing a choice of remedies includes a power, denied to the courts, to "do justice" to small businessmen by giving them leave to violate the antitrust laws whenever they think it necessary in order to compete against "giants."

The majority has rejected the respondent's appeal and with modifications adopted the initial decision of the hearing examiner providing for the issuance of an order to cease and desist.

The final order of the Commission in this case is drastic. It requires the respondent to discontinue its territorially restrictive exclusive dealerships. This is true although there is a substantial showing in the record that the respondent adopted its territorially restrictive exclusive dealerships as an emergency measure to get reestablished after coming close to insolvency. At page 809 of the majority's Opinion it is recognized that:

When "product failure" caused respondent's sales to plummet from $7,000,000 in 1950 to $3,500,000 in 1954, distributors and dealers either dropped Sandran or ceased any serious attempt to promote it. By late 1954 the production difficulties had been substantially overcome, but by that time respondent was in or near insolvency. Distributors, dealers, and the consuming public distrusted Sandran as a result of its recent deficiencies, and respondent lacked the wherewithal to finance an advertising campaign to overcome this sales resistence.

Thus, not only is it recognized and undisputed that respondent is a relatively small short-line manufacturer of hard-surface floor coverings faced with full line competition from giants around it, but also that it vitally needed to utilize the device of territorially restrictive exclusive dealerships to help it overcome what appeared to be insurmountable problems.

It is not seriously contended by the majority that the respondent is likely to acquire monopoly control over the production and sale of hard-surface floor coverings. Also it appears that in the markets where respondent maintains exclusive franchise dealerships its dealers are in active competition with others in the sale of hard-surface floor coverings. It is not shown that its exclusive franchise dealerships have resulted in elimination of competition between its dealers and others. From these circumstances we are enabled to take a broad perspective and weigh the public interest in the survival of the respondent against the theoretical possibility of a pygmy inflicting monopoly conditions in the sale and distribution of hard-surface floor coverings. In my opinion the majority did not take a broad perspective of this matter. Instead, it appears to have been a knothole view which narrowed the majority's perspective to a range no greater and which perhaps was less than a court could have taken in its consideration of this problem.

The Federal Trade Commission's perspective need not be narrowed to that afforded by a knothole view. The Commission is with authority and power to take into view consideration and action of all aspects of a situation necessary for providing justice. Courts are more restricted.

As was stated by Commissioner Elman in his dissent in Federal Trade Commission Docket No. 7888, *In the Matter of Gimbel Brothers*, February 23, 1962 [60 F.T.C. 359, 377]:

> Congress did not contemplate that the Commission would function, like a court, as a passive arbiter of controversies. It was not created merely to apply specific legal standards to isolated commercial acts. If Congress had had a design so narrow, it would hardly have thought it necessary to establish a new kind of governmental mechanism endowed with a comprehensive range of powers for "doing justice" where the processes of the courts are inadequate.

Even our courts in their consideration of problems somewhat similar to the one before us have taken into account and given more weight to the size of the respondents and their need for continuing the challenged acts and practices than it appears the majority did in this case.[1]

In exclusive dealing contracts the relative size of the contractor and the state of the competition of its dealers are factors which should not be ignored. When we ignore them we shut our eyes to the probable consequences of exclusive dealing contracts. The majority recognizes that exclusive dealing contracts are not unlawful except where the probable consequences are the substantial lessening of competition and the tendency to create a monopoly in a line of commerce.

The final order in this case is somewhat novel in that it provides that the respondent may, with "the Commission's prior approval",

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[1] Congress recognized that exclusive dealing contracts contain inherent anti-competitive aspects but such contracts were not made illegal, *per se*. They were made illegal only "where the effect of . . . such condition, agreement or understanding *may be to substantially lessen competition* or tend to create a monopoly in any line of commerce." Thus it would seem that factors such as size of the parties and their possession of economic power as to enable them to do harm to competition and other related circumstances are to be taken into account in determining the probable effect of exclusive dealing arrangements. It follows that all exclusionary agreements are not unlawful. Recently a Federal District Court acknowledged this in adjudicating a case involving a tie-in arrangement. Specifically, the Court had under consideration antitrust allegations that Jerrold Electronics Corporation's action in the new industry of community television antenna equipment involving tying the sale of that equipment to a service contract violated the antitrust laws. Jerrold's success in getting started in this new industry depended on the favorable acceptance of the first systems. It did not dare to permit some of its limited equipment to be used in such a way as to produce unfavorable reactions from customers. Failure of its products in its narrow field of operations would have proved disasterous to Jerrold because it was not operating a diversified business as were its larger competitors, such as RCA and Philco. Although the Court held against Jerrold with respect to its use of some practices, it ruled favorably to Jerrold with respect to the mentioned tie-in arrangement. In doing so it stressed Jerrold's need for the tie-in arrangement to survive and develop in this new industry and in that connection the Court stated:

