fiber product is sold and delivered to the ultimate consumer unless a substitute stamp, tag, label, or other means of identification is affixed thereto in accordance with the provisions of Section 5(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Riley E. Miles and Dorothy S. Miles, individually and as co-partners, trading as Miles n' Miles or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from failing to maintain the records required by Section 6(b) of the Textile Fiber Products Identification Act and Rule 39 of the Rules and Regulations promulgated thereunder to show the information set forth on the stamps, tags, labels or other identification that they removed and the name or names of the person or persons from whom the textile fiber product was received, in substituting stamps, tags, labels or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act.

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

IN THE MATTER OF

PERMA-LITE RAYBERN MFG. CORP. ET AL.

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

Docket C-625. Complaint, Nov. 29, 1963—Decision, Nov. 29, 1963

Consent order requiring Chicago manufacturers of aluminum storm windows and doors, canopies, patios and fiberglass awnings and in the installation thereof and engaged also in the distribution of water softeners to the public, to cease representing falsely—through their door-to-door salesmen and by salesmen who kept appointments made by telephone solicitations—that such salesmen were factory representatives and specially qualified; that their purpose was to introduce respondents' products in that particular area to specially selected prospects and at reduced prices during the "off season", but that immediate purchase was necessary; that a lower price would be charged if the purchaser would allow people to view the installation; and that respondents were comanufacturers of the water softener.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that Perma-Lite Raybern Mfg. Corp., a corporation, and Harry E. Swirsky and Raymond Weller, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Perma-Lite Raybern Mfg. Corp., 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 4300 North Kilpatrick Avenue, Chicago, Illinois.

Respondents, Harry E. Swirsky and Raymond Weller are officers of the corporate respondent. They cooperate and act together in formulating, directing and controlling the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is 4300 North Kilpatrick Avenue, Chicago, Illinois.

Prior to December 30, 1961, Perma-Lite Raybern Corporation was the wholly owned sales subsidiary of the corporate respondent. On that day, Perma-Lite Raybern Corporation was dissolved and all of its assets transferred to the corporate respondent, since which time the selling of respondents' products has been under the control of the corporate respondent.

Whenever it is alleged hereafter that the respondents committed certain acts and practices which are claimed to be false, misleading and deceptive, it is intended to be alleged that the said acts and practices were committed by the individual respondents in conjunction with the corporate respondent and said Perma-Lite Raybern Corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of aluminum storm doors and windows, canopies, patios and fiber-glass awnings and in the offering for sale, sale and distribution of water softeners to the public and in the installation 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 and transported from their place of business in the State of Illinois to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents' method of selling is either by door-to-door salesmen or by salesmen who keep appointments made in previous telephone solicitations by other employees of the respondents, operating in the branch office nearest to the prospective customer. Such salesmen or representatives are trained by respondents in respondents' sales techniques and are furnished by respondents with a sales promotion presentation, commonly known as a "canned sales talk", and with a sales kit containing advertising matter, order blanks and various other materials necessary to promote and to effectuate the sale of respondents' products. Such sales presentations and the material contained in said sales kits are used by respondents' salesmen and representatives in the course of offering for sale and selling respondents' said products and contain many representations respecting respondents' sales program and the prices of their products. Such representations are orally given by respondents' salesmen and representatives in the offering for sale of respondents' products.

PAR. 5. In the course of said solicitations and oral presentations of the sales talk, and by other means, respondents' salesmen or representatives have made many statements or representations, directly or by implication, to prospective purchasers of respondents' products. Typical, but not all inclusive of such statements and representations, are the following:

1. (a) That the respondents' salesmen or representatives are factory representatives dealing directly with the factory thus eliminating a salesman's commission and, therefore, are able to sell respondents' products at a lower price than an ordinary salesman.

(b) That respondents' salesmen or representatives are special representatives from the factory who will present to the prospective customer a "direct factory reference cost plan", thereby implying that said salesmen or representatives will quote a lower or factory price than the usual or regular price.

(c) That by dealing directly with the factory, the installation will be made at just a little more than half of what the same installation would cost if it were made by a representative of the sales department.

(d) That the respondents' salesmen or representatives are bonded and certified to design and advise on all awnings, storm windows and door installations.

(e) That respondents' salesmen or representatives are graduates of an academy, thereby implying that they are specially qualified.

2. (a) That the purpose of respondent's salesmen or representatives making the call on the prospective customer is to introduce respondents' products and to stimulate business in that particular area.

(b) That the persons solicited to purchase the respondents' products have been specially selected to receive the offer.

(c) That the prospective cutomers are contacted during the "off season" and, therefore, respondents' products are being sold at a reduced price.

(d) That the prospective customer must purchase immediately, on the day of the visit, or the offer will be withdrawn and the price will be higher.

3. That of two or more prices quoted to the customer, the particular salesman or representative will sell at the lowest price if the prospective customer will allow people to view the installation or permit the house to be used as a point of reference.

4. That the water softener sold by respondents is manufactured by Dow Chemical Company and Rheem Manufacturing Company in conjunction with the respondents and that the salesman or representative who will call upon the prospective purchaser of the water softener is a special factory representative.

PAR. 6. In truth and in fact:

1. Respondents' salesmen or representatives are not factory representatives, do not deal directly with the factory and are neither bonded nor certified nor are they graduates of any academy or school which specially qualifies them to design or advise on any awning, storm window or door installations, but on the contrary, are ordinary salesmen working out of a branch office and being paid a commission for each sale.

2. Prospective purchasers are not contacted for the purpose of introducing respondents' products in a particular area, the prospective purchasers have not been specially selected, the purchase price is not reduced because the sale is made in the "off season" and it is not necessary for the purchase to be made at that particular time, but on the contrary, sales are made at the same price at all times and to any person who will pay the price.

3. Respondents did not intend to ask, nor did they ask, other prospective customers to view the installation, and they did not intend to use, nor did they use, the home of any purchaser as a point of reference, this statement being used only as a means to induce hesitant buyers into buying respondents' products under the mistaken impression that they were receiving some sort of a special price because of their willingness to allow their homes to be used for these purposes.

4. The water softener sold by the respondents is manufactured by Rheem Manufacturing Company and the respondents have nothing whatsoever to do with its manufacture. Furthermore, the respondents' salesmen or representatives have no connection with the factory of Rheem Manufacturing Company but, on the contrary, are regular salesmen or representatives of the respondents, working out of their local branch offices.

Therefore, the statements and representations set forth in Paragraph Five 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 corporations, firms and individuals in the sale of products of the same general kind and nature as that 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 the 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 Comission 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 Perma-Lite Raybern Mfg. Corp., 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 4300 North Kilpatrick Avenue, in the City of Chicago, State of Illinois.

Respondents Harry E. Swirsky and Raymond Weller 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 Perma-Lite Raybern Mfg. Corp., a corporation, and its officers, and respondents, Harry E. Swirsky and Raymond Weller, 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 manufacturing, offering for sale, sale and distribution and installation of aluminum storm windows and doors, fiberglass awnings, patios, canopies, water softeners, or any other products, in commerce, as "commerce" is defined in the Federal Trade Comission Act, do forthwith cease and desist from:

1. Misrepresenting the status, qualifications or authority of respondents' salesmen or representatives.

2. Representing that the purchasers of respondents' products are granted any reduction in price or afforded any savings in price for any reason whatsoever unless the price offered constitutes a reduction from the respondents' usual and customary price in the recent regular course of business.

3. Representing, directly or by implication, that prospective purchasers are contacted for the purpose of introducing respondents' product in an area, or that prospective customers have been selected or are specially selected to receive respondents' offer, or that purchasers who fail to accept respondents' offer immediately will be required to pay a higher price for respondents' products.

4. Misrepresenting, in any manner, respondents' association or connection with any manufacturer of the water softeners or any other products sold by them.

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

B. WOLLMAN & BROS., INC., ET AL.

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

Docket 8540. Complaint, Oct. 24, 1962—Decision, Dec. 5, 1963

Order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by labeling and invoicing artificially colored furs as natural, and failing to disclose on labels and invoices and in advertising that certain furs were bleached or dyed; failing to disclose in advertising the names of animals producing furs and the country of origin of imported furs, and to describe as natural fur products which were not artificially colored; advertising fur products as reduced from "regular" former prices which were in fact fictitious; failing to keep adequate records as a basis for price and value claims; and failing to comply in other respects with labeling, invoicing and advertising requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that B. Wollman & Bros., Inc., a corporation, Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman, individually, and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent B. Wollman & Bros., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 352 Seventh Avenue, New York, New York.

Individual respondents, Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman, are president, vice-president, treasurer and vice-president-secretary, respectively, of corporate respondent. The individual respondents formulate, direct and control the acts, practices and policies of corporate respondent including those hereinafter set forth. The office and principal place of business of the individual respondents is the same as that of the corporate respondent.

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

PAR. 3. Certain of said fur products were misbranded or otherwise falsely or deceptively labeled in that said fur products were labeled to show that the fur contained therein was natural, when in fact, such fur was bleached, dyed or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

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

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

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

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

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was bleached, dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

PAR. 9. Certain of said fur products were falsely or 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 in the form of price lists and other documents and memoranda which were distributed by respondents in New York to its customers in California and other states outside of the State of New York.

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

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

(b) 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.

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

PAR. 10. Respondents by means of the advertisements referred to in Paragraph Nine, and other advertisements of similar import and meaning not specifically referred to herein, falsely and deceptively advertised their fur products in the following respects:

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

(b) Fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored were not described as natural as required by Rule 19 of said Rules and Regulations.

PAR. 11. By means of the advertisements referred to in Paragraphs Nine and Ten, and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised their fur products in that respondents represented fur products as having been reduced from regular or usual former prices where the so-called regular or usual former prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 12. 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. 13. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Mr. Edward B. Finch, counsel supporting the complaint.

Mr. Lester A. Lazarus, New York, N.Y., counsel for the respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

OCTOBER 9, 1963

The complaint issued in this proceeding on October 24, 1962, charges that B. Wollman & Bros., Inc., Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman, individually and as officers of said corporation, hereinafter called respondents, misbranded, falsely advertised and invoiced certain fur products in violation of the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act.

The respondents filed a joint answer to the complaint in which they admitted the jurisdictional allegations and also admitted that the individual respondents formulate and direct the acts, practices and policies of the corporate respondent, but denied the violations alleged.

Hearings have been held for the receipt of evidence in support of and in opposition to the allegations of the complaint. The matter is now before the hearing examiner for initial decision. Counsel for the parties have filed proposed findings of fact, conclusions of law, and order. These have been considered, together with the testimony and documentary evidence. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent B. Wollman & Bros., Inc., is a corporation organized and doing business under the laws of the State of New York with its office and place of business located at 352 Seventh Avenue, New York, New York.

2. The individual respondents, Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman, are President, Vice-President, Treasurer and Vice-President-Secretary, respectively, of the corporate respondent. The individual respondents formulate, direct and control the acts, practices and policies of the corporate respondent, including those hereinafter found. The office and place of business of the individual respondents is the same as that of the corporate respondent.

3. Prior to and subsequent to the effective date of the Fur Products Labeling Act, August 9, 1952, the respondents have been and are now engaged in the manufacture, advertising, transportation, offering for sale, and sale, in commerce, of 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.

4. The complaint alleges that the respondents violated a number of the specific provisions of the Fur Products Labeling Act and the Federal Trade Commission Act, but the establishment of these alleged violations depend upon whether (1) some of respondents' fur products were dyed, and; (2) whether respondents falsely advertised and invoiced certain of their fur products. Respondents denied that any of their fur products were dyed or falsely advertised and invoiced. Most of the evidence and testimony received at the hearing related to these two questions. The principal testimony bearing on the question of the dyeing of fur products will now be discussed.

5. Mr. George J. Curry, Jr., an investigator with the Bureau of Textiles and Furs in the New York Office of the Federal Trade Commission, testified that he received instructions from his superiors to investigate the firm of B. Wollman & Bros., Inc., generally, under the Fur Products Labeling Act, and particularly, as to whether the firm had been dying furs or otherwise mislabeling fur products. (Tr. 14–84, 203–204) Accordingly, on June 9, 13, 14, and 15, 1961, Mr. Curry went to the premises of B. Wollman & Bros., where he examined the records of the corporate respondent as to the purchase and sale of fur products, inspected the labels attached to certain fur garments, and, with tweesers, removed approximately 200 hairs from each of fifteen mink garments in the corporate respondent's stock, for testing purposes. He removed the hairs from the grotzens [1] and entire body of each garment, including the sleeves, front and back. Upon removing the approximately 200 hairs from each garment, he placed the hairs from each garment in a new, unused envelope which he had obtained from the stock of standard franked envelopes on hand in the New York Office of the Federal Trade Commission, sealed the envelope and marked it for identification. During all of the time that Mr. Curry was removing hairs from the fifteen mink garments, one of the individual respondents was with him. In fact, the respondent Barney Wollman, President of the corporate respondent, assisted Mr. Curry in removing hairs from some of the garments and placed them in the envelopes provided by Mr. Curry. At the request of the individual respondents, Mr. Curry did not remove any of the labels from the garments from which he removed the hairs, but copied and reproduced on the outside of each envelope the information contained on the label which was attached to each fur garment from which Mr. Curry and Mr. Barney Wollman removed the hairs. Some of the

[1] The grotzen is along the center or darker portion of a mink skin.

envelopes containing the hairs were marked for identification and received at the hearing as CX 1, 1A, 2, 2A, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 13A.[2] Mr. Curry also went to the premises of Hebel & Schultz, retail fur dealers in Philadelphia, Pennsylvania, and removed approximately 200 hairs from a mink garment which that company had purchased from the corporate respondent B. Wollman & Bros. This garment is described on Wollman Invoice No. 12670, dated July 18, 1961, Item No. 2956–611A, Cerulean Mink Jacket, a copy of which invoice was received in evidence as CX 19A. Mr. Curry placed the hairs which he removed from this garment in an envelope which was received in evidence at the hearing as CX 19. The envelopes containing these hairs were then transmitted to the Federal Trade Commission in Washington, D. C., Bureau of Textiles and Furs, for testing for the presence of dyes or dyestuffs. The results of these tests will be discussed in subsequent paragraphs.

6. On a subsequent visit to the premises of the corporate respondent, Mr. Curry visited the workroom or factory area where fur garments are manufactured and observed two bottles of dyestuff. Mr. Curry requested a B. Wollman & Bros., employee to permit him (Curry) to examine the bottles, but the employee refused. On a still later visit to the premises with Dr. Leon S. Moos, a graduate chemist and consultant with the Federal Trade Commission in the Bureau of Textiles and Furs, the individual respondent Sheldon Wollman permitted Mr. Curry to take possession of the two bottles. These bottles bore the label "Kander Dark Brown Dye". These bottles were marked for identification and received in evidence at the hearing as CX 92. (Tr. 48) From all of the evidence, the hearing examiner finds that these bottles contained dyes or dyestuffs. On this same visit to the premises of B. Wollman & Bros., while accompanied by Dr. Moos, Mr. Curry also observed several boxes of powder dye, one box being in the possession of an employee of the corporate respondent whose name Mr. Curry did not know. Present at the time, in addition to Mr. Curry and the employee who was holding the box of powder in his hand, were Dr. Moos and the individual respondent Sheldon Wollman.

7. Dr. Leon S. Moos, a graduate chemist and consultant with the Federal Trade Commission, Bureau of Textiles and Furs, corroborated some of the testimony previously given by Mr. Curry. Dr.

[2] CX 2A and 13A are envelopes in which Mr. Curry placed second samples of hairs which he removed a second time from two fur garments for the purpose of making a second test of hairs from these two garments (Items Nos. 2461 and 2065, respectively). In other words, on a previous visit, Mr. Curry had removed samples of hairs from these garments for testing purposes, and had placed the hair samples in envelopes marked CX 2 and CX 13, respectively.

Moos testified that: In July 1962, he visited the place of business of the corporate respondent, and talked with Mr. Sheldon Wollman and his father, Barney Wollman. Mr. Curry, the Commission investigator, was also present. Messrs. Wollman had previously been advised that the Commission's tests of the hairs previously removed from some of the corporate respondent's fur garments showed evidence of dyeing, and Messrs. Wollman stated to Dr. Moos that this could not be so because they did not use any dyes. Dr. Moos then went into the workroom or factory where he observed an employee apply powder to a new mink garment. With an iron, the employee then ironed the powder into the fur. Dr. Moos testified that the powder "changed the color of the fur right in front of my eyes".

8. Miss Idelle Myra Shapiro (Tr. 102–108), a textile technologist employed by the Federal Trade Commission, Washington, D. C., in its Bureau of Textiles and Furs, testified that she tested the hairs contained in the envelopes marked CX 1, 1A, 2, 2A, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 13A, and 19, to find out whether the fur hairs were natural or dyed and found that the hairs contained in each envelope had been dyed. Respondents challenged the qualifications of Miss Shapiro and the validity of the tests of the mink hairs performed by her and about which she testified.

9. Miss Shapiro graduated from the University of Maryland in 1959 with a B.S. Degree, majoring in textiles. She began her employment with the Commission during her senior year in college. At the Commission, she was taught the technique of testing fur fibers or hairs for the presence of dyes by Marjorie Malloy, the Federal Trade Commission chemist in charge at that time. Miss Shapiro has also received instruction from Dr. Moos since his employment with the Commission in 1961. In her original tests of the fur hairs contained in the envelopes, Miss Shapiro used what is known as the 4 Pyridylpyridinium Dichloride test. Miss Shapiro followed the standard procedures outlined in the well-known publication by Fritz Frigl, "Spot Test and Organic Analysis". In making the tests, Miss Shapiro had before her, in writing, a step-by-step standard procedure which she followed in making the so-called 4 Pyridylpyridinium Dichloride test. She did not rely on her memory.

10. Briefly, in making the 4 Pyridylpyridinium Dichloride test of the hairs contained in each of the envelopes, Miss Shapiro did the following: She had three clean, white, cup-shaped crucibles. With clean tweesers, she removed the hairs from each envelope, such as CX 1, and placed the hairs in one of the crucibles. She then placed an approximately equal number of hairs from a known natural mink skin in the second crucible, and an approximately equal number of

hairs from a known dyed mink skin in the third crucible. A solution of 24% pyridine, an organic solvent, was then added to each crucible, and the hairs were allowed to remain in this solution for approximately 30 minutes. Each crucible was then placed over a flame and allowed to remain until the chemical began to fume. The crucibles were then removed from the flame and the contents were allowed to cool for about five minutes. Any dye present on the hair would be stripped from the hair and dissolved by the pyridine solution. The pyridine solution does not affect any natural pigments in the hair. The crucibles containing the known natural mink hairs and known dyed mink hairs serve as positive controls in the test. Samples of the solution from each crucible were then placed in three separate clean test tubes, to which was added a drop of a one-percent solution of 4 Pyridylpyridinium Dichloride, two drops of sodium hydroxide, and three drops of hydrochloric acid. The contents were then shaken. The presence of dye in the solution is indicated by a pink to a deep red color and is determined by a visual observation of the color of the liquid solution, and comparing it with the color of the liquid removed from the crucibles containing the known natural hairs and the known dyed hairs. After each first test, a confirmatory standard chemical analytical test, called a phosphomolybdic test, was run on each hair sample. In making this confirmatory test of each hair sample, Miss Shapiro also had before her a written step-by-step procedure for this test. In fact, for each type of test which Miss Shapiro performs in the laboratory, she has before her a written step-by-step procedure for each test. After completing each test, she records the type of test and the results in the records in her laboratory, identifying the sample tested and the date of the test.

11. Miss Shapiro did a second 4 Pyridylpyridinium Dichloride test on some of the hairs and also what is called a Colorimeter test. Miss Shapiro described the Colorimeter as a device or machine which measures the amount of light passing through a liquid solution. The Colorimeter has a transparent container, called a cuvette, into which the solution is placed. When a natural solution is placed in the cuvette, 100% of the light set at a certain wave length will pass through this solution, and a meter on the device registers 100% transmission of the light through the cuvette. In testing some of the hairs here involved on the Colorimeter, Miss Shapiro took samples of the solution from each of the crucibles and successively placed sample amounts in the cuvette and by comparing the density and color of the solution, she determined the presence of dye in the solution containing the hairs from the corporate respondent's mink garments.

The Commission obtained the Colorimeter in 1961 for use in its laboratory.

12. There are other recognized tests for the testing of fur hairs for the presence of dye, in addition to the two tests which Miss Shapiro testified that she performed on the hairs in question. Among these is a test which is called the Brandowski Base test. Miss Shapiro did not perform the Brandowski Base test on the fur hairs contained in the envelopes which were received in evidence as CX 1, 1A, 2, 2A, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 13A, and 19. However, she did perform the Brandowski test on fur hairs contained in one of the envelopes which Mr. Curry had removed from one of corporate respondent's fur garments. Miss Shapiro had performed two tests of this sample of hairs, and each test proved negative. That is, neither test indicated the presence of dyestuffs. So, Miss Shapiro then performed a third test on the same fur hairs. This third test was the Brandowski Base test. The results from the Brandowski test were also negative. This was the only negative finding from all of the tests made by Miss Shapiro of the samples of hairs removed from fifteen fur garments manufactured by the corporate respondent. Counsel supporting the complaint did not offer in evidence the envelope which had contained this particular sample of hairs, evidently because the three tests run on this sample were negative. A copy of the results of the tests made by Miss Shapiro are in evidence as RX 1 and 2. In her testing of the hairs in question, Miss Shapiro was not concerned with determining the kind, type, or amount of dye, if any, present on the hairs. The purpose of her tests was to determine the presence of dye or dyestuffs, which are not present on natural mink hairs.

13. Some of the testimony offered by respondents in denial of the charge of dyeing will now be discussed. Mr. George Schleifer, foreman, manager, and cutter, in charge of the manufacturing operations of the corporate respondent, like Mr. Sheldon Wollman, denied that any form of dye was ever used on a mink garment manufactured by corporate respondent. Mr. Schleifer testified that the dye contained in CX 92 is used on muskrat, sable, fitch and Bolinsky, but is not feasible to use on mink. Mr. Schleifer also testified that corporate respondent had not purchased more than two jars of powder dye, sometimes called touche powder, in the past ten years and that any powder so purchased was only used to touch-up old, remodeled fur garments. He also testified that the ironer at B. Wollman & Bros., is not permitted to use this powder. Mr. Schleifer also denied ever having had any conversation with Dr. Moos about the use of dye in the B. Wollman & Bros., factory. (Tr. 218–231.)