"A wave of system failures at the start would have greatly retarded, if not destroyed, this new industry and would have been disastrous for Jerrold, who, unlike others experimenting in this field such as R.C.A. and Philco, did not have a diversified business to fall back on but had put most of its eggs in one precarious basket in an all out effort to open up this new field." (*United States* v. *Jerrold Electronics Corporation*, D.C.E.D. Pa., 187 Fed. Supp. 545, 557 [1960]; affirmed per curiam, 365 U.S. 567 [1961]). It should be noted that the appeal did not involve the issues of business justification of Jerrold for the use of the tie-in arrangement.

establish by contract, agreement, or understanding with any of its distributors a merchandising or distribution plan or policy whereby any distributor is assigned a geographical area of primary responsibility in the distribution of respondent's products. Thus, the majority has delivered a one-two punch. It has taken away from the respondent a thing believed necessary to its survival and replaced it with a promise to allow it to have something less if the Commission approves. Moreover, the order prohibits the respondent from individually and unilaterally issuing a franchise to any dealer or distributor which would result in the development of a territorially restrictive exclusive dealership.

I disagree with the majority that there is need for disposition of this case in the manner in which it is disposed of at this time. At least the public interest would not be harmed if we should await the final disposition by the Supreme Court of the United States of the questions involved in the pending case of *United States* v. *White Motor Company*.

From the action of the majority, I dissent.

Final Order *

JUNE 13, 1962

This matter having been heard by the Commission upon the appeal of respondent from the hearing examiner's initial decision filed September 15, 1961; and

The Commission, for the reasons stated in the accompanying opinion, having denied respondent's appeal:

It is ordered, That the findings of fact and conclusions contained in the initial decision, as supplemented and modified by the Commission's opinion, are adopted as those of the Commission.

It is further ordered, That respondent Sandura Company, a corporation, and its officers, directors, agents, representatives, and em-

*NOTE—This order is issued subject to Section 4.22(c) of the Commission's Rules of Practice, which provides as follows:

In any case where the Commission's decision contemplates the entry of an order against a respondent broader in its prohibitions than those, if any, contained in the initial decision, or where the Commission's decision differs from the initial decsion in any substantial respect affecting the scope or content of the order which should properly be entered, the Commission will cause a copy of its decision, together with a proposed form of order, to be served upon all parties. Within twenty days after service upon it of the Commission's decision and proposed order, the respondent may file with the Commission its exceptions to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision. If no exceptions to the Commission's proposed order are filed within twenty days, such proposed order shall become the final order of the Commission. If exceptions to the proposed order are filed by the respondent, counsel supporting the complaint may within ten days after service of such exceptions upon him file a statement in reply thereto, supporting the proposed order. The Commission will thereafter enter its final order.

ployees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of floor-covering, wall-covering, and countertop products, and related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining, or enforcing any merchandising or distribution plan or policy under which contracts, agreements, or understandings are entered into with dealers in or distributors of its products which have the purpose or effect of:

(a) Limiting, allocating, or restricting the geographical area in which, or the persons or classes of persons to whom, any dealer or distributor may sell such products; or

(b) Limiting, allocating, or restricting the geographical area in which, or the persons or classes of persons from whom, any dealer or distributor may buy such products; or

(c) Fixing, establishing, or maintaining the prices at which such products may be sold by dealers or distributors; or

(d) Requiring or inducing any dealer or distributor to refrain from selling such products in any specified geographical area or to any specified persons or classes of persons; or

(e) Requiring or inducing any dealer or distributor to refrain from buying such products in any specified geographical area or from any specified persons or classes of persons; or

(f) Requiring or inducing any dealer or distributor to assist respondent, by means of reports or otherwise, in preventing or restricting any dealer or distributor from selling respondent's products to any person or class of persons, or in any geographical area, or at any price; or

(g) Requiring or inducing any dealer or distributor to assist respondent, by means of reports or otherwise, in preventing or restricting any dealer or distributor from buying from any person or class of persons, or in any geographical area, or at any price; or

(h) Requiring or inducing any dealer or distributor to resell to respondent any unsold stock of respondent's products in the event that business relations between respondent and the distributor or dealer are terminated.

2. Entering into, continuing, or enforcing, or attempting to enforce, any contract, agreement, or understanding with any dealer in or distributor of its products for the purpose or with the effect of establishing or maintaining any merchandising or distribution plan or policy prohibited by paragraph 1 of this order.

3. Engaging, either as part of any contracts, agreements, or understandings with any dealers in or distributors of its products, or individually and unilaterally, in the practice of:

(a) Issuing franchises or licenses to dealers or distributors; or

(b) Circulating lists of dealers or distributors of its products; or

(c) Affixing register numbers or similar identifying marks to its products; or

(d) Obtaining reports from salesmen, shoppers, or other persons concerning the prices at which, the customers to which, or the geographical areas in which, dealers or distributors sell its products; or

(e) Obtaining reports from salesmen, shoppers, or other persons concerning the prices at which, the persons from which, or the geographical areas in which, dealers or distributors buy its products; or

(f) Refusing to sell to dealers or distributors for the reason that they are known to be, or suspected of, selling respondent's products at any price, or to any person, or in any geographical area; or

(g) Refusing to sell to dealers or distributors for the reason that they are known to be, or suspected of, buying respondent's products elsewhere at any price, or from any person, or in any geographical area.

Provided, however, That nothing contained in this Order shall be construed to prohibit respondent, provided it obtains the Commission's prior approval, from establishing, by contract, agreement, or understanding, with any of its distributors a merchandising or distribution plan or policy whereby any distributor is assigned a geographical area of primary responsibility in the distribution of respondent's products.

And further provided, however, That nothing contained in this Order shall be construed to prohibit respondent from petitioning the Commission to reopen and alter, modify, or set aside, in whole or in part, any provision of this Order on the ground that conditions of fact have so changed as to require such action in the public interest.

It is further ordered, That respondent, Sandura Company, a corporation, 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.

OPINION ON RESPONDENT'S EXCEPTIONS TO THE PROPOSED FINAL ORDER

SEPTEMBER 26, 1962

By Elman, *Commissioner:*

On June 13, 1962, the Commission, with one member dissenting, determined that respondent had violated Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) by establishing and enforcing territorially restricted exclusive distributorships, engaging in unlawful price fixing, and establishing and maintaining an anticompetitive dealer-franchise system. On the same date the Commission issued a proposed order, subject to respondent's right under Rule 4.22(c) to file exceptions to the provisions of the proposed order along with a proposed alternative order. Respondent has made such a submission; Commission counsel has filed a reply; and respondent has answered that reply.

We have carefully considered and discuss below each of the objections and proposed alternative provisions submitted by respondent. Some we find to have merit, and are incorporated in the final order; others are rejected. A general observation may be made at the outset. The Commission's proposed order was designed not to be punitive or to prevent or otherwise impede the lawful conduct of respondent's business. Its purposes were remedial and preventive: to assure the public that the unlawful anticompetitive practices in which respondent was found to have engaged would be effectively terminated; that, so far as practicable, conditions of fair and free competition in the distribution of respondent's products would be restored; and that adequate safeguards would be provided against resumption of the illegal practices found, whether in the same form as in the past or in some other guise. It is in the light of these general purposes of the order that we have considered respondent's exceptions.

Respondent objects first to subparagraphs (a), (b), (d), (e), (f) and (g) of paragraph 1 of the order, dealing with territorial and customer limitations on distributors and dealers. The bases of these provisions are adequately set forth in the opinion of the Commission on the merits in this proceeding and require no elaboration here. Suffice it to say that these prohibitions deal only with aspects of respondent's marketing system which the Commission found unlawful, or with like and related practices that are reasonably foreseeable on the basis of the record. Further, respondent has made no mitigating showing of the importance of the prohibited practices to the lawful conduct of its business. The designated subparagraphs will be retained as written.

Respondent points in particular, however, to the fact that these provisions of the order must be read in conjunction with a later proviso which states "that nothing contained in this Order shall be construed to prohibit respondent, provided it obtains the Commission's prior approval, from establishing . . . a merchandising or distribution plan or policy whereby any distributor is assigned a geographical area of primary responsibility in the distribution of respondent's products." Respondent seems to believe that the Commission intended this proviso as a serious restraint upon its marketing freedom. Actually, the reverse is true. The proviso was intended to prevent misinterpretation of the order as a categorical prohibition of respondent's right to use primary responsibility territories.

Respondent's concern is apparently with the requirement that a primary responsibility plan be submitted to the Commission for prior approval. The Commission considers this a necessary precaution in view of its finding that respondent has employed unlawful territorial restraints on distribution of its products in the past. The Commission must exercise care to see that a substitute plan of territorial distribution does not implicitly continue the restrictions struck down by its order. Only a primary responsibility proposal that seems likely to further evasion of the Commission's order against respondent will be disapproved. The burden of the proviso on respondent is thus far less than would be that of the only alternative that would insure protection of the public interest, *viz.*, prohibition of all geographic restrictions on distribution.