14. Mr. Sheldon Wollman, Vice-President and general manager of the corporate respondent, testified as follows: Each fur garment manufactured by corporate respondent bears an identifying symbol called an item number. The item number is written on a paper "hang tag" attached to the outside of the garment by a metal snap. Wollman also marks the item number in indelible ink on the underside or leather side of the fur garment. The two numbers are identical. Mr. Wollman testified that the average age of the fur garments involved in this proceeding (which the Commission claims were dyed) was approximately four years of age. In other words, most of the fur garments were manufactured in 1957. During the intervening years, the garments had been sent out on a consignment basis to retail stores all over the United States. Mr. Wollman testified to his cost price for each mink skin which went into the manufacture of each garment and the average cost of labor involved in the manufacture of each garment. Mr. Wollman also testified, that insofar as he knew, he had never purchased a blended mink skin, and he denied having had the conversation with Dr. Moos, as testified to by Dr. Moos. Mr. Wollman denied that he had ever instructed any employee to dye a mink skin or mink fur product. (Tr. 231–243)

15. Mr. Carl F. Ackerbauer, a consultant chemist, operating the Ackerbauer Laboratories in Johnstown, New York, and since 1961, associated with Federal Testing Corporation, New York, New York, testified, among other things, that: He is a graduate chemist, and in his work does some testing for the New York State Police Laboratories. Based on his experience, he will not accept for testing any material sent to him in an envelope due to the possibility of contamination from the paper. He will only accept material which is contained in glass jars. Paper is a derivative of cellulose which has been treated with caustic soda and sodium bisulphite. Therefore, according to Mr. Ackerbauer, there is a possibility that the mink hairs which were placed in white paper envelopes by Mr. Curry may have become contaminated by the presence of sodium bisulphite and the inherent moisture of the paper. On cross-examination, Mr. Ackerbauer testified that: He did not perform any tests of hairs removed from any of the fur products involved in this proceeding; he considers the Brandowski test the most reliable, but admitted that the Brandowski test would not detect the presence of dyestuff placed on mink hairs in powder form, and would only detect one particular type of dyestuff, ursol dyes. In his opinion, none of the tests of the hairs involved in this proceeding, including those performed by Miss Shapiro, would show the presence of powder dye. On recross-examination, Mr. Ackerbauer testified that, there are some circumstances where pyridine, used in stripping

dyestuff from a mink hair, in the presence of small amounts of adulterants, can become a new chemical called alpha-alphaprimepyridine. Mr. Ackerbauer testified that he does not know, but he has a *feeling* that this alpha-alphaprimepyridine is a contaminant for the two tests used by Miss Shapiro, the 4 Pyridylpyridinium Dichloride and the Phosphomolybdic test. (Italic supplied.) Mr. Ackerbauer further testified that the tests performed by Miss Shapiro were invalid because: "both tests indicate the presence of primary amines and do not indicate the presence of an oxidized amine, which is an amide; at no time was it brought out that the material obtained from the pyridine solution had been reduced from the amide to the amine, giving you the positive test". Mr. Ackerbauer explained the above statement by saying that the tests performed by Miss Shapiro were for the purpose of determining the presence of amines, which is the actual dyestuff, not the dye, and her tests are not indicative of an oxidized amine. They are indicative of an amide. To his knowledge, he went on to say, "if the dyestuff has been applied to the fur it is converted over to the amide. There are no free amines present". (Tr. 243–263.)

16. Mr. Ernest Vandeweghe, principal officer of the Federal Testing Corporation, New York, New York, was the next witness for the respondents. Mr. Vandeweghe is a graduate of Colgate University, with a B.S. Degree, obtained in 1926. Since that time, Mr. Vandeweghe has been in the fur dressing and dyeing business. In 1961, he formed the Federal Testing Corporation. He testified, among other things, that: He has been testing fur fibers for the presence of dyes for approximately fourteen years. He will not accept for testing any fur hair samples sent to him. He prefers to take the entire fur garment to his place of business and there remove the individual hairs for testing. He first makes some preliminary tests to determine the type of dyes he is going to test for. By rubbing a clean white cloth against the fur fibers, the presence of a powdered dye pigment will show on the cloth by a dark discoloration. Next, he might moisten the white cloth with warm water and rub it against the fur fibers to see if this would lift off any of the dye pigment, and then he might use some clorox to strip the color. Ursol dyes are the most common type used in the fur industry for the coloration of fur products. Mr. Vandeweghe did not consider the tests performed by Miss Shapiro determinative of the presence of dye on the hairs. There are substances other than dyes which could have been present on the hairs which, in the tests performed by Miss Shapiro, would have given the identical results. Also, in a visual test, there is room for disagreement between viewers and, for this reason, such a test is not entirely accurate.

17. Mr. Vandeweghe further testified that, after B. Wollman & Bros., had been notified of the results of the tests made by the Federal Trade Commission, Wollman employed Federal Testing Corporation to make tests of some of the same fur products for the presence of dyes. Mr. Vandeweghe testified that his laboratory was employed by B. Wollman & Bros., partly upon the recommendation of Dr. Moos, the Commission fur consultant. Mr. Vandeweghe further testified: He removed and tested samples of hairs from four of the same fur products manufactured by corporate respondent which had been previously tested by the Commission employee, Miss Shapiro, and did not find any dyestuff present on any of the hairs. Mr. Vandeweghe identified the hairs which he removed from each garment by item number; that, in addition to the mechanical abrasion tests on the garment itself, which he described as preliminary, he also performed the Brandowski Base test, the 4 Pyridylpyridinium Dichloride test, and the Phosphomalybdic Acid test on the hairs which he removed from each garment. Each of his tests proved negative. His four written negative test reports were received in evidence as RX 5A–D. Mr. Vandeweghe criticized the manner in which Miss Shapiro performed the 4 Pyridylpyridinium Dichloride test, especially the manner in which she stripped the dyes, as distinguished from dyestuffs, from the hairs. Basically, their procedure was the same, except Mr. Vandeweghe used water instead of pyridine solution, and he left the hairs in the solution while making his visual test, whereas Miss Shapiro removed the hairs from the solution before her final visual testing. In the opinion of this hearing examiner, the test procedure followed by the Commission technician, Miss Shapiro, is preferable to that which Mr. Vandeweghe testified that he followed. It is found that Mr. Vandeweghe's criticism of the Commission's testing procedure is not valid.

18. It is significant that, in determining the results of the tests made by Mr. Vandeweghe, he, like Miss Shapiro, *visually* compared the color of his two controls, the liquid containing the hairs from a known natural and a dyed skin, respectively, with the unknown, which he was testing. (Italic supplied.) It was also Mr. Vandeweghe's opinion that it is possible for two chemists to remove and test hairs from the same fur garment and each obtain opposite results, as in this case, one positive and the other negative.

19. In rebuttal, Commission counsel offered the testimony of Dr. Moos, its fur consultant, who testified that, in his opinion, the possibility of the hairs becoming contaminated by any substance contained in the paper of the envelope, as suggested by Mr. Ackerbauer, was extremely remote. (Mr. Ackerbauer had testified, Paragraph 15 above, that there is a possibility of contamination from the sodium

bisulphite contained in the paper of the envelopes.) Dr. Moos also testified: Sodium bisulphite is a reducing agent, not a dye, used on the pulp in the manufacture of paper and is completely neutralized during the process of making the paper, and would have no effect on the 4 Pyridylpyridinium Dichloride test as performed by the Commission technician, Miss Shapiro. Even if a trace of sodium bisulphate were still present in the paper envelope, this would not affect or change the result of the test; it would be the same. Dr. Moos did not agree with Mr. Vandeweghe's use of water in stripping the dyestuff from the hairs. Dr. Moos preferred the pyridine solution, which was used by Miss Shapiro. In the opinion of Dr. Moos, "you wouldn't get a sufficient solution of dye from the mink hair by plain water, * * * that is the reason why we use the pyridine to strip". This may explain the negative results from the tests made by Mr. Vandeweghe. It may be that his use of water did not remove the dye from the hairs and, therefore, his tests were negative.

20. Upon consideration of all the evidence, the hearing examiner finds that the tests of the hairs conducted by the Commission laboratory technician, Miss Shapiro, wherein she found that said hairs had been dyed, were proper and valid tests. On the other hand, respondents have not established by a preponderance of the evidence their contention that there was a possibility that the hairs tested by Miss Shapiro had been contaminated by their being placed in standard white Federal Trade Commission franked envelopes by Mr. Curry, the Commission investigator.

21. The charge of false advertising and invoicing originated from a consignment of mink fur products from B. Wollman & Bros., to H. Liebes & Co., a department store in San Francisco, California, early in April, 1961. Either in late March or early April, 1961, Mr. Sheldon Wollman, Vice-President of the corporate respondent, phoned Mr. Norman A. Schwartz, then fur buyer for H. Liebes & Co., San Francisco, California, and offered H. Liebes & Co., approximately 100 pieces of mink fur products at approximately fifty cents on the dollar, with the authorization to use the name "B. Wollman & Bros." as the manufacturer in any advertisements of the furs by H. Liebes & Co. The offer was strictly on a consignment basis. Liebes could return any of the fur products it did not sell. Mr. Schwartz was interested in the offer and went to New York and inspected most of the fur products included in the offer. Mr. Sheldon Wollman informed Mr. Schwartz of Wollman's former price of each fur product and the reduced price to H. Liebes & Co. From the corporate respondent's records, Mr. Wollman exhibited to Mr. Schwartz copies of invoices

showing the prices at which many of the fur products included in the offer had previously been consigned for sale to other retail stores in the United States. Not having been sold, the furs had been returned to corporate respondent. This process had been repeated several times each year on the fur products here involved. Their average age was approximately four years. In any event, Mr. Schwartz accepted the offer and requested that corporate respondent send to H. Liebes & Co., a list of the fur products to be included in the consignment, including the item number and a description of each fur product, its former price and Wollman's price to H. Liebes & Co. (Tr. 304–326.)

22. About one week prior to the arrival of the consigned fur products, H. Liebes & Co., received in the United States mail a typewritten list of the fur products which had been requested by Mr. Schwartz. This list was typewritten, on 8½" x 11" typewriter paper, and received in evidence as CX 17A–D. (After its receipt by H. Liebes & Co., some of its employees added numerous dollar figures and other markings in pencil, ink and crayon on each page of the list. These later markings were excluded when CX 17A–D was received in evidence.) To give an idea of the general form of the list (CX 17A–D), information with respect to the first three or four fur products at the top of the first page of the list (CX 17A) is set out as follows:

		Former price	Your cost	Your cost loaded
829/2027	Ranch Jkt	$1,750.00	$950.00	$1,032.61
800/2122	Ranch Jkt	1,350.00	750.00	815.22
800R/4000	Ranch Jkt	1,400.00	650.00	706.52
538X/2662	Ranch Jkt	1,450.00	750.00	815.22

The figures on the extreme left-hand side of CX 17A refer to the "style" and "item" number of each fur product. These numbers are marked on the label and attached to each fur garment. The words "Ranch Jkt." are Wollman's description of the fur product. The figures under the column marked "Former Price" are Wollman's previous price for the fur product, and the figures under the column "Your Cost" are the reduced price to H. Liebes & Co. When the fur products were shipped from B. Wollman & Bros., to H. Liebes & Co., they were accompanied by consignment memoranda or invoices which listed the item number and a description of each fur product, and the price thereof to H. Liebes & Co. Copies of these invoices were received in evidence as CX 20 through 35, inclusive.

23. At the original hearing, Mr. Sheldon Wollman denied that either he or the corporate respondent had prepared CX 17A–D, or that either of them had mailed CX 17A–D to H. Liebes & Co. The hearing examiner reserved his ruling on respondents' objection to its receipt in evidence pending the taking of depositions of H. Liebes & Co., employees in San Francisco, with respect to the authenticity of CX 17A–D. Subsequently, counsel supporting the complaint learned that Mr. Norman A. Schwartz, formerly fur buyer for H. Liebes & Co., was then residing in New York, New York. Instead of taking depositions, a further hearing was scheduled for New York, New York, at which time Mr. Schwartz appeared and testified. Mr. Schwartz testified, among other things, that: (Tr. 304–326) He was fur buyer for H. Liebes & Co., and negotiated in its behalf the consignment transaction here involved; that CX 17A–D was received by H. Liebes & Co., from B. Wollman & Bros., through the United States mail, and contained the information which Mr. Schwartz had requested from Sheldon Wollman. Mr. Schwartz identified CX 93 as an advertisement placed by H. Liebes & Co., in the April 18, 1961, issue of the San Francisco Chronicle, advertising the consigned Wollman furs for sale at one-half price; and CX 94, a letter dated April 12, 1961, from Sheldon Wollman, Vice-President of B. Wollman & Bros., to H. Liebes & Co., which refers to the consigned furs, Wollman's former price, and the reduced price to H. Liebes & Co. Undoubtedly, the prices mentioned in this letter refer to the prices set out in the list which Mr. Schwartz had requested from B. Wollman & Bros., CX 17A–D. That CX 17A–D was prepared by B. Wollman & Bros., is also substantiated by the testimony of Mr. Harry Marder, Wollman's bookkeeper, who was called as a witness for respondent at the subsequent hearing held on July 11, 1963. (Tr. 336–345) Mr. Marder was called by counsel for respondents on another matter, but on cross-examination (Tr. 345), Mr. Marder identified CX 17A–D as a typewritten list made up in the office of the corporate respondent and testified that the list was made up by Mr. Sheldon Wollman from the records kept by Mr. Marder. Accordingly, it is found that CX 17A–D was prepared by or at the direction of Mr. Sheldon Wollman, Vice-President of B. Wollman & Bros., Inc., and mailed to H. Liebes & Co., in response to the previous request of Mr. Schwartz, fur buyer for H. Liebes & Co.

24. The specific allegations set out in the complaint will now be taken up *seriatum*. Paragraph Three of the complaint alleges that

certain of corporate respondent's fur products were misbranded or otherwise falsely or deceptively labeled in that said fur products were labeled to show that the fur contained therein was natural, when, in fact, such fur was bleached, dyed or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act. Copies of the labels attached to some of the corporate respondent's fur products were recorded by Mr. Curry, the Commission investigator, on the envelopes containing the hair samples, and received in evidence as CX 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14. These labels described the particular fur products as being "natural", whereas, the tests made by the Commission laboratory technician found that said fur products had been dyed. It is found, therefore, that the allegations in Paragraph Three of the complaint have been established.

25. Paragraph Four of the complaint alleges that certain of corporate respondent's fur products were misbranded in that they were not labeled in accordance with Section 4(2) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder. It was further alleged that, among such misbranded products, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact. Section 4(2) of the Fur Products Labeling Act requires that the label on a fur product show in words and figures plainly legible that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact. Copies of labels attached to some of corporate respondent's fur products which the Commission laboratory technician found to have been dyed were received in evidence as CX 1, 1A, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 19. Since it has been found that fourteen of the fur products involved in this proceeding were dyed or otherwise artificially colored, and the labels affixed to said fur products represented them as being natural, or at least did not designate the fur product as being "dyed", it follows that the allegations of Paragraph Four of the complaint have been established.

26. Paragraph Five of the complaint alleges that certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(a) Commission Exhibits 3, 4, 5, 7, and 11 are examples of corporate respondent's violations of Rule 4. For instance, the label on respondent's fur product, Item No. 3190 (CX 3), describes the fur product as "Nat. Graphite Ranch Coat". The word "natural" is in abbreviated form, which is a violation of Rule 4 of said Rules and Regulations. The same abbreviations occur on the copies of labels set out on CX 4, 5, 7, and 11. (b) Rule 30 of the Rules and Regulations under the Fur Products Labeling Act provides that the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations shall be set forth in specified sequence. To set forth the color of the fur product in immediate proximity with the animal name is a violation of this Rule. *In the Matter of Paul J. Lighton, et al.*, Docket 8305, April 25, 1962 [60 F.T.C. 821]. As an example, on corporate respondent's fur product, Item No. 3093 (CX 1), the fur product is described on the label as "Natural Tourmaline Mink Jackette". Other examples are the labels reproduced on CX 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 13A, and 14. Accordingly, it is found that the allegations of Paragraph Five of the complaint have been established.

27. Paragraph Six of the complaint alleges that certain of corporate respondent's fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when, in fact, such fur was bleached, dyed, or otherwise artificially colored in violation of Section 5(b)(2) of the Fur Products Labeling Act. Commission Exhibit 16, which is one of the consignment invoices to H. Liebes & Company, invoices Item Nos. 3015 and 2065 at "Nat.", whereas, the Commission laboratory tests of the hairs removed from said fur products showed that said furs had been dyed. Also, corporate respondent's invoice to Hebel & Schultz (CX 19A), describes Item No. 2956 as "N", whereas, the tests of the hairs removed from said fur product showed that said mink product had been dyed. It is found, therefore, that the allegations of Paragraph Six of the complaint have been established.

28. Paragraph Seven of the complaint alleges that certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. Section 5(b)(1)(c) of such Act provides that the fur product

shall be considered to be falsely or deceptively invoiced if such fur product is not invoiced to show "that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact". In CX 16 a fur product, Item No. 3015, is invoiced to H. Liebes & Co., as "Nat. Blue Iris Lutetia Mink Coat", and Item No. 2065, is invoiced as "Nat. Graphite (Ranch) Mink Cape", whereas, the tests of the hairs from these garments (CX 7, 13, and 13A, respectively) made by the Commission laboratory technician shows that they had been dyed. Likewise, corporate respondent invoiced a fur product, Item No. 2956, as "N" (CX 19A), whereas, a test by the Commission laboratory technician (CX 19) on hairs removed from this fur product showed that said fur product had been dyed. Therefore, it is found that the allegations of Paragraph Seven of the complaint have been established.

29. Paragraph Eight of the complaint alleges that certain of corporate respondent's products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that the information required under Section 5(b)(1) of said Act and the Rules and Regulations thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations. Rule 4 requires, among other things, that, in invoicing, the required information shall not be abbreviated, but shall be spelled out fully. In the consignment invoice to H. Liebes & Co. (CX 16), Item No. 3015, the word "natural" is abbreviated "Nat.". In the invoice to Hebel & Schultz (CX 19A), Item No. 2956 is abbreviated "N". Required information is also abbreviated on copies of invoices received in evidence as CX 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32. It is found, therefore, that the allegations of Paragraph Eight of the complaint have been established.

30. Paragraph Nine of the complaint alleges that certain of said fur products were falsely or 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, which 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, it was alleged, were advertisements in the form of price lists and other documents and memoranda which were distributed by respondents in New York to customers in California and other states

outside the State of New York. Among such false and deceptive advertisements of fur products were advertisements which failed:

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

(b) 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.

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

It is the contention of counsel supporting the complaint that CX 17A–D constituted false advertising under the doctrine announced by the Commission in *Leviant Bros., Inc., et al.*, Docket 7194, July 31, 1959, 56 F.T.C. 120, which was followed in *Harry Graff & Son, Inc., et al.*, Docket 7188, July 31, 1959, 56 F.T.C. 92, which states in part:

Section 5(a) of the Fur Act states in pertinent part that:

For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

* * * * * * *

(5) * * * contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.

It is clear from this language that a single representation to a prospective purchaser, as distinguished from a public announcement, may constitute advertising within the meaning of the section. Moreover, there is nothing in the wording of this section or in the legislative history of the Act to indicate that a consignment memorandum may not serve as a medium for conveying a representation or notice "which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale" of a fur product or fur.

The record shows that respondents set forth fictitious comparative prices on consignment memorandums issued by them in connection with the consignment to Arnold Constable of certain fur products which were later purchased by that firm. These consignment memorandums were received by consignee prior to the consummation of the sale to it of the products described therein. It is clear, therefore, that these documents were intended to aid or assist in the sale or offering for sale of the products to Arnold Constable. We think the conclusion is inescapable that the fictitious prices listed therein constituted false representations to the prospective purchaser which were intended for the same purpose. It should be pointed out, in this connection, that while there is no evidence that the consignee was deceived by these representations, the statute does not require any showing that a prospective purchaser was deceived or that the false representations were made under such circumstances that a prospective purchaser might be deceived. It is our opinion, therefore, that the fur products in question were falsely advertised within the meaning of Section 5(a)(5) of the Act.

See also, Opinion of the Commission in Edgar Gevirtz, an individual trading as *Regal Furs*, Docket 8446, July 17, 1962 [61 F.T.C. 74]; also *Jacques DeGorter* v. *F.T.C.*, 244 F. 2d 270.

By reference to CX 17A–D, the following violations will be noted:

1. Failure to use animal name such as "Mink", in violation of Section 5(a)(1).

2. Failure to designate fur products as bleached, dyed, etc., in violation of Section 5(a)(3). See Item No. 3145, CX 17A and CX 16. Also, Item No. 3015, CX 17D, which should have been designated as "Dyed Mink". CX 7, Tr. 125. Also, Item No. D2364, CX 17A, which should have been designated as "Bleached Ermine Cape". CX 16. Also, Item No. 944–505, CX 17D, should have been designated as "Dyed Broadtail-processed Lamb". RX 7Z–12.

3. Failure to set forth the country of origin, in violation of Section 5(a)(6). CX 17D. Item No. 534–2627 should indicate Canada as the country of origin. See CX 33. See also, Item No. 1563, designated on CX 17D as "Wild Coat F.L.". CX indicates this item as "Natural *Canadian* Mink".

Item No. 868, designated on CX 17D as "Tipped Dyed Sable st. Stole", should have designated "Russia" as the fur origin. CX 34. It is found, therefore, that the allegations of Paragraph Nine of the complaint have been established.

31. Paragraph Ten of the complaint alleges that respondents, by means of the advertisements referred to in Paragraph Nine of the complaint, falsely and deceptively advertised their fur products in the following respects:

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

(b) Fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored were not described as natural as required by Rule 19 of said Rules and Regulations.

(a) Commission Exhibits 17A–D, 18, 93, and 94 are replete with examples where required information in advertisements is abbreviated. In many instances the word "Russia" is abbreviated as "Russ.", and the word "Silver" in the animal name "Silver Fox", is abbreviated "Sil.". (b) The same exhibits contain numerous examples where the word "natural" was omitted. This is true in instances where a reference is made to "Ranch Jkt.", and other mink color designations such as "Lutetia", "Cerulean", etc. Accordingly, it is found that the allegations in Paragraph Ten of the complaint have been established.

32. Paragraph Eleven of the complaint alleges that, by means of the advertisements referred to in Paragraphs Nine and Ten, respondents falsely and deceptively advertised their fur products in that respondents represented fur products as having been reduced from regular or usual former prices where the so-called regular or usual former prices were, in fact, fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act. Counsel supporting the complaint contends that CX 17A–D, 18, 93, and 94 constitute evidence sufficient to establish this allegation. Counsel supporting the complaint also urges that the prices set forth in the column entitled "Former Price" in CX 17A–D were fictitious in that they were not the prices at which said merchandise was usually sold by corporate respondents in the recent regular course of business. Counsel urges that evidence to support this contention is contained in CX 36 through 91, inclusive. As an example, the first fur product listed on CX 17A is Item No. 2027, described on said exhibit as "Ranch Jkt.". The "Former Price" quoted to H. Liebes & Co., in this exhibit, CX 17A, as of April, 1961, is $1,750. However, the evidence shows that, on March 13, 1961, less than one month previous to the offering of this product to H. Liebes & Co., the same Ranch Jacket, Item No. 2027, had been sent on consignment to Burger Phillips, Birmingham, Alabama, at an invoice price of $1095. (CX 36) Another example is the fourth fur product listed on CX 17A, Item No. 2662, a "Ranch Jkt.", with a "Former Price" of $1,450. Commission Exhibit 37 shows that this same "Ranch Jkt.", Item No. 2662, had previously, on March 24, 1961, been consigned to another firm, at a price of $1,000. These are examples of the fact that the "Former Price" set forth in CX 17A–D is fictitious in that in the recent regular course of business and by respondents' exhibits (*infra*), even previous thereto, these fur products had been sent on consignment to other retail firms at a price substantially less than that set forth as "Former Price" in CX 17A–D.

Approximately 60 more examples similar to the above are in evidence. Itemization of the various exhibits which substantiate this finding is attached hereto as *Addendum I*. This *Addendum I* indicates the item number of the fur product, the Commission exhibit which sets forth the fictitious "Former Price", the Commission exhibit which indicates the amount of the previous offer in the recent regular course of business, and the Commission exhibit which is evidence of the fact that the same product was set on consignment to H. Liebes & Co., San Francisco, California, and was advertised in CX 17A–D.

It is ironical, but respondents have introduced into evidence exhibits which substantiate the contention that the "Former Price" mentioned in CX 17A–D is fictitious. *Addendum II*, attached hereto, sets forth the item number the Commission exhibit which sets forth the "Former Price" and the respondents' exhibit number with the lower former price set forth therein. While these respondents' exhibits may not be prices obtained in the recent regular course of business, they do indicate that even previous to the dates of CX–36 through 91, some of the items listed in CX 17A–D were offered at lower prices.

Also, RX 7Z–15, which is intended to indicate the previous or former price higher than that set forth for the same item in CX 17D, is dated July 5, 1961, three months subsequent to the former price representation made in CX 17D and therefore, will not be considered as evidence in this decision.

Respondents have introduced into evidence other consignment memoranda or invoices for some of the items listed in CX 17A–D in an effort to justify the "Former Price" set forth in that exhibit. While most of these exhibits may indicate that the "Former Price" was used at one time, the period of time covered by respondents' consignment memoranda, RX 6 through 7Z–67, includes prices in 1957, 1958, 1959, and 1960. While several may fall in December, 1960, the majority are certainly not the usual and regular prices of said merchandise in the recent regular course of business. They are, therefore, too remote in time to substantiate the "Former Price" set forth in CX 17A–D. Whereas all of the consignment invoices submitted by the Commission, namely, CX 36 through 91, appear to have been issued during the period September, 1960, to March 31, 1961, a period no earlier than six months previous to the questioned transaction, which should satisfy the "recent regular course of business" requirement.

While most cases coming before the Commission involving prices deal with products of similar type, grade and quality or comparable products sold in a given trade area, the facts in this case deal with the identical items which had been previously offered but not sold. Even in the previously mentioned types of cases the terms "List Price", "Retail Price" and words of similar import convey to the public the impression that the price figures quoted in conjunction with those terms are the "Normal", the "Going", the "Generally Prevailing" or the "Usual and Customary" prices at which the product is being sold. *Coro, Inc.*, Docket 8346, November 6, 1963, p. 1164 herein. Certainly the representation "Former Price" would have the same, if not an even broader significance. In any event, the "Former Price" must be substantiated by sales in the recent regular course of business. *George's Radio and Television Company, Inc., et al.*, Docket 8134, January 19, 1962 [60 F.TC. 179]. It is found, therefore, that the allegations of Paragraph Eleven of the complaint have been established.

33. Paragraph Twelve of the complaint alleges that the respondents, in advertising fur products for sale as aforesaid, made claims and representations respecting prices and values of fur products; that 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, and respondents failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations. The only evidence offered by respondents to rebut this allegation were copies of corporate respondent's consignment invoices of fur products to various retail stores, principally Saks Fifth Avenue, New York. These were consignment invoices dated during the years 1957, 1958, 1959, and 1960, at specified prices. The representations as to prices complained about in this proceeding were made in April, 1961, and prices quoted on consignment invoices during the years 1957, 1958, 1959, and 1960, do not, with nothing more, establish that such prices were the "usual and customary" prices for such fur products in April, 1961. Mr. Harry Marder, corporate respondent's bookkeeper, in answer to the question whether a fur garment invoiced on consignment to Saks Fifth Avenue at $2,250 in 1958 would remain at the same price until consigned to H. Liebes & Co., in 1961, testified that it would depend on market conditions. (Tr. 342) "If the market went down, as any other commodity, the price would go down. If the market were strong, it would go up." Rule 44(b) provides as follows: "No person shall, with respect to a fur or fur product, advertise such fur or fur product with comparative prices and percentage savings claims except on the basis of current market values or unless the time of such compared price is given." It has been found in Paragraph 30 hereof that the issuance by corporate respondent of CX 17A–D constituted the advertising of such fur products with comparative prices. However, respondent has not established with competent evidence that the "Former Prices" re-

ferred to in CX 17A–D were the "current" prices in April, 1961, as required by said subsection (b) of Rule 44. Respondents' evidence does not meet the requirement of Rule 44(e). Upon the basis of all the evidence, it is found that the allegations of Paragraph Twelve of the complaint have been established.

CONCLUSION

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

ORDER

It is ordered, That respondents, B. Wollman & Bros., Inc., a corporation and its officers, and Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, manufacture for introduction, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution, in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as "commerce", "fur", and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

1. Misbranding fur products by:

A. Representing directly or by implication on labels that the fur contained in fur products is natural when the fur contained therein is pointed, bleached, dyed tip-dyed, or otherwise artificially colored.

B. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

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

D. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations

2. Falsely or deceptively invoicing fur products by:

A. Representing directly or by implication on invoices that the fur contained in fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

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

3. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of any fur product 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. Sets forth information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

C. Fails to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

D. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold by the respondents unless such advertised merchandise was in fact usually and customarily sold at such price by respondents in the recent past.

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

4. 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.

Initial Decision

Addendum I

Item No.	CX 17	Former price	Previous offer	CX amount	Consignment memo—CX
2027	A	$1,750.00	36	$1,095.00	35
2662	A	1,450.00	37	1,000.00	35
2140	A	1,375.00	38	1,200.00	20
2001	A	975.00	39	700.00	20
			40	850.00	20
3082	A	775.00	41	695.00	20
			42	450.00	20
D2364	A	1,175.00	43	1,000.00	16
3145	A	1,650.00	44	1,050.00	16
3114	A	1,700.00	45	1,095.00	24
1948	A	1,550.00	46	1,150.00	24
			47	750.00	24
3063	A	2,250.00	48	1,095.00	24
1655	A	1,850.00	49	1,250.00	25
2738	B	1,150.00	50	650.00	21
2945	B	850.00	51	495.00	21
2363	B	1,050.00	51	675.00	21
			52	800.00	21
2577	B	675.00	53	525.00	21
			51	495.00	21
2616	B	950.00	54	550.00	21
2544	B	850.00	55	675.00	21
2543	B	1,550.00	56	750.00	21
2823	B	1,050.00	50	695.00	22
2580	B	700.00	57	600.00	22
1930	B	1,150.00	48	595.00	22
2286	B	1,000.00	58	750.00	22
2436	B	1,050.00	45	495.00	20
2532	B	1,250.00	42	795.00	20
2586	B	1,350.00	42	895.00	20
3094	B	1,050.00	59	650.00	23
2500	B	1,250.00	60	1,000.00	23
			61	750.00	23
2512	B	1,750.00	61	950.00	23
			62	1,500.00	23
2902	B	1,150.00	59	750.00	23
3004	B	1,150.00	63	900.00	23
2523	B	1,050.00	64	595.00	23
2536	B	1,150.00	65	800.00	23
3115	B	1,150.00	49	1,050.00	20
2099	C	950.00	66	850.00	26
			67	750.00	26
2604	C	700.00	68	450.00	26
2943	C	850.00	43	750.00	26
1212	C	650.00	50	325.00	26
2597	C	650.00	69	295.00	26
2556	C	850.00	50	375.00	27
2550	C	600.00	70	450.00	27
1465	C	600.00	71	400.00	27
1961	C	750.00	50	425.00	27
2852	C	495.00	50	325.00	27
2833	C	2,850.00	72	1,595.00	28
2575	C	2,150.00	73	1,295.00	28
2683	C	2,650.00	74	2,500.00	29
			75	2,500.00	29
2996	C	2,950.00	76	2,650.00	29
2527	C	3,850.00	77	3,000.00	29
			78	3,250.00	29
			79	3,250.00	29
			37	2,500.00	29
2626	C	3,950.00	80	3,150.00	30
2647	C	4,250.00	81	3,250.00	30
3015	D	4,950.00	82	3,950.00	16
			56	4,000.00	16
2656	D	3,250.00	83	2,750.00	31
1432	D	3,250.00	76	2,350.00	31
2968	D	4,750.00	44	2,500.00	32
2549	D	3,000.00	84	2,250.00	32
3045	D	3,750.00	84	2,500.00	32
3000	D	3,250.00	44	2,250.00	33
2812	D	3,650.00	85	2,500.00	33
505	D	1,950.00	86	1,495.00	34
			87	1,450.00	34
868	D	1,150.00	59	575.00	34
979	D	1,650.00	88	1,400.00	34
			89	1,350.00	34
3016	D	5,250.00	90	4,350.00	16
			91	4,500.00	16

Addendum II

Item No.	Commission Exhibit	Former price	Respondents' Exhibit	Former price
	17			
2001	A	$975.00	7F	$850.00
9182	A	1850.00	7J	1750.00
1518	A	1450.00	7S	1250.00
944–505	D	1950.00	7Z–12	1495.00
2529	D	2250.00	7Z–13	2200.00
2065	D	5000.00	7Z–13	4000.00
2943	C	850.00	7Z–22	750.00
2996	C	2950.00	7Z–40	2650.00
2616	B	950.00	7Z–48	900.00
2286	B	1000.00	7Z–54	950.00

Final Order

The Commission, on November 19, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed October 9, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents B. Wollman & Bros., Inc., a corporation, and Barney Wollman, Sheldon Wollman, Herman Wallman, and Harry Wallman 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 set forth in the initial decision.

In the Matter of

JAMES B. TOMPKINS ET AL.

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

Docket 8567. Complaint, Apr. 30, 1963—Decision, Dec. 5, 1963

Order issued in default requiring the California manufacturer and distributors of a toy product designated "ARCH-A-BALL"—consisting of a headband holding a transparent visor over the upper face and eyes and with an inflatable plastic ball attached to the center front by a rubber string, to be punched like a punching bag—to cease representing that the toy was safe for use by such practices as furnishing to dealers window posters and other advertising containing depictions of a child using the toy, and placing the depictions also on the display containers along with the statement: "Simple-

Safe-Durable", when the toy was not hazard free due to the possibility of injury to the user's eyes or face in the event of breaking or shattering of the eye shield.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that James B. Tompkins, an individual, and Stalco Products Corporation, a corporation, and William Houle, and Donald R. Tugwell, as individuals 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 James B. Tompkins is an individual engaged, among other things, in the manufacturing, offering for sale, sale and distribution of a toy product designated "Arch-A-Ball". His business address is 4700 District Boulevard, in the city of Los Angeles, State of California.

PAR. 2. Respondent Stalco Products Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 11827 East 165th Street, in the city of Norwalk, State of California.

Respondents William Houle and Donald R. Tugwell are individuals and are officers of said corporate respondent. The said individuals formulate, direct and control the acts and practices of said corporate respondent. Their business address is the same as that of said corporate respondent.

PAR. 3. Respondent James B. Tompkins is now, and for some time last past has been, successor to the legal interests of others with whom he had formerly been associated in the manufacturing, offering for sale, sale and distribution of the toy product designated "Arch-A-Ball". Certain of the aforesaid functions have been delegated by said respondent to others from time to time, but said re-respondent has retained control over the manufacturing, offering for sale, sale and distribution of said toy product for all times material herein.

Respondents Stalco Products Corporation, William Houle and Donald R. Tugwell are engaged in the business of selling and distributing a variety of toy products. Said respondents are now, and for some time last past have been, the distributors of the "Arch-A-Ball" toy product.

PAR. 4. In the course and conduct of their business, respondents have caused the "Arch-A-Ball" toy product, when sold, to be shipped from their respective warehouses or places of business located in the State of California to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said toy product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. The toy product designated "Arch-A-Ball" is a device consisting of a headband, the front portion of which is a contoured visor composed of transparent plastic. An inflatable plastic ball is connected with the headband by means of a rubber string fastened at or near the center of the visor.

Said toy product is designed and intended to be used in the following manner: the headband is worn in the same way as the user would wear a cap, with the visor positioned over the upper face and eyes. The inflated ball is punched by the user in the same general manner as one would strike a punching bag. When the ball is punched it may be propelled to the extended length of the rubber string, after which it normally springs back toward the visor and may strike it, or the ball may be punched again by the user before it strikes the visor.

PAR. 6. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of said toy product, respondents have made, or have caused to be made, certain statements, depictions, and representations concerning the construction and safety of use of said toy product, of which the following are typical:

Window posters and other advertising materials furnished to dealers to promote the sale of said toy product contain depictions of a child using an "Arch-A-Ball" in the manner described in Paragraph Five hereof. Said posters and other advertising materials also contain the following statement: "Poke It-n Punch It * * * fun for all ages—4 to 74!"

The containers in which said toy product is packaged for display, and for resale to the purchasing public, contain depictions of children using the toy and also contain the following statement: "Simple-Safe-Durable".

PAR. 7. By and through the use of the aforesaid statements and depictions, and others similar thereto but not specifically set out herein, respondents represented, and have placed in the hands of retailers and others the means and instrumentalities of representing, directly or by implication, that said toy product is hazard-free and is safe for use by the purchaser, including children.

PAR. 8. In truth and in fact said toy product is not hazard-free nor is it safe for use by the purchaser, including children, due to the possibility of injury to the user's eyes or face resulting from the breaking or shattering of the eye shield.

Therefore, the statements, depictions, and representations, as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive. In addition, the container in which said product is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on said container.

PAR. 9. 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 toy products of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, depictions, 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, depictions, and representations were and are true and into the purchase of substantial quantities of respondents' toy product by reason of said erroneous and mistaken belief.

PAR. 11. 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.

Mr. John J. McNally and *Mr. Morton Nesmith*, counsel supporting complaint.

Mr. Robert P. Lawton of *Lawton, Christensen and Rouse*, La Habra, Calif., counsel for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

SEPTEMBER 26, 1963

On motion of counsel supporting the complaint dated July 18, 1963, to which no answer was filed, and

HAVING FOUND that the complaint herein issued April 1, 1963, was duly served on all of the parties herein and that none of said parties filed answer to the complaint.

It is ordered, That:

A. Respondents are in default as provided in Rule 4.52(c) of the Commission's Rules of Practice [now 3.5(c)] and have consented to the hearing examiner finding the facts as alleged in the complaint and to the issuance of an order as provided for therein.

B. The following findings of fact, conclusions, and order are, accordingly, made herein:

FINDINGS OF FACT

1. Respondent James B. Tompkins is an individual engaged, among other things, in the manufacturing, offering for sale, sale and distribution of a toy product designated "Arch-A-Ball". His business address is 4700 District Boulevard, in the city of Los Angeles, State of California.

2. Respondent Stalco Products Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 11827 East 165th Street, in the city of Norwalk, State of California.

Respondents William Houle and Donald R. Tugwell are individuals and are officers of said corporate respondent. The said individuals formulate, direct and control the acts and practices of said corporate respondent. Their business address is the same as that of said corporate respondent.

3. Respondent James B. Tompkins is now, and for some time last past has been, successor to the legal interests of others with whom he had formerly been associated in the manufacturing, offering for sale, sale and distribution of the toy product designated "Arch-A-Ball". Certain of the aforesaid functions have been delegated by said respondent to others from time to time, but said respondent has retained control over the manufacturing, offering for sale, sale and distribution of said toy product for all times material herein.

Respondents Stalco Products Corporation, William Houle and Donald R. Tugwell are engaged in the business of selling and distributing a variety of toy products. Said respondents are now, and for some time last past have been, the distributors of the "Arch-A-Ball" toy product.

4. In the course and conduct of their business, respondents have caused the "Arch-A-Ball" toy product, when sold, to be shipped from their respective warehouses or places of business located in the State of California to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said toy product in

commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The toy product designated "Arch-A-Ball" is a device consisting of a headband, the front portion of which is a contoured visor composed of transparent plastic. An inflatable plastic ball in connected with the headband by means of a rubber string fastened at or near the center of the visor.

Said toy product is designed and intended to be used in the following manner: the headband is worn in the same way as the user would wear a cap, with the visor positioned over the upper face and eyes. The inflated ball is punched by the user in the same general manner as one would strike a punching bag. When the ball is punched it may be propelled to the extended length of the rubber string, after which it normally springs back toward the visor and may strike it, or the ball may be punched again by the user before it strikes the visor.

6. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of said toy product, respondents have made, or have caused to be made, certain statements, depictions, and representations concerning the construction and safety of use of said toy product, of which the following are typical.

Window posters and other advertising materials furnished to dealers to promote the sale of said toy product contain depictions of a child using an "Arch-A-Ball" in the manner described in Paragraph Five hereof. Said posters and other advertising materials also contain the following statement: "Poke It-n Punch It * * * fun for all ages—4 to 74!"

The containers in which said product is packaged for display, and for resale to the purchasing public, contain depictions of children using the toy and also contain the following statement: "Simple-Safe-Durable".

7. By and through the use of the aforesaid statements and depictions, and others similar thereto but not specifically set out herein, respondents represented, and have placed in the hands of retailers and others the means and instrumentalities of representing, directly or by implication, that said toy product is hazard-free and is safe for use by the purchaser, including children.

8. In truth and in fact said toy product is not hazard-free nor is it safe for use by the purchaser, including children, due to the possibility of injury to the user's eyes or face resulting from the breaking or shattering of the eye shield.

Therefore, the statements, depictions, and representations, as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive. In addition, the container in which said product is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on said container.

9. 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 toy products of the same general kind and nature as that sold by respondents.

10. The use by respondents of the aforesaid false, misleading and deceptive statements, depictions, 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, depictions, and representations were and are true and into the purchase of substantial quantities of respondents' toy product by reason of said erroneous and mistaken belief.

11. 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.

CONCLUSIONS

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

2. The proceeding is in the public interest.

3. The facts found constitute a violation of Section 5 of the Federal Trade Commission Act.

4. The following order should be issued:

ORDER

It is ordered, That respondents James B. Tompkins, an individual, Stalco Products Corporation, a corporation, and its officers, and William Houle and Donald R. Tugwell, 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 a toy product designated "Arch-A-Ball", or any other product of similar construction or having substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that such product is safe or is free from hazard, or that the purchaser may use it without risk of injury.

2. Failing to clearly and conspicuously disclose on the container in which the product is sold that the visor or eye shield may break or shatter and thereby cause injury to the eyes or face of the user.

3. Furnishing or placing in the hands of jobbers, retailers or dealers in said products the means and instrumentalities by and through which they may deceive or mislead the public in the manner or as to the things hereinabove prohibited.

Final Order

The Commission, on November 6, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed September 27, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Stalco Products Corporation, a corporation, and James B. Tompkins, William Houle, and Donald R. Tugwell 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 set forth in the initial decision.

In the Matter of

CARTER PRODUCTS, INC., ET AL.

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

Docket 7943. Modified order, Dec. 6, 1963

Order modifying, in accordance with the opinion of the Court of Appeals, Fifth Circuit, of Sept. 27, 1963, 323 F. 2d 523, 7 S.&D. 794, the Commission's original desist order in this proceeding dated April 25, 1962, 60 F.T.C. 782, requiring the manufacturer of "Rise" shaving cream and its advertising agency to cease disparaging competing shaving creams and misrepresenting the superiority of their shaving cream by misleading and inaccurate comparisons on television.

Modified Order

The United States Court of Appeals for the Fifth Circuit having, on September 27, 1963, issued its opinion and judgment setting aside the Commission's order to cease and desist issued in this matter on April 25, 1962, and having remanded the case to the Commission for modification of its said order in accordance with the opinion of the Court:

It is ordered, That the Commission's said order to cease and desist be, and it hereby is, modified to read as follows:

> *It is ordered*, That respondents Carter Products, Inc., a corporation and Sullivan, Stauffer, Colwell & Bayles, Inc., a corporation, their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of shaving cream or any other merchandise manufactured or sold by respondent Carter Products, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> (a) Disparaging the quality or properties of any competing product or products, through the use of false or misleading pictures, depictions or demonstrations either alone or accompanied by oral or written statements.
>
> (b) Representing directly or by implication that pictures, depictions or demonstrations either alone or accompanied by oral or written statements, accurately portray or depict the superiority of any product over competing products when such a portrayal or depiction is not an accurate comparison of such product with competing products.
>
> *And further*, in the advertising, offering for sale, sale, or distribution of "Rise" shaving cream, or any other shaving cream manufactured or sold by respondent Carter Products, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, from misrepresenting the moisture retaining properties of competing shaving creams or otherwise falsely disparaging the quality or merits of competing shaving creams.
>
> *It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondent S. Heagan Bayles in his individual capacity.

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

IN THE MATTER OF

THE READER'S DIGEST ASSOCIATION, INC.

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

Docket C-626. Complaint, Dec. 10, 1963—Decision, Dec. 10, 1963

Consent order requiring publishers of magazines, books, phonograph records, etc., with main office at Pleasantville, N.Y., to cease representing falsely in advertising that their "BEST SELLERS" volume could be obtained "free", "absolutely free", or as a "paid in full gift", etc., when a binding obligation was incurred by persons accepting the book; that their Reader's Digest magazine sold regularly at $4.00 but that because of their profit sharing policy subscribers were entitled to a *greatly reduced price* of only $2.97, and that a subscriber was obligated to continue his subscription and to pay the latter price unless he took affirmative action of cancelling his subscription; and representing falsely on the letterhead of "The Mail Order Credit Reporting Association, Inc." that delinquent accounts had been turned over to an independent collection agency with instructions to take all necessary legal steps to collect amounts due, when the purported collection agency was only a mailing address utilized by respondent.

COMPLAINT

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

PARAGRAPH 1. Respondent The Reader's Digest Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Pleasantville, in the State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the publishing, advertising, offering for sale, sale and distribution of magazines, books, phonograph records and other articles of merchandise to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products when sold, to be shipped from its place of business in the State of New York and from various other sources of supply in the States of Massachusetts and Indiana to purchasers thereof located in various other states of the United States and in the District of Columbia and maintains, and at all times mentioned herein has 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 its business and for the purpose of inducing the sale of its books, respondent has made certain statements and representations by advertisements in magazines and in pamphlets, brochures and other advertising materials disseminated by and through the United States mail to subscribers and others on its own and other mailing lists.

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following excerpts from one five piece mailing packet distributed by the respondent to potential customers:

a. On the mailing envelope in large black print: YOUR COPY OF A MAGNIFICENT NEW BOOK IS

$\boxed{\text{PAID IN FULL}}$

b. On a large, multi-colored advertising piece at the top of the front side in large conspicuous letters: Regular Price $2.73 — YOURS *absolutely* FREE-BEST SELLERS from READER'S DIGEST CONDENSED BOOKS. On the reverse side of this advertising piece: Order your FREE book *Today!*

c. On a large multi-colored cardboard enclosure entitled RESERVATION* CERTIFICATE: a cardboard token with the words PAID IN FULL and the statements IMPORTANT This Paid in Full "Credit" Token reserves a valuable $2.73 volume for you! Please return it promptly to us, placed in the "YES" pocket at right and your FREE Book will be shipped at once. Also appearing on this cardboard enclosure: To Secure your FREE volume, place your "Paid in Full" Token Here. Send $2.73 "BEST SELLERS" Volume *FREE!* and the above-named Reader's Digest Subscriber is entitled to receive the New "Best-Sellers From Reader's Digest Condensed Books" — Regular Price $2.73 — Absolutely FREE!

d. On the top of a two page typed, single spaced letter, in large red printing: Return your "Paid in Full" Credit Token TODAY and you will Receive a Free Copy of a New 576-Page Book, "BEST-SELLERS From READER'S DIGEST CONDENSED BOOKS" — Regular Price $2.73 — *Absolutely FREE!*

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set forth herein, respondent represents and has represented, directly or by implication, that the offer of said book is without limit, restriction or qualification, that no obligation, duty or liability is incurred by persons accepting said book, and that said book is "free," "absolutely free" and a "paid in full gift".

PAR. 6. In truth and in fact:

The offer of said book is not without limit, restriction or qualification, and a very definite and binding obligation, duty or liability is incurred by persons accepting said book, and said book is not "free," "absolutely free" and not a paid in full gift".

Persons receiving said book must agree to become a trial member of Reader's Digest Condensed Books and to accept and pay for subsequent volumes or to affirmatively notify the respondent of cancellation. The only way the proffered "free", "absolutely free book" or "paid in full gift" can be obtained without becoming a trial subscriber to Reader's Digest Condensed Books is by the payment of the regular price of $2.73 plus postage.