Respondent next objects to subparagraph 1(h), which restrains respondent from "Requiring or inducing any dealer or distributor to resell to respondent any unsold stock of respondent's products in the event that business relations between respondent and the distributor or dealer are terminated." Two arguments are made: (1) that the repurchase of inventory is often an important service to the distributor, who frequently can find no other customer when he discontinues respondent's line; and (2) that the right of repurchase is a necessary protection for respondent in the event a distributor fails to pay his bills.

This provision of the order was aimed only at an auxiliary practice which the Commission believes is a dangerous enforcing device in a restrictive distribution system. The arguments of respondent indicate the desirability of exceptions to accommodate valid business objectives that pose no threat to competition. Accordingly, subparagraph 1(h) will be amended by the addition of the language, "provided that respondent shall not be prohibited from repurchasing such unsold stock at the request of a distributor or dealer or from obtaining an option from a distributor or dealer to repurchase such unsold stock in the event that the distributor or dealer is unable to meet his financial obligations to respondent."

Paragraph 3 of the order prohibits respondent from engaging, either in combination with its distributors and dealers or individually and unilaterally, in seven specified distributive practices. Respondent objects to each of these.

Subparagraph 3(a) orders respondent to cease "Issuing franchises or licenses to dealers or distributors." Respondent asserts that no case forbids the use of a franchise system in and of itself and that such a system is an important aid in inducing dealers to promote the sale of its products. But this proceeding has shown that respondent's franchise system is not a discrete mechanism but only a part of a more comprehensive distribution pattern. That distribution pattern is unlawfully restrictive, and, as the Commission's opinion explains, the franchise system contributes to its anticompetitive effect. The Commission therefore considers this provision necessary in order to guarantee that respondent's distributors and dealers will not continue to believe that they are under the restraints that have been associated with the franchise system in the past. It appears, however, that this objective can be achieved without resort to a perpetual injunction. Subparagraph 3(a) will be amended, therefore, by the addition of the words "for a period of two years following the effective date of this order."

Respondent next objects that subparagraph 3(b), which precludes "Circulating lists of dealers or distributors of its product", will deny it the opportunity to utilize such lists for a variety of legitimate business purposes. This provision was intended to terminate a practice that the Commission considered instrumental in furthering respondent's price fixing and dealer boycott activities. We agree with respondent that its scope is unnecessarily broad and it will be amended by the addition of the words "to such dealers or distributors."

Subparagraph 3(c) prohibits respondent from "Affixing register numbers or similar identifying marks to its products." Respondent makes a convincing case for the need of some such method of identification for production and quality control purposes. However, complaint counsel points out that this argument fails to explain the need for assigning a different number to each roll of goods. Respondent concedes that numbers designating specific rolls are not essential to its production program. These are the numbers that permit respondent to trace rolls of its goods to individual purchasers, and hence may have the anticompetitive function of reinforcing price fixing, dealer boycotts, and territorially restricted exclusive distributorships. The remaining numbers appear to serve only valid business purposes. Accordingly, subparagraph 3(c) will be amended to read "Affixing to its products numbers or other identifying marks which designate specific wrapped rolls or other commercially sized items sold as individual units to distributors or dealers."

By subparagraphs 3(d) and (e), respondent is prohibited from obtaining reports from various sources concerning prices, customers, and geographical areas in which its products are marketed. Respondent argues at length that these provisions deny it access to information essential to a business manufacturing goods for sale to the public. Upon reconsideration, we conclude that its point is well taken, and that these provisions are not required for the elimination of the unfair practices found by the Commission. Subparagraphs 3(d) and (e) will therefore be deleted from the final order.

Finally, in subparagraphs 3(f) and (g), respondent is forbidden to refuse to sell to dealers or distributors on the ground that they are buying or selling respondent's products at a given price, or to certain customers, or in a particular area. Respondent argues that these provisions deny it the right to choose its customers.

We think it appropriate to point out first that these terms of the order lack the sweep attributed to them by the respondent. Respondent may refuse to sell to present or prospective customers for many reasons. Only such refusals to deal as are grounded in disapproval of the purchaser's price, customers, or sales area are prohibited.[1] These, of course, are the precise areas in which the Commission has found respondent to have engaged in unlawful anticompetitive practices. The danger that respondent will utilize the knowledge and experience gained through years of restrictive dealing to perpetuate the effects of prohibited practices through other devices is both patent and serious. If competitive behavior on the part of respondent's distributors and dealers is to be restored, they must be freed from the threat of continuation of the evils of prior collusive practices through unilateral techniques.