In the advertising material described in Paragraph Four, the only reference to or disclosure of the conditions, obligations or other prerequisites to the receipt and retention of said "free," "absolutely free" or "paid in full gift" book is ambiguously and inconspicuously contained in the letter which is one piece of the five piece packet. The remaining pieces of the afore-described mailing packet contain no reference, disclosure or other indication of any conditions, obligations or other pre-requisites to the receipt and retention of the free book.

The conditions, obligations and other pre-requisites to receipt and retention of said "free", "absolutely free" or "paid in full gift" books are, therefore, not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisements or offer might be misunderstood.

Other similar advertising and promotional materials offer said books at nominal amounts instead of "free", such as, "New Condensed Best-Sellers for 2¢ each." Said advertising and promotional materials do not clearly and conspicuously disclose the other conditions, obligations and other pre-requisites to the receipt and retention of the nominally priced book.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. Respondent, for the purpose of inducing the renewal of subscriptions to its magazine, Reader's Digest, has distributed and disseminated to its subscribers, by and through the United States mail, a series of letters and advertising materials containing various representations and statements, of which the following are typical, but not all inclusive:

a. In the initial letter of this series—

ANNOUNCING * * * A Profit-Sharing Plan for Digest Subscribers — with a 26% Reduction in Price! * * * Your present subscription normally would expire about three months from now.

But under the Digest's Continuing Service plan, your subscription will not "expire" at that time. Instead, it will be continued without interruption —

as long as you wish it continued — at a greatly reduced price * * * P.S. — IMPORTANT! If, for some reason, you *do not* wish to continue your subscription for the coming year, would you be good enough to tell us when you receive the statement; simply write "cancel" across it and return it to me, so that I can remove your name from our list of Continuing Subscribers.

Otherwise, you need *do nothing* but pay the $2.97 when the statement arrives — and your subscription will be happily continued, without interruption.

b. In a second letter, which is mailed in an envelope marked from the respondent's "CONTROLLER'S OFFICE" and marked "PROFIT-SHARING STATEMENT ENCLOSED FOR YOUR CONTINUING SUBSCRIPTION."

A few weeks ago I wrote to tell you why you are now entitled to a *greatly reduced price*, because of our profit-sharing policy of Continuing Subscription Service * * *

As I promised you, your present subscription will be continued for the coming year (to the date stamped on the enclosed statement) *at only $2.97*. You save over $1.00 on the regular $4.00 price! * * *

P.S. — If you *do not* wish to continue your Digest for the coming year, would you please write "Cancel" on the enclosed statement and return it to me, so that I can remove your name from our profit-sharing list of Continuing Subscribers?

c. Enclosed with this second letter is a "statement" containing the following:

Please be sure to RETURN THIS CARD with your payment * * * If you have *already* paid, please disregard this notice * * * REGULAR ONE YEAR Price $4.00. PAY THIS AMOUNT ONLY SPECIAL REDUCED PRICE $2.97.

d. Subsequent letters are also mailed in envelopes containing the markings "CONTROLLER'S OFFICE", and "PROFIT-SHARING STATEMENT ENCLOSED FOR YOUR CONTINUING SUBSCRIPTION", and include a "statement" similar to the one previously described in sub-paragraph "c" hereof and a note or letter with statements and representations similar to those previously quoted and described in sub-paragraphs "a" and "b" hereof.

PAR. 8. By and through the use of the above quoted statements, and others of similar import not specifically set out herein, the respondent represented and represents that:

a. The higher stated price set out in said advertisements and materials in connection with the term "regular" is the price at which the subscription is usually and customarily sold by respondent and that the difference between the higher and lower prices represents savings to subscribers from respondent's usual and customary subscription price.

b. The subscriber's subscription to Reader's Digest magazine has already been renewed for another year and that the subscriber is obligated to make the payment of $2.97 unless the subscriber takes the affirmative action of cancelling the subscription.

PAR. 9 In truth and in fact:

a. The higher stated price set out in said advertisements and materials in connection with the term "regular" is not the price at which the subscription is usually and customarily sold by respondent and the difference between the higher and lower prices do not represent savings to subscribers from respondent's usual and customary subscription price.

b. The subscriber's subscription to Reader's Digest has not been renewed for another year and the subscriber is not obligated to make the payment of $2.97 whether or not the affirmative action of cancelling the subscription by notifying the respondent is taken.

Therefore, the statements and representations as set forth in Paragraph Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of its business and for the purpose of inducing the payment of delinquent accounts, respondent has made certain statements and representations through letters and materials sent through the United States mails to deliquent customers who have purchased books or subscribed to Reader's Digest magazine. Said delinquent customers receive a total of 12 mailings, of which 9 are on the letterhead of the respondent, Reader's Digest, and the last three are on the letterhead of The Mail Order Credit Reporting Association, Inc. of 12 West 38th Street, New York 18, New York.

Typical but not all inclusive of the representations and statements contained in said mailings are the following:

A. On mailings using respondent's letterhead:

a. Your account is in the red * * * All it takes is a small check or money order from you — to put it safely in the black again. Your credit is still good, and I'm sure you want to keep it that way * * *.

b. *PLEASE!* * * * pay this past due bill NOW.

c. Your credit standing is worth far more to YOU than this small amount. That is why we are sending you this postage stamp with the POLITE but URGENT REQUEST that you use it to mail your payment in the enclosed envelope— *TODAY.*

d. THE LAST WORD FROM READER'S DIGEST ABOUT YOUR *UNPAID* ACCOUNT * * *

This is the last letter you will receive from Reader's Digest about the small amount which you owe us, and about which we have written many times over a period of months. * * *

We don't like to turn over the names of our members to a collection agency, but we are sure you will agree it is reasonable for us to expect that those who have owed us money for many months will pay it.

* * * We are sure you will agree that we are being scrupulously fair when we send you one more appeal for payment — *before turning over your account to a collection agency.*

This will be done if we do not hear from you within the next fourteen days. Such action as is taken after that date will be out of our hands * * *.

B. On the letterhead of The Mail Order Credit Reporting Association, Inc., 15 West 38th Street, New York 18, New York—

a. We have been notified by one of our members, Reader's Digest Consensed Books, of your failure to pay a past due account. A duplicate of their statement is enclosed. They have engaged us to take whatever legal steps are necessary to secure payment. * * *

b. *SECOND NOTICE*

A duplicate statement of your account with Reader's Digest Condensed Books is enclosed herewith. We have been instructed to take any necessary legal steps to effect collection. * * *

Before we proceed further, we are giving you a final opportunity to make payment. Although the sum involved is small, it is our business to collect our clients' delinquent accounts regardless of size, and we are organized for that purpose. In the event of legal action, you may not be aware that court costs and attorney fees must be paid by the person against whom judgement is rendered. Legal action against you may result in considerable additional expenses to you. If you doubt this statement, we suggest that you consult your own attorney.

In order that you may avoid unnecessary expense, we urge you to send your payment today in the enclosed envelope. * * *

c. *FINAL NOTICE* Your account with Reader's Digest Condensed Books was turned over to us some time ago for collection. * * * This is the last request for payment which we shall send.

* * * We hope it will not be necessary to take legal action. * * *

PAR. 11. By and through the use of the above quoted statements, and others of similar import not specifically set out herein, respondent represented and represents that:

(a) If payment is not made, the delinquent customer's name will be transmitted to a credit rating agency or bureau with the result that said customer's credit rating will be adversely affected.

(b) If payment is not made, the account will be turned over to an independent, bona fide collection agency.

(c) The Mail Order Credit Reporting Association, Inc., is an independent, bona fide collection agency.

(d) The letters and notices with said The Mail Order Credit Reporting Association's name and address thereon are prepared and sent by that agency.

(e) The respondent has turned over to The Mail Order Credit Reporting Association, Inc., the delinquent account of the customer for collection with instructions to take all necessary legal steps to collect the outstanding amount due.

PAR. 12. In truth and in fact:

(a) If payment is not made, the delinquent customer's name is not transmitted to a credit rating agency or bureau with the result that said customer's credit rating is adversely affected. The failure to pay such indebtedness is not reported to any credit rating bureau nor is any record maintained thereof by respondent.

(b) If payment is not made, the account is not turned over to a bona fide independent collection agency.

(c) The Mail Order Credit Reporting Association, Inc., is not an independent, bona fide collection agency.

(d) Letters and notices with said The Mail Order Credit Reporting Association's name and address thereon are not prepared and sent by that agency. Said letters and notices are prepared by the respondent and distributed from its place of business in Pleasantville, New York. Replies to letters bearing The Mail Order Credit Reporting Association, Inc., address are in fact forwarded to the respondent, unopened. The Mail Order Credit Reporting Association, Inc., is only a mail address utilized by the respondent.

(e) The respondent has not turned over to The Mail Order Credit Reporting Association, Inc., the delinquent account of the customer for collection nor has the respondent instructed said Association to take all necessary legal steps to collect the outstanding amount due.

Therefore the statements and representations as set forth in Paragraphs Ten and Eleven hereof were and are false, misleading and deceptive.

PAR. 13. In the conduct of its business and at all times mentioned herein, the respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of magazines, books, phonograph records and other articles of merchandise of the same general kind and nature as that sold by the respondent.

PAR. 14. The use by respondent 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 respondent's products and merchandise, and into the payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitutes, 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a a proposed form of order; and

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

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

1. Respondent The Reader's Digest Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the City of Pleasantville, State of New York.

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

ORDER

It is ordered, That respondent The Reader's Digest Association, Inc., a corporation, and its officer, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of magazines, books, phonograph records or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "free", "absolutely free", "paid in full gift" or any other word or words of similar import or meaning,

to designate or describe articles of merchandise or representing that articles of merchandise are offered at nominal amounts, in advertising or in other offers to the public when all of the conditions, obligations, or other prerequisites to the receipt and retention of the said free or nominally priced articles of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisements or offer might be misunderstood.

2. Using the word "regular", or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business; or otherwise misrepresenting the respondent's usual and customary retail selling price of such merchandise.

3. Representing that any saving is offered in the purchase of merchandise from the respondent unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise was usually and customarily sold by the respondent at retail or at which said merchandise was usually and customarily sold at retail in the trade area involved.

4. Misrepresenting in any manner the savings available to purchasers of respondent's merchandise.

5. Representing, directly or indirectly that:

a. Subscriptions or orders for the aforesaid products or other contractual relationships between respondent and members of the public have been entered, renewed, established, or otherwise effected for any period of time obligating the payment of any sum of money or the performance of any other act in the absence of the direct and expressed agreement of such members of the buying public.

b. Members of the buying public who have not directly and expressly agreed to become indebted to respondent are obligated or liable to pay any amount for goods or services offered for sale or sold by respondent.

6. Representing, directly or indirectly, that delinquent customers' general or public credit ratings will be adversely affected unless respondent in fact refers the information of such delinquency to a separate, bona fide credit rating agency or bureau or other business enterprises.

7. Representing, directly or indirectly, that delinquent accounts will be turned over to an independent, bona fide collec-

tion agency unless respondent in fact turns said accounts over to such agencies.

8. Representing, directly or indirectly, that any organization or trade name owned in whole or in part by respondent or over which respondent exercises operating control is an independent, bona fide collection agency.

9. Representing, directly or indirectly, that letters, notices or other communications which have been prepared or originated by respondent have been prepared or originated by any other person, firm or corporation.

10. Representing, directly or indirectly, that delinquent accounts have been turned over to any person, firm or corporation with instructions to take legal steps to collect the outstanding amount due unless such is the fact.

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

IN THE MATTER OF

SNAP-ON TOOLS CORPORATION

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

Docket 7116. Complaint, Apr. 10, 1958—Decision, Dec. 11, 1963

Order dismissing complaint as directed by the Court of Appeals, Seventh Circuit, of July 30, 1963, 321 F. 2d 825, 7 S.&D. 753; the Commission's order of Nov. 1, 1961, 59 F.T.C. 1035, required respondent manufacturer of mechanics' hand tools and related equipment, to cease forcing its dealers to enter into exclusive dealing agreements.

ORDER DISMISSING COMPLAINT

The United States Court of Appeals for the Seventh Circuit having on July 30, 1963, entered its judgment setting aside the Commission's order to cease and desist and directing the Commission to dismiss its complaint;

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

Complaint

IN THE MATTER OF

RUTH SEGAL ET AL., TRADING AS CAMEO FUR CO., ETC.

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

Docket C-627, Complaint, Dec. 11, 1963—Decision, Dec. 11, 1963

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by failing to label as "Natural", fur products which were not artificially colored; failing, on invoices, to show the true animal name of furs and the country of origin of imported furs, to disclose when fur was bleached or dyed, etc., and to use the terms "Persian Lamb", "Dyed Broadtail-processed Lamb", and "Natural" where required; invoicing fur products deceptively as "Broadtail Lamb"; failing in other respects to comply with labeling and invoicing requirements; and furnishing false guaranties that their fur products were not misbranded, falsely invoiced or falsely advertised.

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 Ruth Segal and Moe Segal, individually and as copartners trading as Cameo Fur Co. and Claire of Cameo, 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. Respondents Ruth Segal and Moe Segal are individuals and copartners trading as Cameo Fur Co. and Claire of Cameo.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 363 Seventh Avenue, New York, New York.

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

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.

(a) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

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

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

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

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

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

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

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

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

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

(b) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

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

PAR. 8. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guarantied would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices 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. Respondents Ruth Segal and Moe Segal are individuals and copartners trading as Cameo Fur Co. and Claire of Cameo.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 363 Seventh Avenue, New York, New York.

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 Ruth Segal and Moe Segal individually and as copartners trading as Cameo Fur Co. and Claire of Cameo or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder on one side of the labels affixed to fur products.

4. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

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

B. Falsely or deceptively invoicing fur products by:

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

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

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

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

5. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

6. Failing to set forth on invoices the item number or mark assigned to fur products.

It is further ordered, That respondents Ruth Segal and Moe Segal, individually and as copartners trading as Cameo Fur Co. and Claire of Cameo, or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

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

IN THE MATTER OF

ROBART'S FURRIERS, 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-628. Complaint, Dec. 11, 1963—Decision, Dec. 11, 1963

Consent order requiring retail furriers in Hartford, Conn., to cease violating the Fur Products Labeling Act by failing to disclose on labels and invoices the true animal name of furs and when fur was artificially colored; labeling fur products with the name of another animal than that producing the fur; failing to show the country of origin of imported furs on invoices; failing in other respects to comply with labeling and invoicing requirements; making pricing claims in newspaper advertising without keeping the required records; removing the original labels prior to ultimate sale of fur products; and substituting nonconforming labels for those originally affixed to fur products while failing to keep the records required.

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 Robart's Furriers, Inc., a corporation, and William Weinbaum, Helaine Weinbaum, Goldine Weinbaum and Maurice M. Weinbaum, individually and as officers of said corporation hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Robart's Furriers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut.

Respondents William Weinbaum, Helaine Weinbaum, Goldine Weinbaum, and Maurice M. Weinbaum are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 84 Pratt Street, formerly doing business at 66 Pratt Street, in the City of Hartford, State of Connecticut.

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 furs which have 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 in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

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

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 4. Certain of said fur products were misbranded in that labels attached thereto, set forth the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 4(3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

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

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

(b) Trade names, coined names, or other names or words descriptive of a fur as being the fur of an animal which is in fact fictitious or nonexistent were used on labels, in violation of Rule 11 of the Rules and Regulations.

(c) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

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

(f) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of the said Rules and Regulations.

(g) 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.

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

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

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

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

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

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that required item numbers were not set forth on invoices in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Respondents advertised certain of said fur products for sale through the use of certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products.

Among and included in the aforesaid advertisements, but not limited thereto, were certain advertisements of respondents which appeared in issues of the Hartford Courant, a newspaper published in the City of Hartford, State of Connecticut.

In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations 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 pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 9. Respondents have removed and have caused and participated in the removal of, prior to the time fur products subject to the provisions of the Fur Products Labeling Act were sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products in violation of Section 3(d) of said Act.

PAR. 10. Respondents in introducing, selling, advertising, offering for sale in commerce, and in processing for commerce, for products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, have misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of the said Act, in violation of Section 3(e) of the said Act.

PAR. 11. Respondents in substituting labels as provided in Section 3(e) of the Fur Products Labeling Act have failed to keep and preserve the records required, in violation of said Section 3(e) and Rule 41 of the Rules and Regulations promulgated under the said Act.

PAR. 12. 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 determine 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, Robart's Furriers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 84 Pratt Street, in the City of Hartford, State of Connecticut.

Respondents William Weinbaum, Helaine Weinbaum, Goldine Weinbaum, and Maurice M. Weinbaum, 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 respondents Robart's Furriers, Inc., a corporation and its officers, and William Weinbaum, Helaine Weinbaum, Goldine Weinbaum, and Maurice M. Weinbaum, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of 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 the terms, "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

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

3. Setting forth on labels attached to fur products the name or names of any animal or animals other than the name of the animal producing the fur contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

4. Failing to set forth the term "natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

5. Setting forth trade names, coined names, or other names or words descriptive of a fur as being fur of an animal which is in fact fictitious or nonexistent.

6. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder on one side of the labels affixed to the fur products.

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

8. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and

Regulations promulgated thereunder in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

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

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

B. Falsely and deceptively invoicing fur products by:

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

2. Failing to set forth on invoices the item number or mark assigned to fur products.

C. 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 respondents Robart's Furriers, Inc., a corporation and its officers, and William Weinbaum, Helaine Weinbaum, Goldine Weinbaum and Maurice M. Weinbaum, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device do forthwith cease and desist except as provided in Section 3(e) of the Fur Products Labeling Act, from removing, or causing or participating in the removal of, prior to the time any fur product subject to the provisions of the Fur Products Labeling Act is sold and delivered to the ultimate consumer, any label required by the said Act to be affixed to such fur product.

It is further ordered, That respondents Robart's Furriers, Inc., a corporation and its officers, and William Weinbaum, Helaine Weinbaum, Goldine Weinbaum, and Maurice Weinbaum, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from:

A. Misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

B. Failing to keep and preserve the records required by the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in substituting labels as permitted by Section 3(e) of the said Act.

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

IN THE MATTER OF

GREANS, 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-629. Complaint, Dec. 11, 1963—Decision, Dec. 11, 1963

Consent order requiring retail furriers in Norfolk, Va., to cease violating the Fur Products Labeling Act by representing, in labeling and advertising, prices of fur products as reduced from higher prices which were, in fact, fictitious; failing, in newspaper advertising, to show the true animal name of fur used in fur products; representing falsely, in such advertising, that fur products on sale were "from our exclusive fur collection by OLEG CASSINI", failing to use the term "Natural" for fur products which were not artificially colored, failing to comply with other advertising requirements; and failing to keep adequate records as a basis for pricing 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 Greans, Inc., a corporation, and Barney B. Brittman, Fanny B. Cohen, Jack Cohen and Blanche C. Brittman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Greans, Inc., is a corporation organized, existing and doing business under the laws of the Commonwealth of Virginia. Respondents Barney B. Brittman, Fanny B. Cohen, Jack Cohen and Blanche C. Brittman are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 113 College Place, Norfolk, Virginia.

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 furs which have 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 violation of Section 4(1) of the Fur Products Labeling Act in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified in that labels affixed to fur products, contained representations, either directly or by implication that the prices of such fur products were reduced from the prices at which respondents regularly and usually sold such fur products in the recent regular course of business and the amount of such purported reduction constituted savings to purchasers of respondents' products when, in fact, the so-called regular or usual prices were fictitious in that they were not the prices at which such fur products were regularly and usually sold by the respondents in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents' said fur products, as represented.

PAR. 4. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of the Virginian Pilot, a newspaper published in the City of Norfolk, State of Virginia.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the true animal name of the fur used in the fur product.

PAR. 5. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in violation of Section 5(a) (5) of the Fur Products Labeling Act by representing, directly or by implication through such statements as "Save $200— An outstanding value from our exclusive fur collection by OLEG CASSINI luxurious styled Autumn Haze Mink Stoles" that the fur products advertised and offered for sale were manufactured, created, designed or styled by said Oleg Cassini, when in fact the majority of fur products thus advertised and offered for sale were not manufactured, created, designed or styled by the said Oleg Cassini.

PAR. 6. By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from regular or usual retail prices and that the amount of such price reductions afforded savings to the purchasers of respondents' products, when the so-called regular or usual retail prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 7. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(b) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 8. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by implication that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 9. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations 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 pricing claims and representations were based, in violation of Rule 44(e) of the 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 Greans, Inc., is a corporation organized, existing and doing business under the laws of the Commonwealth of Virginia, with its office and principal place of business located at 113 College Place, Norfolk, Virginia.

Respondents Barney B. Brittman, Fanny B. Cohen, Jack Cohen and Blanche C. Brittman 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.

ORDERS

It is ordered, That respondents Greans, Inc., a corporation, and its officers and Barney B. Brittman, Fanny B. Cohen, Jack Cohen and Blanche C. Brittman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of 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 the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail by respondents at such price in the recent past.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondent's products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondents' fur products are reduced.

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

1. 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.

2. Represents, directly or by implication that any of their fur products were manufactured, created, designed or styled by Oleg Cassini or any other person unless such fur products were manufactured, created, designed or styled by Oleg Cassini or such other person.

3. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

4. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

5. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondents in the recent past.

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

7. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

D. 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

RODDER'S MADEMOISELLE ET AL.

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

Docket C-630. Complaint, Dec. 11, 1963—Decision, Dec. 11, 1963

Consent order requiring retail furriers in Fresno, Calif., to cease violating the Fur Products Labeling Act by failing, in invoicing and newspaper advertising, to show the true animal name of fur used in fur products and the country of origin of imported furs; failing, in invoicing, to disclose when fur was artificially colored, using the term "Mink" for Japanese Mink, using "Broadtail" deceptively, and failing to use the terms "Dyed Broadtail-processed Lamb" and "Natural" as required on invoices; setting forth the name of an animal other than that producing certain furs, failing to use the term "Natural" where required, and representing prices falsely as reduced by making such statements as "Save at least 25%", in advertising; failing to comply with other invoicing and advertising requirements; and failing to maintain adequate records as a basis for pricing 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 Rodder's Mademoiselle, a corporation, and Abraham L. Rodder and Samuel E. Rodder, individually and as officers of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rodder's Mademoiselle is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents Abraham L. Rodder and Samuel E. Rodder are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 1045 Fulton Street, Fresno, California.

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 furs which have been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

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

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

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

PAR. 4. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Mink" when in fact the fur contained in such products was Japanese Mink and fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

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

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

(b) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on invoices 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.

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements which appeared in issues of the Fresno Bee, a newspaper published in the city of Fresno, State of California.

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

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

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

PAR. 7. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in that such advertisements set forth the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 8. In advertising fur products for sale as aforesaid respondents represented through such statements as "Save at least 25%" that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 10. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations 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 pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

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

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rodder's Mademoiselle is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1045 Fulton Street, Fresno, California.

Respondents Abraham L. Rodder and Samuel E. Rodder are officers of the corporate respondent and their address is the same as that of corporate respondent.

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

ORDER

It is ordered, That respondents Rodder's Mademoiselle, a corporation, and its officers and Abraham L. Rodder and Samuel E. Rodder, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of 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 the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

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

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or

designation of the animal or animals that produced the fur contained in such fur product.

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

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

5. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

6. Failing to set forth separately information required under Section 5(b)(1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

B. 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 any fur product and which:

1. 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.

2. Sets forth the name or names of any animal or animals other than the name of the animal producing the furs contained in the fur product as specified in the Fur Products Name Guide and as prescribed by the Rules and Regulations.

3. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such fur products are not reduced to afford to purchasers the percentage of savings stated.

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

5. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

6. Sets forth information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

7. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

C. 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

GENERAL RECREATION INDUSTRIES, INC., ET AL.

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

Docket C-631. Complaint, Dec. 11, 1963—Decision, Dec. 11, 1963

Consent order requiring Minneapolis, Minn., manufacturers of sleeping bags to cease attaching fictitious price labels to their sleeping bags, and distributing to retailers and others catalogs containing excessive "list prices", represented thereby as usual retail selling prices; and misrepresenting the size of the bags by giving, on attached labels and in catalogs, the "cut size", which was larger than the actual size.

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 General Recreation

Industries, Inc., a corporation, and Morton G. Brown, Emanuel M. Green, Myron B. Green, Sol Kronick and Herschal Wolpert, 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 General Recreation Industries, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its principal office and place of business located at 29 Main Street, S.E., Minneapolis 14, Minnesota.

Respondents Morton G. Brown, Emanuel M. Green, Myron B. Green, Sol Kronick and Herschal Wolpert 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 manufacturing, advertising, offering for sale, sale and distribution of sleeping bags 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 State of Minnesota to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of using fictitious prices in connection therewith, and misrepresenting the size of said products, by various methods and means, typical but not all inclusive of which are the following:

(a) By attaching, or causing to be attached tickets or tags to their said sleeping bags upon which a certain amount is printed and, by distributing, or causing to be distributed, to retailers, and others, catalogs describing, among other things, respondents' sleeping bags and containing a stated price of each, thereby representing, directly or by implication, that the amounts so stated are the usual and regular retail price of said sleeping bags. Among and typical of the statements on the price tickets or tags attached thereto are the following:

$11.50, $13.95, $15.95, $19.95, $21.95, $29.95, $34.50 and $55.00

Among and typical of the statements in that connection contained in respondents' recent catalog are the following:

List Price: $11.50,	List Price: $34.00,
List Price: $13.95,	List Price: $34.50,
List Price: $15.95,	List Price: $36.95,
List Price: $18.00,	List Price: $37.50,
List Price: $19.95,	List Price: $38.95,
List Price: $21.50,	List Price: $39.50,
List Price: $22.50,	List Price: $40.75,
List Price: $22.95,	List Price: $42.00,
List Price: $24.00,	List Price: $42.50,
List Price: $26.50,	List Price: $44.00,
List Price: $27.50,	List Price: $45.00,
List Price: $29.95,	List Price: $48.75,
List Price: $32.00,	List Price: $55.00,
	List Price: $60.50

In the manner aforesaid, through stating a specified price and also by using the word "List Price" followed by a specified price in their catalogs, and otherwise, respondents represented, and now represent, that said amounts were and are the prices at which the merchandise referred to were and are usually and customarily sold at retail.

In truth and in fact, the amounts stated on the tickets, tags or labels and those set out in connection with the word "List Price" in their catalogs, and otherwise, were not the prices at which the merchandise referred to was usually and customarily sold at retail in the trade areas where such representations were and are made, but are in excess of prices at which said merchandise generally sells at retail in some of the trade areas where the representations were and are made.

(b) By attaching, or causing to be attached, labels to their sleeping bags stating the "cut size" of the sleeping bags, which is larger than the actual size of the bag in question. Although the "approx. fin. size" followed by a listing of dimension therefor currently appears on labels being used and attached to said sleeping bags, the same does not appear in immediate conjunction with the wording "cut size". Further respondents list the "cut size" only in their catalogs describing their said sleeping bags and the dimensions listed therein are almost invariably larger than the actual size of the bag described. The term "cut size" when used in the manner alleged above, is confusing and tends to indicate that such description is the actual size of the finished products. In the manner aforesaid respondents represent that the dimension of the sleeping bag following the words "cut size" is the actual size of the sleeping bag.

In truth and in fact the actual size of the finished product is smaller than the size set out on the label or in the catalog following the words "cut size".

Therefore, the statements and representations and acts and practices set forth above are false, misleading and deceptive.

PAR. 5. By the aforesaid statements, representations, acts and practices respondents place in the hands of the uninformed or unscrupulous retailers means and instrumentalities by and through which they may mislead the public as to the usual and regular price of and the size of said products.

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

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead 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. 8. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent General Recreation Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 29 Main Street, S.E., in the City of Minneapolis 14, State of Minnesota.

Respondents Morton G. Brown, Emanuel M. Green, Myron B. Green, Sol Kronick and Herschal Wolpert 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 respondents General Recreation Industries, Inc., a corporation, and its officers, Morton G. Brown, Emanuel M. Green, Myron B. Green, Sol Kronick and Herschal Wolpert, individually and as officers of said corporation, their agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacture, offering for sale, sale or distribution of sleeping bags or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, labeling, representing in a catalog or otherwise representing the "cut", "cut size" or dimensions of material used in their construction, unless such representation is accompanied by a description of the finished or actual size, in immediate conjunction therewith with the latter description being given at least equal prominence;

2. Misrepresenting the size of such products on labels or in any other manner;

3. The act or practice of preticketing merchandise at an indicated retail price, when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the

trade area, or when there is no generally prevailing retail price for such merchandise in the trade area;

4. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and regular retail price of, or the size of respondents' merchandise;

5. Putting any plan into operation through the use of which retailers or others may misrepresent the usual and regular retail price of, or the size of respondents' merchandise;

6. Using the term "list price" or any other words or terms of similar import, to refer to price of merchandise unless such amounts are the prices at which the merchandise is usually and customarily sold in the trade area in which such representations are made, or otherwise misrepresenting the usual and customary retail price or prices of respondents' merchandise in any trade area.

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

NATIONAL PARTS WAREHOUSE ET AL.

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

Docket 8039. Complaint, July 12, 1960—Decision, Dec. 16, 1963

Order requiring a limited partnership—organized in 1956 by its manager and the auto parts jobber stockholders in two membership corporations which had been operated as bookkeeping devices to obtain lower prices from auto parts suppliers and which it took over—along with its manager and 55 auto parts jobber members, to cease discriminating in price in violation of Sec. 2(f) of the Clayton Act by knowingly inducing or accepting from seller suppliers a lower net price than that at which the suppliers sold to the jobber members' competitors; and maintaining respondent warehouse as an instrumentality for inducing or receiving from suppliers discounts which resulted in a net price below that which the suppliers charged their competitors.

COMPLAINT *

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more

* Reported as amended by Hearing Examiner's order of June 11, 1962.

particularly designated and described, have violated and are now violating the provisions of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent National Parts Warehouse, hereinafter sometimes referred to as respondent N.P.W., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 308 Whitehall Street, S.W., Atlanta, Georgia.

Respondent N.P.W., although utilizing partnership form, is a membership organization, organized, maintained, managed, controlled, and operated by and for its members. The membership of respondent N.P.W. is composed of corporations, partnerships, and individuals whose business consists of the jobbing of automotive products and supplies.

Respondent N.P.W., as constituted and operated, is known and referred to in the trade as a buying group.

Respondent Bryant M. Smith, Sr., is the manager and general partner of respondent N.P.W. with his office and principal place of business located at 308 Whitehall Street, S.W., Atlanta, Georgia.

PAR. 2. The following respondent corporations and individuals, sometimes hereinafter referred to as respondent jobbers, in association with respondent Bryant M. Smith, Sr., constitute respondent N.P.W.:

Respondent Auto Machine and Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 301 East Bay Street, Savannah, Georgia.

Respondent Arnau Tire and Accessory Co., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 222 South Jefferson Street, Dublin, Georgia.

Respondent Appalachian Auto Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1902 University Avenue, N.W., Knoxville, Tennessee.

Respondent Mrs. George H. Ridgeway is a sole proprietor doing business under the firm name and style of Madison Auto Supply Co., with her principal office and place of business located at Madison, Georgia.

Respondent Moyer Auto Parts, Inc., a corporation, with its principal place of business located at 212 W. Broad Street, Griffin, Georgia;

Respondent Auto Parts Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located at Market and Island Streets, Kingsport, Tennessee.

Respondent Auto Parts and Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 116–118 S. College Street, Lebanon, Tennessee.

Respondent Brunswick Auto Parts Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 1217 Newcastle Street, Brunswick, Georgia.

Respondent Bessemer Auto Parts, Inc., is a corporation organized. existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 630 North 20th Street, Bessemer, Alabama.

Respondent Buchanan-Lyon Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at Cambellsville, Kentucky.

Respondent Barnes Motor and Parts Co., Inc., 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 315 East Barnes Street, Wilson, North Carolina.

Respondent Battery and Electric Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at 300 Buncombe Street, Greenville, South Carolina.

Respondents L. R. Wells, and W. F. Wells, are copartners doing business under the firm name and style of Cairo Auto Supply Co., with their principal office and place of business located at Cairo, Georgia.

Respondent Cains' Parts and Service Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at Lake Wales, Florida.

Respondent Condrey Motor Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 3300 W. Clay Street, Richmond, Virginia.

Respondent Cottle's Auto Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at Tallassee, Alabama.

Respondents A. Macina and J. Follo, are copartners doing business under the firm name and style of Court Square Auto Parts, with their principal office and place of business located at 640 Court Street, Clearwater, Florida.

Respondent Bluefield Supply Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, doing business under the firm name and style of Counts Automotive Supply Company, with its principal office and place of business located at 229 Bluefield Avenue, Bluefield, West Virginia.

Respondent E'town Distributing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 712 East Dixie Avenue, Elizabethtown, Kentucky.

Respondent Dickson Auto Supply, Inc., 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 316 East Marion Street, Shelby, North Carolina.

Respondent I. N. Kohorn is a sole proprietor doing business under the firm name and style of Dixie Auto Parts Co., with his principal office and place of business located at 109 N. Warren Street, Mobile, Alabama.

Respondent The Fergerson Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 1000 Broadway, Paducah, Kentucky.

Respondents George M. Greer, Barney Nation and Mrs. George M. Greer, are copartners doing business under the firm name and style of Greer Auto Supply Company, with their principal office and place of business located at 524 Main Street, Cedartown, Georgia.

Respondent Genuine Auto Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 230 Molton Street, Montgomery, Alabama.

Respondent Gadsden Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal offices and place of business located at 111-117 East Broad Street, East Gadsden, Alabama.

Respondent General Auto Supplies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 219 East Market Street, New Albany, Indiana.

Respondent Jordan Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 226 E. Third Street, Lexington, Kentucky.

Respondent Lakeland Battery and Auto Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 107 West Main Street, Lakeland, Florida.

Respondent George O. Franklin, III, a sole proprietor doing business under the firm name and style of Metter Auto Supply Co., with his principal office and place of business located at Metter, Georgia.

Respondents A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon, and Miriam Grey Bowling are copartners doing business under the firm name and style of Motor Bearings and Supply Co., with their principal office and place of business located at 116 S. St. Andrews Street, Dothan, Alabama.

Respondent Morgan Supply Co., Inc., a corporation, with its principal place of business located at 780 Gordon Street, S. W., Atlanta, Georgia;

Respondent B. H. Fenn, is a sole proprietor doing business under the firm name and style of Millville Auto Parts, with his principal office and place of business located at 2708 E. 5th Street, Panama City, Florida.

Respondent The Megahee-Speight Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 336 West Jackson Street, Thomasville, Georgia.

Respondent Motor Supply Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South

Carolina, with its principal office and place of business located at 918-24 Gervais Street, Columbia, South Carolina.

Respondent McLean Auto Supply 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 114 Roper Street, Laurinburg, North Carolina.

Respondent T. Felton Millians, is a sole proprietor doing business under the firm name and style of Newman Auto Supply, with his principal office and place of business located at 21 East Washington Street, Newman, Georgia.

Respondent, Pensacola Automotive Supply Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 212 West Intendencia, Pensacola, Florida.

Respondent Piston Ring and Supply Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 1511 Tampa Street, Tampa, Florida.

Respondent Parts Supply Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at Orangeburg, South Carolina.

Respondent Barney R. Riner, is a sole proprietor doing business under the firm name and style of Riner Radiator and Battery Co., with his principal office and place of business located at 116 Jernigan Street, Sandersville, Georgia.

Respondents George Stuckey, James Stuckey and Dexter Stuckey, are copartners doing business under the firm name and style of Stuckey Brothers Parts Co., with their principal office and place of business located at Hemingway, South Carolina.

Respondent Guy Fumbanks, is a sole proprietor doing business under the firm name and style of Standard Auto Supply, with his main office and place of business located at McKenzie, Tennessee.

Respondents R. S. Woodham and W. P. Woodham, are copartners doing business under the firm name and style of Tallahassee Auto Parts Company, with their principal office and place of business located at 1441 South Monroe Street, Tallahassee, Florida.

Respondent Tanner Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2550 Anderson Avenue, Fort Myers, Florida.

Respondent White Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, doing business under the firm name and style of White Electric and Battery Service, with its principal office and place of business located at 118 N. W., 8th Avenue, Gainsville, Florida.

Respondents Calhoun H. Young, and Ruth C. Young, are copartners doing business under the firm name and style of Young Parts and Supply Co., with their principal office and place of business located at 834 N. W., 10th Terrace, Fort Lauderdale, Florida.

Respondent MacGregor Flanders is a sole proprietor doing business under the firm name and style of Flanders Parts Company, with his principal office and place of business located at 303 Maple Street, Carrollton, Georgia.

Respondent M. S. Church Auto Parts Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 322 N. Second Street, Pulaski, Tennessee.

Respondents A. C. Craig and J. A. Craig, are copartners doing business under the firm name and style of Craig Supply Co., with their principal office and place of business located at 103 University Avenue, Tuscaloosa, Alabama.

Respondent Hyatt Parts and Supply Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 439 S. Green Street, Gainesville, Georgia.

Respondent Marianna Auto Parts & Supply Co., a corporation with its principal place of business located at 502 East Lafayette Street, Marianna, Florida.

Respondents Wendell Frazier, Norris Frazier and Winston C. Nunn, are copartners doing business under the firm name and style of Nunn Auto Supply Co., with their principal office and place of business located at 121 East Main Street, Glasgow, Kentucky.

Respondent Thompson Auto Supply Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 122 Hardy Street, Hattiesburg, Mississippi.

Respondent Wood's Automotive, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at Wall and Franklin Streets, Natchez, Mississippi.

Respondent Huggins Motor Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 15-5th Street, N., St. Petersburg, Florida.

PAR. 3. The respondent jobbers set forth in Paragraph Two have purchased and now purchase in commerce from suppliers engaged in commerce numerous automotive products and suppliers for use, consumption, or resale within the United States. Respondent Jobbers and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several states of the United States from the respective state or states of location of said suppliers to the respective different state or states of location of the said respondent jobbers. Respondent jobbers and said suppliers are therefore engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 4. In the purchase and the resale of said automotive products and supplies, respondent jobbers are in active competition with independent jobbers not affiliated with respondent N.P.W.; and the suppliers selling to respondent jobbers and to their independent competitors are in active competition with other suppliers of similar automotive products and supplies.

PAR. 5. Respondent N.P.W. since its formation in 1956, has been, and is now, maintained, managed and operated by its general partner and manager, respondent Bryant M. Smith, Sr., for the respondent jobbers set forth in Paragraph Two and each respondent has participated in, approved, furthered, or cooperated with the other respondents in the carrying out of the procedures and activities hereinafter described.

In practice and effect, respondent N.P.W. has been, and is now, serving as the medium or instrumentality by, through, or in conjunction with, which said respondent jobbers exert the influence of their combined bargaining power on the competitive suppliers hereinbefore described. As a part of their operating procedure, said respondent jobbers direct the attention of said suppliers to their aggregate purchasing power as a buying group and, by reason of such, have knowingly demanded and received, upon their individual purchases, discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale. Suppliers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them in favor of such suppliers as can be, and are, induced to afford the discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale so demanded

Respondent jobbers demand that those suppliers who sell their products pursuant to a quantity discount schedule shall consider their serveral purchases in the aggregate as if made by one purchaser and grant quantity discounts, allowances, or rebates on the resultant combined purchase volume in accordance with said suppliers' schedules. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers whose quantity discounts, allowances, or rebates from such suppliers are based upon only their individual purchase volumes. From other suppliers the respondent jobbers demand the payment or allowance of trade discounts, allowances, or rebates which such suppliers do not ordinarily pay or allow to jobber customers. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers who are not afforded such trade discounts, allowances, or rebates.

When and if a demand is acceded to by a particular supplier, the subsequent purchase transactions between said supplier and the individual jobber respondents have been and are billed to, and paid for through, the aforesaid organizational device of respondent N.P.W. Under such circumstances said organization thus purports to be the purchaser when in truth and in fact it has been, and is now, serving as an agent for the several respondent jobbers and as a means for facilitating the inducement and receipt by the aforedescribed respondent jobbers of the price discriminations concerned.

PAR. 6. Respondents have induced or received from their suppliers, in the manner afore-described, favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew or should have known constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 7. The effect of the knowing inducement or receipt by respondents of the discriminations in price, as above alleged, has been, and may be, substantially to lessen, injure, destroy, or prevent competition between suppliers of automotive products and supplies granting such discriminations and other suppliers of such products and supplies, who do not grant or allow such discriminations, and also between respondent jobbers and competing independent jobbers not receiving or securing such discriminations.

PAR. 8. The foregoing alleged acts and practices of respondents in knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, are in violation of subsection (f) of Section 2 of said Act.

Mr. Richard B. Mathias, *Mr. John Perry*, and *Mr. Eldon P. Schrup* supporting the complaint.

Mellitz & Frank, St Louis, Mo., by *Mr. Bernard Mellitz* and *Mr. Malcolm I. Frank*, for the respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JUNE 12, 1962

The Federal Trade Commission issued its complaint against the respondents on July 12, 1960, charging that respondents have induced or received from their suppliers favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew, or should have known, constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended; and that such acts and practices of respondents were in violation of subsection (f) of Section 2 of said Act. Respondents' answers denied generally the allegations of the complaint, although some factual allegations were admitted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answers, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondents and by counsel supporting the complaint and oral argument thereon. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent National Parts Warehouse, hereinafter sometimes referred to as N.P.W., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 1260 Kennedy Road, Forrest Park, Georgia.

2. The limited partners of respondent N.P.W. are corporations, individuals doing business as copartners, and other individuals whose business consists of the jobbing of automotive products and supplies, and the general partner is a former automotive jobber. N.P.W. is a successor organization to a corporation, Automotive Parts Distributors, Inc., which was a bookkeeping organization, buying in its name for the benefit of its stockholders and doing no warehousing. At the time of the formation of N.P.W., the partners were the former stockholders of Automotive Parts Distributors, Inc., and the partnership acquired the assets and liabilities of the corporation and took over its operation.

3. At the time of the issuance of the complaint in this proceeding the partners of N.P.W. were:

Respondent Bryant M. Smith, Sr., the manager and general partner of respondent National Parts Warehouse, with his office and principal place of business located at 1260 Kennedy Road, Forrest Park, Georgia.

Respondent Auto Machine and Parts Co., Inc., a Georgia corporation, with its principal office and place of business located at 301 East Bay Street, Savannah, Georgia.

Respondent Arnau Tire and Accessory Co., a Georgia corporation, with its principal office and place of business located at 222 South Jefferson Street, Dublin, Georgia.

Respondent Appalachian Auto Parts Co., Inc., a Tennessee corporation, with its principal office and place of business located at 1902 University Avenue, N.W., Knoxville, Tennessee.

Respondent Mrs. George H. Ridgeway, a sole proprietor doing business under the firm name and style of Madison Auto Supply Co., with her principal office and place of business located at Madison, Georgia.

Respondent Moyer Auto Parts, Inc., a corporation, with its principal place of business located at 212 W. Broad Street, Griffin, Georgia, which was erroneously identified in the complaint as a partnership composed of Robert A. Moyer, Mrs. Helen F. Moyer, and Harry D. Baker, copartners doing business under the firm name and style of Auto Parts and Supply Company, with their principal office and place of business located at 212 W. Broad Street, Griffin, Georgia.

Respondent Auto Parts Company, Inc., a Tennessee corporation, with its principal office and place of business located at Market and Island Streets, Kingsport, Tennessee.

Respondent Auto Parts and Service Company, Inc., a Tennessee corporation, with its principal office and place of business located at 116–118 S. College Street, Lebanon, Tennessee.

Respondent Brunswick Auto Parts Company, a Georgia corporation, with its principal office and place of business located at 1217 Newcastle Street, Brunswick, Georgia.

Respondent Bessemer Auto Parts, Inc., an Alabama corporation, with its principal office and place of business located at 630 North 20th Street, Bessemer, Alabama.

Respondent Buchanan-Lyon Company, a Kentucky corporation, with its principal office and place of business located at Campbellsville, Kentucky.

Respondent Barnes Motor and Parts Co., Inc., a North Carolina corporation, with its principal office and place of business located at 315 East Barnes Street, Wilson, North Carolina.

Respondent Battery and Electric Co., Inc., a South Carolina corporation, with its principal office and place of business located at 300 Buncombe Street, Greenville, South Carolina.

Respondents L. R. Wells and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co., with their principal office and place of business located at Cairo, Georgia.

Respondent Cains' Parts and Service Co., a Florida corporation, with its principal office and place of business located at Lake Wales, Florida.

Respondent Condrey Motor Parts, Inc., a Virginia corporation, with its principal office and place of business located at 3300 W. Clay Street, Richmond, Virginia.

Respondent Cottle's Auto Supply, Inc., an Alabama corporation, with its principal office and place of business located at Tallassee, Alabama.

Respondents A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts, with their principal office and place of business located at 640 Court Street, Clearwater, Florida.

Respondent Bluefield Supply Company, a West Virginia corporation, doing business under the firm name and style of Counts Automotive Supply Company, with its principal office and place of business located at 229 Bluefield Avenue, Bluefield, West Virginia.

Respondent E'town Distributing Company, Inc., a Kentucky corporation, with its principal office and place of business located at 712 East Dixie Avenue, Elizabethtown, Kentucky.

Respondent Dickson Auto Supply, Inc., a North Carolina corporation, with its principal office and place of business located at 316 East Marion Street, Shelby, North Carolina.

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Respondent I. N. Kohorn, a sole proprietor doing business under the firm name and style of Dixie Auto Parts Co., with his principal office and place of business located at 109 N. Warren Street, Mobile, Alabama.

Respondent The Fergerson Company, Inc., a Kentucky corporation, with its principal office and place of business located at 1000 Broadway, Paducah, Kentucky.

Respondents George M. Greer, Barney Nation and Mrs. George M. Greer, copartners doing business under the firm name and style of Greer Auto Supply Company, with their principal office and place of business located at 524 Main Street, Cedartown, Georgia.

Respondent Genuine Auto Parts Co., Inc., an Alabama corporation, with its principal office and place of business located at 230 Molton Street, Montgomery, Alabama.

Respondent Gadsden Auto Parts, Inc., an Alabama corporation, with its principal office and place of business located at 111–117 East Broad Street, East Gadsden, Alabama.

Respondent General Auto Supplies, Inc., and Indiana corporation, with its principal office and place of business located at 219 East Market Street, New Albany, Indiana.

Respondent Jordan Auto Parts, Inc., a Kentucky corporation, with its principal office and place of business located at 226 E. Third Street, Lexington, Kentucky.

Respondent Lakeland Battery and Auto Supply, Inc., a Florida corporation, with its principal office and place of business located at 107 West Main Street, Lakeland, Florida.

Respondent George O. Franklin, III, a sole proprietor doing business under the firm name and style of Metter Auto Supply Co., with his principal office and place of business located at Metter, Georgia, which firm was identified in the complaint as respondent Mrs. Katherine B. Franklin, Executrix of the estate of George O. Franklin, Jr., a sole proprietor doing business under the firm name and style of Matter Auto Supply Co., with her principal office and place of business located at Metter, Georgia.