The importance of subparagraphs 3(f) and (g) is enhanced by the Commission's determination to omit subparagraphs 3(d) and (e) from its order. Unrestrained by the latter provisions, respondent is free to gather much of the information necessary to restore the results, if not the exact machinery, of its previous distribution scheme. Sub-

[1] Even this statement is qualified by the right reserved to respondent to obtain approval for the establishment of distributorships having a geographical area of primary responsibility.

paragraphs 3(f) and (g) are essential to the suppression of this threat to competition. The authority of the Commission to base its order on such considerations is well settled. (See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, and cases cited therein.) Subparagraphs 3(f) and (g) will be renumbered 3(d) and (e), respectively, and will not otherwise be amended.[2]

Respondent's exceptions conclude with an extensive argument in support of the substitution of an order proposed by respondent for the one drafted by the Commission. Respondent's proposal lacks the detail and specificity necessary to complete disposition of the complex issues of this case, and is inadeqaute "to preclude the revival of the illegal practices" found. *Federal Trade Commission* v. *National Lead Co., supra*, at p. 430. As is evident from our opinion on the merits, this is far from a simple case. An order written in general terms would neither adequately protect the public interest nor describe, with sufficient clarity to meet the needs of respondent and the Commission's compliance staff, the extent to which respondent's present illegal marketing practices must be altered.

Upon careful consideration of respondent's exceptions to the proposed order issued with the decision of the Commission in this proceeding, the Commission has determined that those exceptions shall be granted to the extent indicated in this opinion. The proposed order will be amended accordingly and, as amended, it will be adopted as the final order of the Commission.

Commissioner MacIntyre agrees in part and dissents in part from this order of the Commission in keeping with his dissenting opinion to the original order of the Commission in this case.

ORDER ENTERING FINAL ORDER UNDER RULE 4.22(c)

SEPTEMBER 26, 1962

Respondent having filed, under Rule 4.22(c) of the Commission's Rules of Practice for Adjudicative Proceedings, exceptions to the proposed order in this proceeding, a proposed alternative order, and reasons in support therof; and

It appearing that respondent's exceptions and reasons in support thereof are in part meritorious;

It is ordered, That the proposed order issued with the decision of the Commission in this proceeding be, and it hereby is, amended as follows:

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[2] Of course, these provisions of the order, like all the others, are subject to the explicit proviso that respondent may petition the Commission for their modification "on the ground that conditions of fact have so changed as to require such action in the public interest."

Subparagraph 1(h) is amended to read: "Requiring or inducing any dealer or distributor to resell to respondent any unsold stock of respondent's products in the event that business relations between respondent and the distributor or dealer are terminated, provided that respondent shall not be prohibited from repurchasing such unsold stock at the request of a distributor or dealer or from obtaining an option from a distributor or dealer to repurchase such unsold stock in the event that the distributor or dealer is unable to meet his financial obligations to respondent."

Subparagraph 3(a) is amended to read: "Issuing franchises or licenses to dealers or distributors for a period of two years following the effective date of this order; or".

Subparagraph 3(b) is amended to read: "Circulating lists of dealers or distributors of its products to such dealers or distributors; or".

Subparagraph 3(c) is amended to read: "Affixing to its products numbers or other identifying marks which designate specific wrapped rolls or other commercially sized items sold as individual units to distributors or dealers; or".

Subparagraphs 3(d) and 3(e) are deleted from the order.

Subparagraphs 3(f) and 3(g) are renumbered 3(d) and 3(e), respectively.

It is further ordered, That the proposed order, as amended, be, and it hereby is, entered and adopted as the Final Order of the Commission.

By the Commission, Commissioner MacIntyre agreeing in part and dissenting in part from this order of the Commission in keeping with his dissenting opinion to the original order of the Commission in this case.

IN THE MATTER OF

CLAUDE I. WOOLWINE DOING BUSINESS AS UNIVERSAL TRAINING SERVICE ET AL.*

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

*Docket 8138. Complaint, Oct. 12, 1960**—Decision, Sept. 28, 1962*

Consent order requiring a San Francisco seller of a correspondence course purporting to prepare purchasers for U.S. Civil Service examinations and U.S. Government positions, to cease misrepresenting the availability of Government jobs and accompanying salaries, representing falsely connection with

* A desist order was issued against the other respondent, Grady L. Rushing doing business as Marcel Co., on Nov. 27, 1961, 59 F.T.C. 1182.

** Published in 59 F.T.C. 1182.