Respondents A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon, and Miriam Grey Bowling, copartners doing business under the firm name and style of Motor Bearings and Supply Co., with their principal office and place of business located at 116 S. St. Andrews Street, Dothan, Alabama.

Respondent Morgan Supply Co., Inc., a corporation with its principal place of business located at 780 Gordon Street, S.W., Atlanta, Georgia, which was identified in the complaint as Dewey M. Morgan, a sole proprietor doing business under the firm name and style of Morgan Supply Co., with his principal office and place of business located at 780 Gordon Street, S.W., Atlanta, Georgia.

Respondent B. H. Fenn, a sole proprietor doing business under the firm name and style of Millville Auto Parts, with his principal office and place of business located at 2708 E. 5th Street, Panama City, Florida.

Respondent The Megahee-Speight Co., a Georgia corporation, with its principal office and place of business located at 336 West Jackson Street, Thomasville, Georgia.

Respondent Motor Supply Company, Inc., a South Carolina corporation, with its principal office and place of business located at 918–24 Gervais Street, Columbia, South Carolina.

Respondent McLean Auto Supply Company, a North Carolina corporation, with its principal office and place of business located at 114 Roper Street, Laurinburg, North Carolina.

Respondent T. Felton Millians, a sole proprietor doing business under the firm name and style of Newnan Auto Supply, with his principal office and place of business located at 21 East Washington Street, Newnan, Georgia.

Respondent Pensacola Automotive Supply Co., a Florida corporation, with its principal office and place of business located at 212 West Intendencia, Pensacola, Florida.

Respondent Piston Ring and Supply Co., Inc., a Florida corporation, with its principal office and place of business located at 1511 Tampa Street, Tampa, Florida.

Respondent Parts Supply Company, a South Carolina corporation, with its principal office and place of business located at Orangeburg, South Carolina.

Respondent Barney R. Riner, a sole proprietor doing business under the firm name and style of Riner Radiator and Battery Co., with his principal office and place of business located at 116 Jernigan Street, Sandersville, Georgia.

Respondents George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co., with their principal office and place of business located at Hemingway, South Carolina.

Respondent Guy Fumbanks, a sole proprietor doing business under the firm name and style of Standard Auto Supply, with his main office and place of business located at McKenzie, Tennessee.

Respondents R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company, with their principal office and place of business located at 1441 South Monroe Street, Tallahassee, Florida.

Respondent Tanner Auto Parts, Inc., a Florida corporation, with its principal office and place of business located at 2550 Anderson Avenue, Fort Myers, Florida.

Respondent White Stores, Inc., a Florida corporation, doing business under the firm name and style of White Electric and Battery Service, with its principal office and place of business located at 118 N.W., 8th Avenue, Gainsville, Florida.

Respondents Calhoun H. Young and Ruth C. Young, copartners doing business under the firm name and style of Young Parts and Supply Co., with their principal office and place of business located at 834 N.W., 10th Terrace, Fort Lauderdale, Florida.

Respondent MacGregor Flanders, a sole proprietor doing business under the firm name and style of Flanders Parts Company, with his principal office and place of business located at 303 Maple Street, Carrollton, Georgia.

Respondent M. S. Church Auto Parts Company, a Tennessee corporation, with its principal office and place of business located at 322 N. Second Street, Pulaski, Tennessee.

Respondents A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co., with their principal office and place of business located at 103 University Avenue, Tuscaloosa, Alabama.

Respondent Hyatt Parts and Supply Co., a Georgia corporation, with its principal office and place of business located at 439 S. Green Street, Gainesville, Georgia.

Respondent Marianna Auto Parts & Supply Co., a corporation with its principal place of business located at 502 East Lafayette Street, Marianna, Florida, which was erroneously identified in the complaint as Mary D. Henson, a sole proprietor doing business under the firm name and style of Marianna Auto Parts and Supply Co., with her principal office and place of business located at 502 East Lafayette Street, Marianna, Florida.

Respondents Wendell Frazier, Norris Frazier and Winston C. Nunn, copartners doing business under the firm name and style of Nunn Auto Supply Co., with their principal office and place of business located at 121 East Main Street, Glasgow, Kentucky.

Respondent Thompson Auto Supply Co., Inc., a Mississippi corporation with its principal office and place of business located at 122 Hardy Street, Hattiesburg, Mississippi.

Respondent Wood's Automotive, Inc., a Mississippi corporation, with its principal office and place of business located at Wall and Franklin Streets, Natchez, Mississippi.

Respondent Huggins Motor Parts, Inc., a Florida corporation, with its principal office and place of business located at 15 - 5th Street, N., St. Petersburg, Florida.

There are currently approximately 67 partners of N.P.W.

4. The respondent jobbers, directly and through respondent N.P.W., have purchased and now purchase in commerce from suppliers engaged in commerce numerous automotive products and supplies for use, consumption, or resale within the United States. Respondent jobbers and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several states of the United States from the respective state or states of location of said suppliers to the respective different state or states of location of the said respondent jobbers and to the warehouse of respondent N.P.W. Respondent jobbers and said suppliers are therefore engaged in commerce, as "commerce" is defined in the Clayton Act.

5. In the purchase and the resale of said automotive products and supplies, respondent jobbers are in active competition with independent jobbers not affiliated with respondent N.P.W.; and the suppliers selling to respondent jobbers and to their independent competitors are in active competition with other suppliers of similar automotive products and supplies.

6. Respondent N.P.W. since its formation in 1956 has been, and is now, managed and operated by its general partner and manager, respondent Bryant M. Smith, Sr., for the respondent jobbers described in paragraph 3, and each respondent has participated in, approved, furthered, and cooperated with the other respondents in the carrying out of the procedures and activities hereinafter found.

Such cooperation includes serving on the Advisory Committee, whose membership is selected from various areas, which studied various aspects of the operation of N.P.W. and made recommendations to respondent Bryant M. Smith, Sr., which were usually followed.

In accordance with the partnership agreement, however, the general partner does manage the business of the partnership and has made the final decisions regarding the lines which are bought as well as all other management decisions. It is necessary in making these decisions that he follow the desires of the partners in order to perpetuate the partnership.

7. Respondent N.P.W. has been, and is now, serving as a means or instrumentality by or through which respondent jobbers make known their aggregate purchasing power to suppliers in various ways, including general meetings of the partners and the suppliers' sales representatives. Many, if not all, of the suppliers are familiar with the size and nature of the business of N.P.W. and of its jobber partners. The respondents through the agency of N.P.W. and their general partner have induced their suppliers to grant to them the suppliers' normal warehouse distributor discount which is usually about 20 percent of the jobber price, and have induced the sellers that sell in accordance with a quantity-discount schedule to consider them to be one purchaser and to grant quantity discounts, allowances, or rebates on their combined purchase volume in accordance with the suppliers' schedules. The jobber partners order their N.P.W. lines directly from suppliers of the N.P.W. warehouse and from the N.P.W. warehouse by using a standard form of N.P.W. order blank. When agreements are reached by which suppliers sell to respondents, it is agreed that in most cases orders may be placed with the suppliers either directly or by N.P.W., and that N.P.W. will be billed for all purchases regardless of the manner of ordering. Currently the sellers allow a warehouse distributor discount, and only a few continue to grant additional discounts, allowances or rebates based upon the quantity of purchases.

8. The jobber partners are billed by N.P.W. at the manufacturer's suggested jobber prices, and the partners settle with N.P.W. monthly on this basis. N.P.W. settles its account with suppliers on a monthly basis and receives discounts and allowances from the suppliers in accordance with its arrangements with them. In accordance with the terms of their partnership agreement, respondent N.P.W. each year distributes to the partners all discounts and rebates received, less operating expenses, in proportion to the amount of each partner's purchases. The discounts and other allowances realized on sales to jobbers who are not partners are distributed equally to the jobber part-

ners on an annual basis. Sales to non-partners have ranged from about 1 percent of total N.P.W. sales in 1956 to approximately 6 percent in 1961.

9. Many suppliers ship directly to the partners and the quantities shipped directly vary between the partners and from time to time. Direct shipments, also called drop shipments, were approximately 70 percent of the total billed to N.P.W. in 1956 and had decreased to approximately 20 percent in 1961.

10. When a seller's line was accepted by N.P.W., or when new conditions or terms were agreed upon, notice was sent to the jobber partners giving full information regarding the contract terms. In one recent year each jobber partner was supplied with a so-called "Buyers Guide" showing N.P.W.'s arrangements with each supplier. N.P.W. also distributed catalogs, price sheets and other material to its partners which were furnished to N.P.W. by suppliers, although some suppliers distributed such material directly to the partners.

There are approximately 150 suppliers selling to N.P.W.

The dollar amount of purchases of N.P.W. has been substantial, as have been the discounts and allowances received from suppliers on these purchases and passed on to the partners after deducting expense of operation. For the years 1956 through 1960 they were:

Year	N.P.W. purchases	Discounts and allowances, less expenses, passed on to partners
1956	$2,950,978	$259,749
1957	3,723,720	355,013
1958	4,664,921	444,052
1959	5,606,555	575,613
1960	5,588,862	534,073

11. The respondent jobbers knew they were receiving discriminatory discounts, allowances, and rebates from their suppliers. They knew that the quantity rebates allowed them were not based on the quantities or other factors involved in a particular sale and were not based upon quantities sold by them to other jobbers, but rather on the combined dollar amount of all sales to them because of their partnership in N.P.W. without regard to the actual cost of production, sale, and delivery to them.

Respondent jobbers knew or should have known that the warehouse distributor discount which they received did not represent savings in like amount to the sellers because (1) some of respondent jobbers had previously bought comparable quantities from the same suppliers at jobber prices; (2) they knew that the warehouse distributor discount resulted in profits to warehouse distributors after warehousing and sales expenses were incurred; (3) they knew that although some suppliers charged certain penalties when shipments were made directly to them rather than to the N.P.W. warehouse and that certain other "service" lines were handled on which there was little or no profit, the gross income in 1960 of N.P.W. was 17.71 percent of the purchases, and that more than half of this was returned to them after expenses of N.P.W. were paid; and (4) the penalty for drop shipments was frequently 5 percent and they knew or should have known that these suppliers considered this amount to approximate their difference in cost between selling and delivering to jobbers and warehouse distributors.

12. The automotive parts business is a highly competitive business involving small net margins of profit. The net margin of profit of a number of jobber witnesses, was between 1 percent and 5 percent after taxes. The importance of the discounts granted by the various suppliers and received by respondents, is shown by the testimony of jobbers who attached significance to the smaller 2 percent cash discount which is normally allowed all buyers by their suppliers. This small discount was considered important by them in determining their profit margins and in the successful operation of their businesses.

13. The amount of the competitive advantage which the respondent jobbers have over competing jobbers is calculated by the auditor's reports of N.P.W. which show net rebates to the partners after paying all expenses of N.P.W. on lines purchased during the years shown.

Year:	*Average net rebate (percent)*
1956	8.92
1957	9.70
1958	9.78
1959	10.73
1960	10.11

14. Respondents contend that the partnership is a functional and useful business, that it has grown over the years because of its fine management devoted to the concept of availability and service. The partnership is undoubtedly efficiently managed and does provide a degree of availability and service to its partners who are located generally in the Southeastern States. Except for the few located in the Atlanta trading area, most of them are much further from the N.P.W. warehouse than jobbers are usually located from their distributors. Their locations extend from southern Indiana to southern Florida, with the most distant being more than 600 miles from Atlanta.

Although fast service to a jobber from a warehouse distributor is of great importance, it appears that it is not as important to these respondent jobbers as is extra profit. With efficient inventory control these jobbers can usually anticipate their needs and rely on deliveries from Atlanta and some drop shipments from the suppliers' factories or branch warehouses. Although the distances involved are handicaps and require additional time and delivery costs, it is evident that they are considered to be overcome by lower prices. The freight from Atlanta to the partners is paid by the partnership, but is ultimately borne by the partners since it is deducted along with other partnership expenses before rebates are returned to the partners.

N.P.W. does perform several of the functions of an automotive warehouse distributor, such as warehousing, billing, and collecting. In its effort to more fully perform the warehouse distributor function, it also makes some sales to non-partner jobbers. It has one salesman who calls on such jobbers and these sales have grown, as herein before found, to approximately 6 percent of N.P.W.'s billing. The one paramount function of a warehouse distributor is to sell, and this N.P.W. does not do, except to these non-partner jobbers.

15. Respondents' second principal contention is that the partnership is a bona fide business entity created under a state law and that this entity cannot be ignored. It is contended that since the partnership is not a mere shell, but is managed and controlled by the general partner rather than the jobber partners, it cannot be pierced in order to conclude that sales made to the partnership were, in fact, sales to the partners. The limited partners do not manage the partnership and have no day-to-day control over its acts, but since they have the right to withdraw and the ultimate power to dissolve the partnership, they have absolute control. They also order directly from suppliers in the name of the partnership. Additionally, the limited partners are stockholders in and control the corporation which owns the warehouse which, except for the stock in the warehouse owned by the partnership, constitutes the assets owned or used by the partnership. Control of the organization, however, is not an essential element in this case. What the respondents have done is to join together to obtain a warehouse distributor discount on their purchases whether purchased jointly or separately. The purpose of the organization of the partnership and the reason for its continued existence is the collection of the warehouse distributor discount and such quantity discounts that were and are available. Some of the suppliers have required them to warehouse all of the products bought, others have required them to warehouse a part of the products, and still others have no warehousing

requirement. Whether it was because of the policies of some sellers or because of respondents' recognition that they must adopt some of the characteristics of a legitimate warehouse distributor to avoid a Clayton Act charge, they did in changing their organization, which was merely a bookkeeping device, form a partnership in which the management was placed in the hands of a single general partner and they undertook a warehousing operation. If an organization of buyers could be devised whereby control of the organization was completely divorced from the buyers, there would still be a violation of the statute if all the required elements were present.

The element of control over an intermediary is only one factor to be considered in determining whether the earnings returned to a member of the intermediary organization are, in fact, price discriminations. If the intermediary is controlled by the buying member of the organization it is easy to see that such intermediary was acting for the buying member at all times. But even if it be considered that the intermediary was not acting for the buying member at every stage of its operations but did return profits to the member, and if the profits can be calculated as a percentage of the purchase price invoiced to the buying member, such profits constitute in a very real sense a reduction in price which is indirectly received by the jobber from the manufacturer.

16. Since the partnership was formed and has been maintained to obtain warehouse distributor prices for jobbers and to buy almost entirely for them, the fact that purchases are made in the name of the partnership and through the agency of the partnership should not defeat the conclusion that in practicality the real buyers are the jobber partners.

The legal fiction of the separate entity of a statutory limited partnership can and should be disregarded in this case just as the fiction of a separate corporate entity has been disregarded in other cases where the real buyers were stockholders in a corporation buying for their benefit. A failure to disregard the partnership entity would permit a circumvention of the Clayton Act.

N.P.W. performs some of the services usually performed by a warehouse distributor, but the prime question is not what functions are performed or who controls the operations of the partnership, but whether the respondent jobbers receive the price discriminations. The profits of the buyer organization are returned to the buyers in proportion to their purchases and this is, in practical effect, a reduction in price. Through the lower cost of merchandise the respondent jobbers obtained a competitive advantage over their competitor jobbers who sell the same or comparable merchandise in the same trade areas and who receive discounts and rebates based only on their own purchases as jobbers.

CONCLUSIONS

1. Respondents have induced and received from their suppliers, as herein found, discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale which they knew or should have known constituted price discriminations prohibited by Section 2(a) of the amended Clayton Act.

2. The acts and practices of the respondent jobbers is knowingly inducing and receiving discriminations in price prohibited by Section 2(a) of the amended Clayton Act through respondents Bryant M. Smith, Sr., and National Parts Warehouse, as herein found, are in violation of Section 2(f) of the amended Clayton Act.

ORDER

It is ordered, That respondents National Parts Warehouse, a limited partnership; Bryant M. Smith, Sr., individually and as manager and general partner of National Parts Warehouse; Auto Machine and Parts Co., Inc., a corporation; Arnau Tire and Accessory Co., a corporation; Appalachian Auto Parts Co., Inc., a corporation; Mrs. George H. Ridgeway, doing business under the firm name and style of Madison Auto Supply Co., a sole proprietorship; Moyer Auto Parts, Inc., a corporation; Auto Parts Company, Inc., a corporation; Auto Parts and Service Company, Inc., a corporation; Brunswick Auto Parts Company, a corporation; Bessemer Auto Parts, Inc., a corporation; Buchanan-Lyon Company, a corporation; Barnes Motor and Parts Co., Inc., a corporation; Battery and Electric Co., Inc., a corporation; L. R. Wells, and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co.; Cains' Parts and Service Co., a corporation; Condrey Motor Parts, Inc., a corporation; Cottle's Auto Supply, Inc., a corporation; A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts; Bluefield Supply Company, a corporation, doing business under the firm name and style of Counts Automotive Supply Company; E'town Distributing Company, Inc., a corporation; Dickson Auto Supply, Inc., a corporation; I. N. Kohorn, doing business under the firm name and style of Dixie Auto Parts Co., a sole proprietorship; The Fergerson Company, Inc., a corporation; George M. Greer, Barney Nation, and Mrs. George M. Greer, copartners doing business under the firm name and style of Greer

Auto Supply Company; Genuine Auto Parts Co., Inc., a corporation; Gadsden Auto Parts, Inc., a corporation; General Auto Supplies, Inc., a corporation; Jordan Auto Parts, Inc., a corporation; Lakeland Battery and Auto Supply, Inc., a corporation; George O. Franklin, III, doing business under the firm name and style of Metter Auto Supply Co., a sole proprietorship; A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon and Miriam Grey Bowling, copartners, doing business under the firm name and style of Motor Bearings and Supply Co.; Morgan Supply Co., Inc., a corporation; B. H. Fenn, doing business under the firm name and style of Millville Auto Parts, a sole proprietorship; The Megahee-Speight Co., a corporation; Motor Supply Company, Inc., a corporation; McLean Auto Supply Company, a corporation; T. Felton Millians, doing business under the firm name and style of Newnan Auto Supply, a sole proprietorship; Pensacola Automotive Supply Co., a corporation; Piston Ring and Supply Co., Inc., a corporation; Parts Supply Company, a corporation; Barney R. Riner, doing business under the firm name and style of Riner Radiator and Battery Co., a sole proprietorship; George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co.; Guy Fumbanks, doing business under the firm name and style of Standard Auto Supply, a sole proprietorship; R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company; Tanner Auto Parts, Inc., a corporation; White Stores, Inc., a corporation, doing business under the firm name and style of White Electric and Battery Service; Calhoun H. Young and Ruth C. Young, copartners, doing business under the firm name and style of Young Parts and Supply Co.; MacGregor Flanders, doing business under the firm name and style of Flanders Parts Company, a sole proprietorship; M. S. Church Auto Parts Company, a corporation; A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co.; Hyatt Parts and Supply Co., a corporation; Marianna Auto Parts & Supply Co., a corporation; Wendell Frazier, Norris Frazier and Winston C. Nunn, copartners doing business under the firm name and style of Nunn Auto Supply Co.; Thompson Auto Supply Co., Inc., a corporation; Wood's Automotive, Inc., a corporation; Huggins Motor Parts, Inc., a corporation, limited partners in National Parts Warehouse, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products, accessories and supplies by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products, accessories and supplies of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondents' business, or where respondents are competing with other customers of the seller.

(2) Maintaining, operating, or utilizing respondent National Parts Warehouse or any other organization as a means or instrumentality to knowingly induce or receive discounts or rebates, which result in net prices lower than competing jobbers receive from the same seller, for products which respondents sell to customers other than jobbers. The provisions of this paragraph (2) are not applicable to respondent National Parts Warehouse or respondent Bryant M. Smith, Sr.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

OPINION OF THE COMMISSION

DECEMBER 16, 1963

By DIXON, *Commissioner:*

The complaint herein charges respondents with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13).[1] The hearing examiner in his initial decision held that the allegations had been sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have filed exceptions to this decision, and the matter is now before us for consideration.

Respondents herein are National Parts Warehouse (hereinafter sometimes referred to as NPW), a limited partnership, Bryant M. Smith, Sr., the manager and general partner of NPW, and 55 limited partners of NPW, various corporations, partnerships and individuals

[1] Section 2(f) provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

engaged in the business of jobbing automotive parts and supplies in the 10 states comprising the southeast quarter of the nation and in Indiana.

The following facts are not in dispute. NPW was organized in 1956 by respondent Smith and a group of some 45 auto parts jobbers who were then stockholders in two membership corporations, Automotive Parts Distributors, Inc., and Southeastern Auto Parts Warehouse Co., Inc., which had been operated as bookkeeping devices for the purpose of obtaining for their members lower prices from auto parts suppliers. The member jobbers were advised by counsel at that time that their operation of these corporations was in violation of Section 2(f) of the Clayton Act. They were further advised that they could legally form a limited partnership to engage in warehouse distribution of auto parts provided the partnership actually performed all warehousing functions and was managed and controlled by a general partner who was not an auto parts jobber. Pursuant to this advice, the limited partnership was formed on February 14, 1956, and began operations on March 1, 1956, by acquiring all the assets and liabilities and taking over all the operations of the aforementioned membership corporations. The amount of the capital contribution made by each of the limited partners was $6,500.[2] According to the partnership agreement, the business of the partnership was to be "that of buying, selling, leasing, exchanging, manufacturing automotive parts and all other types of personal property and real estate as well as operating warehouses, and otherwise dealing in all types of automotive parts and other personal property and real estate." This agreement also contained the following provision with respect to the distribution of income:

> The general partner shall receive 1% of the gross sales of the partnership as compensation for his services to the partnership, which 1% shall be included as an expense in calculating net income of the partnership for distribution to partners. All expense of operating the partnership, including rent, salaries, office supplies, taxes, traveling expense of the general partner, and all other expenses shall be included as an expense in calculating net income of the partnership for distribution to the partners. The net income of the partnership shall be allocated to the partners on the basis of the proportion that their purchase from the partnership caused the partnership to receive.

The record also shows that NPW has engaged in a warehouse operation since its inception, and, at the present time, occupies a modern warehouse of 65,000 square feet, employing over 50 persons and maintaining an inventory in excess of $800,000. In 1961 it

[2] This contribution was later increased to amounts ranging from $10,000 to $25,000.

carried 150 lines of merchandise upon which it obtained the normal warehouse distributor's discount ranging up to 20 percent of the jobbers' price. Ninety-four percent of its sales in 1961 were made to the limited partners, the remaining sales being made to nonpartners. NPW performs many of the functions that a warehouse distributor normally performs, purchasing for its own account, warehousing merchandise, billing its jobber customers at the manufacturer's suggested jobber prices, and settling its account with suppliers on a monthly basis, receiving discounts and allowances from the suppliers in accordance with its arrangements with them. It employs only one salesman, however, and his duties are restricted to sales to nonpartners. Smith, the general partner, spends an average of two days a week in the field calling on the jobber partners.

The dollar amount of purchases by NPW during the years 1956 through 1960 and the discounts and allowances received from suppliers and distributed to the jobber partners during this period are as follows:

Year	NPW purchases	Discounts and allowances, less expenses, passed on to partners
1956	$2,950,978.00	$259,749.00
1957	3,723,720.00	355,013.00
1958	4,664,921.00	444,052.00
1959	5,606,555.00	575,613.00
1960	5,588,862.00	534,073.00

The average net rebates made to the partners on the various lines handled by NPW during the same period are as follows:

Year:	*Average net rebate (percent)*
1956	8.92
1957	9.70
1958	9.78
1959	10.73
1960	10.11

The hearing examiner has held in substance that NPW has served as a means or instrumentality through which the jobber partners have induced auto parts suppliers to grant to them the supplier's normal warehouse distributor's discount;[3] that discounts obtained by NPW,

[3] The examiner also found that the respondent jobbers have induced and received quantity discounts on the basis of their combined purchases but that at the present time most suppliers have discontinued giving this form of discount.

less operating expenses, are distributed to the respondent jobbers in proportion to the amount of the purchases of each; and that the practical effect of this distribution of discounts is to reduce the price of auto parts purchased by the respondent jobbers. The examiner also held that respondent jobbers thus received more favorable prices than other jobbers with whom they were competing in the resale of like merchandise purchased from the same supplier and that the probable effect of such price differences was to injure, destroy or prevent competition in the resale of such products. He further held that respondents were aware of these price differences and of the probable anticompetitive effects thereof and that they also knew that the discounts which they received did not represent savings in like amount to the suppliers from whom the goods were obtained. He concluded, therefore, that respondents had knowingly induced and received price discriminations prohibited by Section 2(a) of the Clayton Act, as amended.

I

Respondents' principal contention on this appeal is that, notwithstanding the physical fact that NPW, at the end of each year, passes on to its individual jobber partners "patronage rebate" checks amounting to more than 10% of the price paid by competing jobbers, there has been no "discrimination" in price within the meaning of the amended Clayton Act. They express this proposition as follows:

> One of the elements in a 2(f) case is that under 2(a) in order to receive discriminatory prices from a supplier, there must be a purchaser. Under the law in order to be a purchaser from a supplier under 2(a) the supplier must deal directly with the limited partner and control the terms and price of the purchase * * *. The limited partners bought from NPW, not from the supplier, nor did they deal directly with suppliers, nor did suppliers control the prices they paid NPW or the terms of the sale by NPW. Therefore, they cannot be held to have received discriminatory prices. * * * [I]n order to find a limited partner receiving discriminatory prices, it must be found he is the actual purchaser and to do this, it must be found he has control of management of the organization that does the buying and from whom he buys.[4]

In other words, respondents contend that there is no *seller-purchaser relationship* between the discriminating manufacturers of auto parts and NPW's 55 individual jobber partners. In their view, NPW is the "purchaser" of the manufacturers. The jobber partners, according to respondents, are "purchasers" of NPW itself.

[4] Respondents' brief, pp. 31–32.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in part that it shall be unlawful for any person, "either directly or *indirectly*, to discriminate in price between different *purchasers*," where the effect of such discrimination may be to injure competition (emphasis added). Section 2(f) of the statute "is a corollary to § 2(a), making it unlawful 'knowingly to induce or receive' a price discrimination barred by the latter." *Federal Trade Commission* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, 65, n. 6 (1959). Thus the "discrimination" that Section 2(f) prohibits buyers from inducing or receiving is the "discrimination" that Section 2(a) prohibits sellers from giving, plus one additional element—"knowledge," on the buyer's part, that there is little likelihood of a defense for his seller. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346, U.S. 61 (1953).

Before there can be a "discrimination" within the meaning of either section it must be shown, of course, that the same seller has sold to two different "purchasers" at different prices. Here, the examiner found, as noted, that numerous manufacturers of auto parts, while charging their nonaffiliated jobber purchasers their regular, published jobber price, sold to respondent jobbers, through their agent, NPW, at substantially less than that price (generally 20% less).

Respondents insist, however, that NPW is not a mere agent of its jobber partners. They contend that it is an independent "middleman," a "purchaser" in its own right. In support of this, they argue, as noted, that the jobber partners have no "control of [NPW's] management" and that they do not "deal directly" with the manufacturers.

This emphasis upon the matter of "control" over what purports to be an intermediary between buyer and seller arises out of what is known as the "indirect purchaser" doctrine, i.e., the statutory prohibition of all discrimination, whether accomplished "directly or *indirectly*" (emphasis added). Under it, "there *need not be privity of contract* between seller and ultimate buyer to establish the buyer as a 'customer' or 'purchaser.' If the manufacturer deals with a retailer through the *intermediary* of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter *deals directly* with the retailers and *controls the terms* upon which he buys * * *; otherwise the requirement of the statute could be easily avoided by the use of a 'dummy' wholesaler." *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109-110 (2d Cir. 1962) (emphasis added), *cert. denied*, 371 U.S. 824

(1962). See also *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961).

This rule, as the court explained in *American News*, *supra*, stems "from a fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of" price discrimination, and is designed to accomplish that objective by making the seller's responsibilities under the statute coextensive with his power or control:

> The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by the use of a "dummy" wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors. 300 F. 2d at 109–110.

It should be noted here that the "control" contemplated by the indirect purchaser doctrine is not, as respondents contend, "management" control. The statute has no concern with management, as such; it is interested only in the giving and receipt of discriminatory concessions that may injure the competitive environment. Hence, it is not control over the middleman's business as a whole that is to be considered, but merely control over the precise thing that forms the *res* of the litigation, *e.g.*, the discriminatory price concession. In the instant case, for example, where respondents claim that NPW is an independent "warehouse distributor" reselling to its equally independent jobber partners who, in turn, resell to retail dealers (garages, service stations, etc.), any one of these *manufacturers* could certainly make one of those *retailers* its "purchaser" by contacting it directly and giving it a rebate of, say, 10% on its purchases of the manufacturer's products, even if the intervening middlemen (the jobber from whom the retailer bought directly, and the warehouse distributor from whom that jobber had bought) were completely unaware of that discriminatory concession from their supplier to their customer. (That manufacturer could also make that retailer his own "purchaser" by having those two intermediaries pass such a concession on to the favored retailer.) The independence of those intermediaries in the general "management" of their businesses would not alter the fact that the manufacturer had, by reaching down through its distribution system and undertaking to favor one of its remote ("indirect") purchasers over another, exercised the very power or "control"—control over the *discriminatory* terms of sale—that is the object of the statute's concern.

The buyer corollary of this rule is that the seller-purchaser relationship is similarly established if a purported middleman, instead of being under the "control" of the seller, is "controlled" by the *buyer* himself. Since the very purpose of the statute is "to protect *buyers'* competitors," *American News*, *supra*, there is even more reason for its application where it is the buyer, rather than the seller, that controls the intermediary. It would be a strange result indeed to hold that seller-controlled intermediaries must be pierced in order to protect buyer's competitors, but refuse to permit such piercing where it is the favored purchaser himself who has devised a "middleman" to procure for him discriminatory advantages over his competitors. This precise point was settled in *American Motor Specialties, Inc.* v. *Federal Trade Commission*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960), and *Mid-South Distributors, Inc.* v. *Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961). These two cases, like the one before us now, involved "buying group" organizations formed by jobbers in the auto parts industry for the purpose of procuring discriminatory price concessions. The courts found that the individual members of those organizations were "purchasers" of the auto manufacturers; that the organizations themselves were merely agents created by the jobbers for the purpose of procuring lower prices and passing them through to their individual members in the very form involved here—"patronage rebates"; and that those jobbers had thus knowingly induced and received discriminatory prices in violation of Section 2(f).

The respondents in the instant case were aware of the illegality of such operations when they created NPW in February of 1956. In fact, many of NPW's present jobber partners were then "members" of two such organizations, using them to receive price concessions they now concede were unlawful. NPW's present general partner, Smith, was running one of them. On the advice of counsel, those two organizations were dissolved,[5] and NPW was formed to accomplish the same objectives but in a manner, respondents tell us, that Section 2(f) cannot reach.

NPW, in respondents' view, is distinguishable from the "buying groups" of the past in two principal particulars: (1) those condemned organizations were *corporations* and thus subject to the "control" of the individual jobber stockholders (through the power of the stockholders to elect the board of directors), whereas NPW, as a

[5] CX 30, a letter from NPW's general partner to his new "limited" partners a few days after the dissolution of the old organizations and the formation of NPW, summarizes this transition from the old to the new.

limited partnership, is subject to no management control by its jobber owners ("limited" partners); and (2) those earlier buying groups, since most of their sales were of the "drop-shipment" variety, were merely "bookkeeping devices" performing no real intermediary functions, whereas some 80% of the merchandise handled by NPW goes through a warehouse it owns and operates.

Respondents' first argument is really the heart of their defense in this case. They conceded, at least in oral argument before us, that their present operation would be illegal *if NPW were a corporation* (or even a "general" partnership), rather than a limited partnership.[6] Their theory is that, because the state statute under which NPW was created (and under what they describe as "elementary" principles of partnership law) vests all "management" control, and all responsibility for partnership debts, in their "general" partner,[7] the individual jobber partners that own NPW and receive all of its profits cannot be held to "control" it, or held responsible for its act of inducing price concessions and passing them on to its owners. In other words, respondents contend that, by selecting the limited partnership form of business association for their "buying group" organization, they have divested themselves of all *responsibility* for its acts, retaining only the power to receive the *benefits* that flow from them.

The argument is ingenious but unsound. There is no legal magic in the limited partnership. It is hornbook law that, if a partnership is formed "for the prosecution of an illegal business or for the conduct of a lawful business in an illegal manner, the courts will refuse to recognize its existence,"[8] and that a "limited partnership may be unlawful by virtue of general provisions of law applicable to all forms of business association."[9] It would be a strange result indeed if a state statute designed to permit the carrying on of lawful business enterprises should be held to insulate the members of an organization from responsibility for carrying on activities they concede would be in violation of federal law if attempted through the corporate form of business association.

While we think these 55 individual jobber partners have in fact exercised considerable "management" control over their creature,

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[6] Transcript of Oral Argument Before the Commission, 6–7.

[7] Georgia Limited Partnership Act, Ga. Code Annotated, Sec. 75–408, 411(2) (Supp. 1961).

[8] 68 *C.J.S.* 410, Sec. 7 (Partnership).

[9] 2 Rowley & Sive, *Rowley on Partnerships* 548 (2d ed. 1960).

NPW,[10] that is not, as noted above, the kind of "control" with which the statute is concerned. The question is whether they had "control" of the precise transactions that have caused the competitive injury; if they had the power to prevent that injury, then they are responsible for not having done so.

Here there can be no serious doubt that the price advantages accorded to these 55 jobber partners of NPW over their competitors have at all times been within the "control" of the manufacturers that gave them and the respondent jobbers that received them. First, resale prices of auto parts at each of the several levels of distribution are determined by the manufacturers themselves, not by their intermediary resellers.[11] Thus NPW, when it invoices its individual jobber partners at the end of each month, simply follows the jobber prices published to the trade by the manufacturers. And respondents themselves emphasize the fact that NPW, when it "buys" from the manufacturers, pays the same price (*i.e.*, receives the same discount from the published jobber price) those manufacturers charge all "other" warehouse distributors. It is established, therefore, that

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[10] One of the more significant of the partnership's "decisions" was the making, from time to time, of the choice between "lines" of auto parts, that is, between the offerings of competing manufacturers. Respondents contend that this was committed solely to the discretion of Smith, the general partner, and that, at most, he merely secured the "advice" of the jobber partners. The facts are otherwise. The partnership agreement itself provided for an "Advisory Committee" to aid the general partner in "making decisions." CX 1, Article XIII. Subsequently, a "Lines Committee" was formed to aid him in selecting the supplier lines to be handled by the partnership. Under the formal partnership agreement, members of the Advisory Committee were to be "appointed" by Smith. But in his writings to his partners, he reminds them of the names of the persons they have *"elected"* to membership in that Committee. CX 33–A (emphasis added). And he reported to them that *they* had *"voted* to purchase the Felt Products Company line of Gaskets," and that they had *"approved* for six month's trial the line of Wesco Universal Joints and Kits." CX 33–A (emphasis added). Indeed, it appears that Smith "decides" on lines to be handled by sending out *post cards* on which each partner indicates his *vote*: "Dear Partners: According to the letter that was sent out and the *cards returned,* it is certainly evident that you want to remain" with "Herbrand Tools — and ViChrome Tools. In connection with the Herbrand Tools, we had only *eight votes* that were outstanding against the Herbrand Tool line and wanted the other line." CX 36–A (emphasis added). See also CX 122 and 127.

The real measure of Smith's "independence" is illustrated by the testimony of one jobber partner who explained that the Advisory Committee met only "if something came up that was *important,*" such as "if we were contemplating on new lines or * * * something like that * * *." Tr. 633–634 (emphasis added).

Finally, of course, there is the fact, noted by the examiner, that the jobber partners at all times possessed the ultimate power over NPW—they could withdraw, pull out their money, and hence kill it. Thus, Smith, the "general" partner, wrote to his "limited" partners as follows: "Bear in mind that you *voted* in your meeting Saturday that you would *continue your investment* in National Parts Warehouse." CX 33–A (emphasis added).

[11] For example, one manufacturer's representative testified flatly that "if we caught them [warehouse distributors] cutting the price, we would certainly cut them off. That is my authority to do whenever I want to. If I'm selling you and you're going out and cutting the price, I can cut you off tomorrow." Tr. 1536. General adherence to the manufacturers' published price sheets is established in this record, as will be discussed below.

NPW has no "control" over either the price that it "pays" or the price that it "charges."

But this invoice "price," however, is not the actual price paid by the jobber partners, since it does not reflect the year-end "patronage rebates" each of them subsequently receives on his individual purchases.[12] A simple illustration will show the real price paid by those jobber partners. Assume an order by Partner A, to NPW, for $100 worth of auto parts produced by Manufacturer X, a supplier that allows its warehouse distributors (which NPW claims to be) a 20% discount from its regular jobber price list. On this $100 order, NPW will gross $20 (20% of $100). NPW's *expenses*—including all costs incurred in warehousing, customer delivery, etc.—are approximately 8% of its (jobber) sales prices.[13] Therefore, NPW has realized a *net profit* of $12 (gross of $20, less $8 expenses), a sum it retains until the end of the year. At that time, however, NPW is legally bound, by the express terms of its partnership agreement with its jobber partners, to return to *each* of them *all profits* it has earned on their *individual purchases:* "The *net income* of the partnership shall be allocated to the partners [the 55 individual jobber partners] on the basis of the *proportion that their [individual] purchase from the partnership caused the partnership to receive.*"[14] Therefore, Partner A's $100 order "caused the partnership to receive" a "net profit" of $12, and he is legally entitled to have it returned to him at the end of the year. Deducting that $12 rebate from the $100 "price" that he initially "paid" NPW earlier in the year, there can be no denying the physical fact that the merchandise ultimately cost him only $88. (In the meantime, of course, his competitors—the nonaffiliated jobbers that must buy this same product direct from Manufacturer X—are paying the full $100 jobber price, sans any "rebates.") Further, Manufacturer X can raise or lower Partner A's ultimate purchase price by simply increasing or decreasing the "discount" to NPW. For example, in the illustration given above, an increase of the discount from 20% to 25% would automatically reduce Partner A's actual purchase price from $88 to $83. (NPW would then gross $25 on the $100 order. After deducting its $8 for expenses—which would

[12] That jobber price is, however, the actual price NPW charges to its nonpartner jobber customers. As noted, some 6% of NPW's total "sales" are genuine warehouse distributor sales to jobbers that are not affiliated with NPW in any manner. They are invoiced by NPW at the same jobber price NPW "charges" its own jobber partners. However, these third-party jobbers receive no year-end "patronage rebates." Accordingly, the jobber price is the *actual* price insofar as these sales by NPW are concerned.

[13] Tr. 1372.

[14] CX 1, Partnership Agreement, Article IX ("Distribution of Income") (emphasis added).

not be affected by the change in discount—it would have $17, rather than $12, to "rebate" to Partner A.)

We conclude that NPW's "control" over the prices it "charges" its own jobber partners is, figuratively speaking, roughly comparable to that exercised by a sieve over water being poured through it. The jobber partners, in reserving to themselves the absolute legal right to receive all of their creature's profits, have made themselves responsible for the acts by which it "earns" those profits. Everything that NPW does is done not for itself, but for those who receive its profits. It is, therefore, their agent.

Turning to respondents' "warehouse" argument—the contention that NPW's ownership and operation of a warehouse shows that it actually performs the "warehouse distributor" *function* and thus establishes its right to receive the warehouse distributor *price*—we note at the outset that this argument is not applicable to the approximately 20% of NPW's "sales" that admittedly never go through its warehouse. In these "drop-ship" transactions, NPW is acting as a mere "bookkeeping device" for the collection of price concessions, and its jobber partners (not NPW) are plainly the "purchasers" of the drop-shipping manufacturers. *Alhambra Motor Parts* v. *Federal Trade Commission*, 309 F. 2d 213, 216 (9th Cir. 1962).

As to the remaining 80% of NPW's "sales," it may be true that NPW actually performs the same *warehousing* function that "other" warehouse distributors perform. But we do not see how that affects the question of whether NPW is a "purchaser" in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot convert an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and "control" the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a "warehouse distributor" does not cause the parties to cease being principal and agent, and become, instead, "seller" and "buyer."

II

Respondents' contention that the individual jobber partners of NPW had no way of "knowing" they were receiving lower prices than their nonaffiliated jobber competitors is particularly lacking in merit. Putting aside their frivolous argument that the "patronage rebate" checks they received at the end of each year were merely "returns on investment" instead of price reductions, the question is simply whether those individual jobber partners knew that their agent, NPW, was "buying" at a lower price than the nonaffiliated jobbers with whom they competed.

In the first place, the very existence of NPW is predicated upon its ability to buy at a lower price than that at which the jobber partners, acting in their respective individual capacities, could themselves purchase. This is illustrated by the fact that NPW, the organization, refuses to deal with any manufacturer that charges NPW itself the same price that it offers to NPW's individual partners.[15] Indeed, it is the difference between the price NPW pays and the price the individual jobber partners would themselves have to pay that constitutes the "profits" they divide up at the end of each year. If there was no difference between the two prices, there would obviously be no "profits."

And, notwithstanding their denial of any knowledge of the "warehouse distributor" price—the price their own partnership, NPW, pays its suppliers—the jobber partners are fully informed as to both of these prices, and thus as to the difference between them. In view of the fact that the partnership agreement itself expressly provides that an "accurate and complete set of records shall be kept" and that "each limited partner shall have *complete access* to such records *at all times*," [16] which, of course, includes the invoices NPW receives from its manufacturer suppliers, the partners certainly could have known as much as they desired about the prices NPW paid. In fact, however, there was no necessity for the partners to examine NPW's records: the organization informed them of the price it paid, in writing. It sent them a "Buyer's Guide" [17] or catalog containing a full description of the "deal" then in effect between NPW and each of its suppliers. Because this "deal book" was likely to have been seen by third-party visitors in the partners' own jobbing establishments, the prices were coded.[18] Thus, one manufacturer's agreement with NPW was explained to the partners in part as follows:

Contract Terms:	NPW Cost—Distributor [Jobber] Sheet less "OY"% [20%] [19]
	Partner Cost—Distributor Green Sheet
Patronage Earnings:	Held by NPW "OY"% [20%] [20]

[15] Tr. 927, 937, 943–944.

[16] CX 1, Article XII ("Records") (emphasis added).

[17] CX 88.

[18] The code employed the ten-letter word "worksteady," with each letter representing, successively, the numbers 1 through 0, as follows:

W	O	R	K	S	T	E	A	D	Y
1	2	3	4	5	6	7	8	9	0

By way of illustration, a discount of 20% would be expressed as "OY%." Tr. 277.

[19] *Ibid.*

[20] CX 88, p. 3.

In other words, NPW paid 20% less than the manufacturer's published jobber price list, invoiced its partners at the full jobber price,[21] and "held" the 20% differential until the end of the year, when each member, after the deduction of his share of NPW's expenses of operation, received the remainder of the 20% held for him by NPW on his own individual purchases.

Respondents would have us believe that they had no way of knowing whether their manufacturer suppliers actually followed the "jobber" prices that they published and disseminated to the trade. Yet NPW itself, as noted above, sold some 6% of its total 1960 volume to third-party, independent jobbers. And it was able to secure the full jobber price on all of those sales.[22] Each and every one of the individual jobber partners of NPW has full knowledge of this fact for the simple reason that, at the end of the year, they each received a share of NPW's "profits" on those sales—the difference between the low price paid by NPW, and the higher jobber price it charged those outsiders.[23] If NPW itself had *paid* the full jobber price, its resale at that price would have resulted in a net loss, not in a profit to be divided up.

Moreover, each of the jobber partners, prior to joining NPW, bought from these same suppliers and paid, in those earlier days, the full jobber price, sans any discounts not published to the trade.[24] And, even today, the jobber partners buy a very substantial part of their requirements direct from manufacturers, paying, in all such cases, the full jobber price. This is illustrated by the following letter from NPW's general partner, Smith, to each of the jobber partners:

Dear Partners:

Please keep the following discounts in your mind in purchasing Bay Lifts. I have recently been informed that some of the Partners have been purchasing them on their regular forms and not on the NPW form. It will *cost you money* to purchase on your own form when they have given to your warehouse the following discount * * *.

Please check with your buyer on this as I understand that some of the

[21] NPW's partners pay NPW on a monthly basis, at the full jobber price. NPW pays its own manufacturer supplies monthly, keeping the 20% difference between the price it paid and the "price" it "charged." It is this differential, less expenses, that NPW distributes at the end of each year as "patronage rebates," proportionalizing it according to each partner's own purchases.

[22] NPW's salesman serving nonpartners testified that "we only have one price. * * * I never quote prices other than to say whatever the manufacturers jobbers printed prices are, will be your price at all times." Tr. 1691.

[23] The partners divide the profits received from this phase of NPW's operation on an equal basis, that is, the same sum of money to each partner, regardless of his size, the volume of his purchases from NPW, or the amount of his "capital investment" in NPW.

[24] Tr. 1316–1317.

Partners have been ordering on their own form and *losing this discount.*[25]

In addition to all this, the individual jobber partners of NPW called on regularly by manufacturers' salesmen, and individually attend NPW's annual "display" or "exhibit" meetings at which the various manufacturers, represented by their sales managers and executives, display their wares for the partners' benefit. Prices are discussed freely at those meetings.[26] In fact, the jobber partners, in their own testimony, made it plain that they regarded it as a matter of common knowledge that all auto parts manufacturers charge all jobbers the same price—the price published to the trade.[27] And they clearly understand their year-end "patronage rebate" checks to be, in effect, a "reduction in the cost of merchandise,"[28] as, indeed, NPW itself advised them to treat it for tax purposes.[29]

Turning from the question of respondents' "knowledge" of the prices paid by their competitors to the facts of the matter, representatives of the various auto parts manufacturers testified that they charge all jobbers the full, published jobber price,[30] and the competing jobbers testified that they not only paid that price,[31] but considered it common knowledge that every other jobber did likewise.[32]

III

Respondents' contention that they have no reason to believe the price concessions they have received might cause competitive injury to the jobbers with whom they compete is even more unrealistic than their asserted ignorance of prevailing prices in the trade. We would have supposed that, after the extensive litigation of this very point

[25] CX 171 (emphasis added).

See also CX 166, a letter from NPW to a supplier that wanted to give NPW its 20% discount off the face of the invoices, rather than by deferred rebates or credit memos: "We are afraid that deducting same from the face of the invoice that someone might misconstrue same that it was your policy to *give that to everybody*." (Emphasis added.)

[26] One manufacturer's representative stated:

"Most of the partners don't ask for a price discussion. All they want to know is the dealer price and the jobber price. Any further price information, *they seem to have it.*" Tr. 1598–1599 (emphasis added).

[27] As one of them put it, "we are all pretty familiar with our prices that we've been paying, because *it's the price that I think everybody else pays.*" Tr. 482 (emphasis added).

Another, asked if he knew the prices paid by competing jobbers, stated: "I would say they buy from the jobber's price sheet." Tr. 406.

[28] Tr. 398.

[29] NPW's "audits" or financial statements presented to the partners at the end of each year carried, until recently, the following statement: "The amount shown as Patronage Rebates should be used as a reduction in your Cost of Goods Sold Section." See *e.g.,* CX 7 (1959 audit), p. 22.

[30] "We've got one price to our warehouses, and our warehouses sell at our jobbers blue sheet. * * * This price that we have is one price to all jobbers." Any warehouse that cut the jobber price "would certainly" be cut off. Tr. 1534–1535.

[31] See, *e.g.,* tr. 433, 522, 557, 611, 712–715, 735, 760, 810, 828, 840.

[32] "We buy at the jobber prices. I am sure all jobbers do." Tr. 785. See also tr. 799, 800.

in the various "automotive parts" cases,[33] this industry above all others would be quite clear that a price advantage several times greater than the average jobber's total net profit margin cannot fail to injure competition in the end. Yet we are once again urged to find that such a price concession is harmless.

As noted above, the discounts induced and received by these respondents range as high as 20% of the prices paid by competing jobbers for the same products. Out of this, the individual jobber partner receives, in addition to the many "services" NPW performs for him, cash rebates that average more than 10% of the price paid by competing jobbers. In the context of the auto parts industry, such advantages are substantial indeed. The number of jobbers has been increasing rapidly in recent years, and competition is very keen.[34] While the jobbers generally follow the manufacturers' suggested resale prices and thus realize a gross markup of some 30% on their sales to the dealer trade, their *net* profit margin, after taxes, generally ranges from 2% to 5%, seldom exceeding 3%.[35] Respondents' counsel thought this was too low, offering the logical *tour de force* that the reason their profits were so low was that their costs were too high! The argument suffered a great deal, however, from the fact that NPW's own jobber partners testified that they, too, had a similar profit picture.[36]

Respondents point out that these net profit margins omit the vital factor of "turnover." Thus, a jobber may make only 2% net profit on each $1.00 of sales, but he may "turnover" his entire stock of mer-

[33] See, *e.g.*, the seller-liability cases cited by the court in *Mid-South Distributors, supra*, 287 F. 2d at 514, n. 1.

[34] One of NPW's jobber partners estimated that there were now about 100 jobbers of auto parts in Atlanta. He added: "I guess [I] would be [in competition] with all of them." Tr. 709.

And an NPW jobber partner located in McKenzie, Tennessee, explained the competitive situation this way:

A. Well, you go to a town, there's from one to four or five [jobbers] in each town within a radius of ten miles around us competing for the same business; yes, sir. There are three in our town of 2700. Ten miles away there are two. Eighteen miles north there's four, and twenty miles on the other side there are two. In thirty miles there's five or six. There are plenty of jobbers.

Q. In other words, competition is very keen, isn't it, in your trade area?

A. Very keen; yes, sir. Tr. 1826.

[35] Tr. 435 ("3 to 4 percent"); 456 (5%); 525 (3% to 5%); 560 (2% to 3½%); 599 (less than 1% in 1960); 717 (not over 1½%); 740 (5%); 766 (ranges from net losses to 2½% profit); 811 (4% to 5%); 825 (1%); 845 (1% to 2%). One jobber mentioned the figure 20% (tr. 473), but his "turnover" explanation (tr. 477) indicates that he was referring to return on inventory investment.

[36] One of NPW's jobber partners testified that his net profit margin was about 5% (tr. 690); another, 4% (tr. 495); another, 1% to 2% (tr. 648); another, 2%:

Q. What was your net profit after taxes for 1961?

A. Less than 2 percent.

Q. For 1960, what was it?

A. Less than 2 per cent. Tr. 1765.

chandise as many as 8 or 9 times in the course of a year's business. This, of course, measures net return on his investment in ineventory. For example, one of the jobbers in question, with an inventory of $40,758.67, had sales in 1960 of approximately $400,000.00 [37] or an 8 or 9 times turnover. While this means the jobber netted some 16% to 18% return on the money invested in his inventory (8 or 9 times 2% net profit on sales), it does not disturb the fact that his entire year's operation could not have yielded more than $8,000.00 in net profits (total sales of $400,000.00 times 2% net profit on each dollar of sales).

Moreover, while the nonfavored jobbers are "turning over" their inventory for a profit of 2% to 3% on each dollar of sales, NPW's jobber partners are busily "turning over" for themselves not merely this same 2% or 3%, but the *additional* 10% or more they have already "earned" through NPW before the goods reach their shelves! For example, at the end of 1959, Smith, NPW's general partner, reported to his jobber partners with understandable pride that their respective, individual "returns" on their "capital investments" in NPW had ranged from a "low" of 50% to a high of 300%!

In that year, the *total* capital investment of all the partners was $492,500. *Net* income for the year was $601,437.65 [38] or approximately *120%* return on capital investment.

To illustrate the net results of this "group buying" device, Morgan Supply Co., one of the largest of NPW's "partner customers," received not only a "patronage rebate" of $37,670.80 but an additional $5,570.47 in "volume rebates" (which NPW collects from the manufacturers and distributes to the jobber partner who "earned" them). After adjustments relating to the 2% cash discount, Morgan had "earned," in 1959, $42,440.83 in "discounts and rebates." [39] After deducting $16,066.46 for its "freight" costs and its share of NPW's "expenses" for the year, and adding its share of the "income" from the "commercial accounts" (nonpartner customers)—$457.70 in amount—Morgan had a "net income" from NPW of $26,832.07, or *11.43%* of the regular jobber price of its total purchases from NPW during the year.[40] This amounted to a "return" on its $9,100 "investment" of nearly 300%.

To be sure, there is no evidence in this record that Morgan has used this 11.43% price advantage over its 100-plus Atlanta competitors to cut the resale price and drive them out of business. But it has long

[37] Tr. 1644–1647.
[38] CX 7, p. 7.
[39] CX 7, p. 17.
[40] *Ibid.*

been settled that a "passing on" of discriminatory prices in the form of lower resale prices is not necessary to finding of competitive injury. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956); *Tri-Valley Packing Assn.*, Dkt. 7225 and 7496 (May 10, 1962) [60 F.T.C. 1134]; *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963) [63 F.T.C. 1]. Those who receive price concessions of this magnitude can use the money they pocket in a host of ways, *e.g.*, by the opening of "branch" stores,[41] to gain competitive advantages that cannot fail to make them, in the end, victors over their nonfavored competitors.[42] The amended Clayton Act, unlike the Sherman Act, looks not merely to results that have already come to pass, but also to those that can be reasonably anticipated in the future. "The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co.* v. *Federal Trade Commission*, *supra*, 324 U.S. at 738. See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Forster Mfg. Co., Inc.*, Dkt. 7207, Opinion of the Commission, 21–22 (January 3, 1963) [62 F.T.C. 852, 888, 904]. We do not see how a price advantage of 11.43% in an industry where net profit margins rarely exceed 3%, could fail to injure competition over a sufficient period of time. Hence the fact that few of respondents' jobber competitors have gone out of business so far, and even the fact that some of those competitors may affirmatively deny that they have been injured,[43] does not preclude us from finding "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay * * * substantially more for their goods than their competitors had to pay." *Morton Salt*, *supra*, 334 U.S. at 46–47; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

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[41] Several of NPW's partners have such branch stores. CX 3–A.

[42] One nonfavored jobber testified that, while the jobber markup was adequate his low volume of sales kept his total profits so low that he was thinking about getting out of the business. Tr. 1675–1676.

[43] While some of these unfavored jobbers stated that they were not being hurt by the competition of NPW's jobber partners, others were not so certain:

Q. You couldn't single out those two [two of NPW's Atlanta partners] and say they injured you competitively any more than any other competitor?

A. The men that are the closest to you in my type of business is the man that will hurt you the most in my opinion.

Q. Yes. Are either of one of these close to you?

A. Yes, sir. Tr. 859.

As the court said in *E. Edelmann & Co.* v. *Federal Trade Commission, supra*, 239 F. 2d at 155.

> Certain of petitioners' jobbers testified that they knew that the warehouse distributor bought at a lower price than they did and stated that they did not care; that warehouse distributor competition with them had not injured them in any way; and that they knew of no lessening of competition nor of any corralling of business by one or a few of their competitors. In view of the competitive conditions of the market as reflected by the record, the small profit margins on which the participants in this market operated and the size of the discriminations, we believe that the Commission was justified in disregarding this testimony. In addition, petitioner suggested resale prices at all levels of distribution and it was found that these suggested prices were regularly adhered to. This explains, at least in part, why the warehouse distributors did not "corral" the market by taking advantage of the discounts accorded them by cutting prices. It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene.

Hence the fact that the discriminatory prices induced and received by these respondents are likely to cause competitive injury has been clearly shown. While the testimony as to the keenness of competition in the auto parts jobbing business, and the narrowness of the profit margins in it, consisted principally of the testimony of jobbers located in the Atlanta, Mobile, and Pensacola areas, the record makes it plain that these same conditions prevail in the other areas served by NPW jobber partners. For example, one of them located in McKenzie, Tennessee, gave a particularly graphic description of the sharp competition that exists between him and other jobbers in his area (n. 34, *supra*). The taking of such evidence in each and every one of the separate areas in which NPW's 50-plus jobber partners are located would have resulted in an undue proliferation of the record, and would have been merely cumulative. *Automatic Canteen, supra*, 346 U.S. at 65, no. 3. Further, these jobber partners, having induced and received the discriminatory prices through a group device, individually and collectively share the responsibility for the injury caused by the operation of that device in each and every area.

We conclude that each of these respondent jobbers, having been informed by NPW's "audit" reports of the precise price advantage he and his fellow partners enjoyed over their respective nonfavored competitors (e.g., Morgan's 11.43% advantage over his Atlanta competitors), and knowing, from his own experience, that those competitors could have no more than a 2–3% net profit margin, knew only too well that his continued inducement and receipt of those price discriminations could not fail to ultimately injure his competition.

IV

The most serious contention raised by respondents on this appeal is that they have no reason to believe their partnership operation, with its alleged volume purchasing and extensive warehousing, has not effected sufficient "savings," for their manufacturer suppliers, to fully "cost justify," under Section 2(a) of the statute, the full amount of the discounts received by NPW (*e.g.*, 20%). *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953). We are not unaware of the fact that such operations can frequently enable groups of small merchants to duplicate some of the efficiencies of the larger, single-entity enterprises, and we are certainly not unsympathetic toward the efforts of any organization, "buying groups" or otherwise, to achieve savings of this kind. Yet it is our task to find the facts as they exist, and apply with an even hand the law as Congress has given it to us, rather than condoning violations of law merely because they have been committed by the small businessmen who are otherwise the special wards of the various antitrust and trade regulation laws. *Mid-South Distributors* v. *Federal Trade Commission*, *supra*, 287 F. 2d at 520. The law's concern for the small businessman is great, but it certainly does not sanction his receipt of discriminatory prices that favor him at the expense of competitors who are as small as, or smaller than, himself. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 518–522 (1963). Price discriminations are forbidden to all if they injure competition and cannot be exonerated under one of the various statutory defenses set forth in the statute itself.

"Cost justification" is one of those defenses. In substance, Section 2(a) provides that a price discrimination shall not be unlawful, notwithstanding either the fact or the gravity of the injury that it is causing in the competitive environment, if it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [favored] purchasers sold or delivered."

Neither complaint counsel nor respondents have undertaken a formal "cost study" to determine precisely the costs that these auto parts manufacturers incur in selling to NPW's jobber partners on the one hand, and the nonfavored jobbers on the other. But the record adequately demonstrates that the "differing methods or quantities" in which respondents buy could not have possibly saved those manufacturers the differences between the prices charged for their products to these different classes of purchasers.

Auto parts manufacturers, as discussed above, generally serve their jobber customers either directly, through warehouse distributors, or, in some instances, by both methods. Here, only those jobbers that buy *direct* from the manufacturers are involved. It is the cost of selling and delivering to these direct-buying jobbers on the one hand, and to NPW's jobber partners on the other, that are to be compared.

In selling direct to jobbers, the manufacturers employ salesmen or "manufacturer's representatives" that physically call on each individual jobber at his place of business, take his orders, familiarize him with the manufacturers' products, including new items, assist him in selecting and stocking the parts he needs, and otherwise aid and advise the jobber. The manufacturers compensate their salesmen and representatives on a commission basis.

Orders are received, and shipments made, either by the factory itself, or by a local warehouse owned, leased, or hired by the manufacturer. The presence of such a local warehouse in a given city is, of course, a convenience to jobbers in the area, since ready access to its stock reduces the time required to get delivery, and permits a corresponding reduction in the jobber's own inventory. Not all manufacturers, however, provide such service; many ship directly from their factories.

Freight costs are a fairly substantial factor in the auto parts business, because of the weight of some of the parts, *e.g.*, batteries. The policy of virtually all of the manufacturers is that they pay the freight only on orders that exceed a stated minimum in either quantity or cost, such as orders above 300 pounds, more than 20 cases, more than 225 batteries, or above some stated dollar amount. On smaller shipments, the buyer bears the freight costs.

If the "differing methods or quantities in which" respondents buy have effected for their suppliers any savings in *freight*, they have not been explained to us. The record is clear that, except for the some 20% of its volume that the manufacturers "drop-ship" to its partners direct, NPW at least tries to make each order large enough that the manufacturer will pay the freight to NPW's warehouse. To the extent that it does so, respondents have succeeded in shifting the freight costs from themselves and onto their manufacturers. Hence they have not "saved" the manufacturer anything on freight; they have *increased* his costs in this regard. It is certainly a fair inference that NPW, buying on behalf of over 55 jobbers, succeeds more frequently in getting such freight-free shipments than would each of the 55 ordering separately, or each of their nonaffiliated competitiors ordering separately.

Turning to potential cost savings in the matter of *billing*, there would be no savings to the supplier in regard to the 20% of NPW's volume that is handled by drop-shipment; there, individual shipments, and individual invoices, remain the same in size and number, with NPW, a useless "intermediary," simply duplicating the manufacturer's billing expenses, not relieving him of them. In addition, however, it is not at all apparent from the record that NPW's "central billing" procedures saved any money at all for the manufacturers.[44] In any event, however, billing is a relatively minor expense, wholly incapable of affecting the issue in question to any significant extent.

There is, however, one item in the auto parts manufacturer's costs that is obviously significant—the expense of *selling*. In order to persuade jobbers to carry his "line" in preference to lines sold by competing manufacturers, he must reach those jobbers either through his own sales representatives or through representatives employed by his middlemen (*e.g.*, warehouse distributors). Since the nonaffiliated, nonfavored jobbers involved here buy directly from the manufacturers themselves, through sales representatives paid on a commission basis by those manufacturers, we are not directly concerned with any sales made by warehouse distributors' salesmen. However, the record, so far as we have been able to determine, does not indicate the costs actually incurred by these manufacturers in selling through their own salesmen. We know that, when both the warehousing and the selling functions are turned over to a warehouse distributor in a given area, the cost to the manufacturer is generally 20% of the regular jobber price. And we know that the going market price or value of the *warehousing* service is 5% of that jobber price. Hence, the "selling" costs cannot exceed 15%.

Respondents, in contending that they perform all of the "functions" generally performed by warehouse distributors, are thus claiming that they have relieved their manufacturer suppliers of this selling expense, and that this "savings" is an allowable item under Section 2(a)'s cost justification proviso.

[44] One supplier wrote to NPW as follows (CX 167–A):

"Our present billing procedure [sending NPW first an invoice and then a credit memo] has placed an *extra load* on our Bookkeeping Department, to the extent that we are almost unable to handle it, — one of the reasons being that *your organization* operates over a fairly wide territory and perhaps covers as many as three or four of our sales representatives * * *."

"After considerable discussion with our Accounting Department, and also, taking into consideration the fact that *we do not want to place an undue burden on your* Accounting Department [it was decided that the solution was to issue two invoices: one, to be sent to the individual NPW partner, would show the full jobber price; the other, to NPW itself, would show 20% off its face]. This means that it will *not be necessary for you to re-invoice* your jobber members * * *." (Emphasis added.)

We are not persuaded that this is the law. In effect, this means that a buyer can be paid for selling to himself. Here, however, it is not necessary for us to deal with this question. The record shows that respondents have not, in fact, relieved their manufacturers of the expense of "selling" to the jobber partners. While it is claimed that NPW's general partner, Smith, calls on and sells to the jobber partners, this contention was completely discredited by the testimony of the partners themselves. One of them testified that Smith had been in his place of business twice since NPW's formation in 1956.[45] Another, testifying in March of 1962, stated that no NPW salesman had called on him since he joined NPW in May of 1961. An NPW partner had visited him, all right, but not to "sell me anything." [46]

NPW employs only one salesman. And that salesman's efforts are directed solely at jobbers who are *not* members of NPW (when a particular jobber joins NPW, the latter's commission salesman immediately stops calling on him [47]). This professional salesman, devoting full time to the job of calling on and selling to independent, nonaffiliated jobbers, accounts for only 6% of NPW's total "sales." Respondents would have us believe that Smith, their general partner, personally "sells" the remaining 94% of NPW's more than $6 million total, accomplishing this impressive feat of salesmanship on a part-time basis, namely, two days out of each week!

The explanation for the general partner's success in singlehandedly "selling" to his jobber partners 94% of the $6 million worth of goods handled by NPW in two days per week, without bothering to hire a sales force, lies in the fact that salesmen and sales representatives employed and paid *by the manufacturers* (on a commission basis) continue to call on and take orders from NPW's jobber partners just as they did before those jobbers joined NPW (and just as they continue to call on and take orders from nonaffiliated competitors of the jobber partners).[48] Auto parts manufacturers assign their salesmen to specific geographical territories, and the latter receive their commissions

[45] Q. Doesn't Mr. Smith call on you?

A. I think he's been in my place of business on two occasions.

Q. Since 1956?

A. Yes, sir.

Q. And do I understand that Mr. Smith does not regularly call on you in an attempt to sell you merchandise?

A. No, sir * * *. Tr. 1784.

[46] Tr. 1312.

[47] Tr. 1312, 1607–1699.

[48] NPW concedes that the manufacturers' salesmen call on and sell to the jobber partners. See, *e.g.*, tr. 188. Representatives of the manufacturers testified to the same effect. See, *e.g.*, tr. 1073, 1141–1142, 1527–1528, 1556, 1857. The jobber partners acknowledged that they are still called on and solicited by manufacturers' salesmen. See *e.g.*, tr. 662, 694.

on all sales of the manufacturers' goods in that assigned territory. Thus, it appears that some manufacturer's salesman or sales representative was paid, *by the manufacturer*, a full commission on every "sale" allegedly made by NPW to its jobber partners. NPW, so far as this record shows, has "saved" its suppliers nothing in the matter of sales expenses.

In at least one way, NPW has *increased* the "selling" expenses of its manufacturer suppliers. As previously mentioned, it stages an annual "exhibit" or "trade show" affair, generally in July or August, at various summer resort cities. These yearly events are, in effect, a private showing of the manufacturers' wares in an effort to woo a special group of particularly demanding buyers—NPW's jobber partners. As Smith explained it, "these shows are for the purpose of giving the manufacturer or the supplier an opportunity to sell to that man [the individual jobber partner of NPW] his product or sell to that man his service." [49] At these "shows," the manufacturers, represented not only by their salesmen and sales managers but by their "executives" as well, exhibit their offerings on tables set up in the usual trade-show manner. The partners "go from one table to the other," [50] frequently placing orders on the spot with the manufacturers' representatives. These orders are naturally placed in NPW's name, with NPW receiving its usual (*e.g.*, 20%) "warehouse" discount on the sales. As one manufacturer's representative put it: "*We* try to sell merchandise *for him* [NPW's general partner, Smith]." [51] These factory salesmen, representatives, and executives, many of whom bring their families along,[52] naturally find that "it is expensive" [53] to attend NPW's annual "shows." But they explain that it is a "profitable expense item." [54]

"Profitable" or not, however, these are extra items of expense that these manufacturers do not incur at all in selling to respondents' competitors. We think it plain that respondents' operation of NPW, far from lessening their suppliers' costs of selling to and servicing the 55 jobber partners, has actually *increased* these particular cost items for the manufacturers.

Finally, it should be noted that NPW's *total expenses*, including the costs incurred in operating its warehouse and in performing all of the other "services" it renders to its jobber partners, averages only

[49] Tr. 299.
[50] Tr. 355–357.
[51] Tr. 1549 (emphasis added).
[52] Tr. 1532.
[53] Tr. 1598.
[54] *Ibid.*

8% of the jobber price of the merchandise it sells. Its bookkeeper testified as follows:

Q. What does it cost National Parts Warehouse to do business?

A. Let me get the audit and check it.

Q. Approximately.

A. Approximately *eight percent.*

* * * * * * *

HEARING EXAMINER CREEL: That includes warehouse cost; does it not?

THE WITNESS: That includes all expenses.[55]

It is clear, however, that a substantial part of this 8% is spent by NPW in rendering services to its jobber partners that the manufacturers in question do not perform for their nonfavored customers, and that cannot, therefore, be considered a "cost saving" to those manufacturers. For example, a stipulation between counsel supporting the complaint and counsel for respondents states that all of NPW's jobber partners, if called as witnesses (several had already been called), would have testified that, since becoming partners in NPW, "they operate their businesses in substantially the same manner as they did before becoming partners in National Parts Warehouse, *except* that they *maintain smaller stocks* at their business establishments, [and] that they *order frequently* from National Parts Warehouse and warehouse distributors *in smaller quantities* than they previously did when dealing directly with manufacturers."[56] The manufacturers, even when they have local warehouses, will not bear the expense of making these small, frequent shipments to their jobber customers. As one manufacturer's representative put it: "They [NPW] can ship a jobber, I guess, every day, maybe two or three times a day out of their warehouse whereas we wouldn't offer such a service ourself."[57]

[55] Tr. 1372 (emphasis added). NPW's total sales and total expenses are set forth in detail at CX 5, p. 8 (1956); CX 6, p. 8 (1957); CX 4, p. 8 (1958); CX 7, p. 8 (1959); and CX 8, p. 4 (1960).

While the record does not indicate exactly how much of this 8% total is spent by NPW in the operation of its warehouse, it has been clearly established that this item could not have exceeded 5% of the jobber price. (The manufacturers can, and do, hire "commercial warehousemen" to perform the full warehousing service for a fee of only 5% of that jobber price. Tr. 992. See also tr. 41, 43, 1065, 1606–1620. This going price for the warehousing service is corroborated by the fact that the manufacturers frequently cut a warehouse distributor's "discount" by 5%, *e.g.,* from 20% to 15%, when the latter, instead of warehousing the goods, asks the manufacturer to "drop-ship" direct to the warehouse distributor's jobber customer. See tr. 991, 1112, 1120, 1141, 1144, CX 239, p. 1, caption, and CX 240, p. 1.) Therefore, even if we accepted the contention that a buyer's warehousing of its own goods can give rise to cognizable cost savings, there would still remain a 15% differential between the price paid by respondents and the price paid by their competitors that cannot be cost justified.

[56] Tr. 1882–1883 (emphasis added).

[57] Tr. 1214.

NPW, in giving its partners this extra service, enables the individual jobber partner "to reduce the amount of inventory he must carry,"[58] and thus free a substantial part of his capital for expansion or other uses. But in doing so NPW "pads" its "expenses" with an item that, since it is not incurred by the manufacturers in dealing with their direct-buying, independent jobber customers, cannot represent a "cost saving" to those manufacturers in selling or delivering to respondents (as compared with the cost of selling or delivering to respondents' competitors). In other words, this is a "service" that respondents have performed for themselves, not for their manufacturer suppliers. As such, its cost is not an allowable item of "cost justification."

NPW's jobber partners, as "experienced automotive parts jobbers,"[59] cannot be heard to deny knowledge of things that "trade experience" alone should have taught them. *Automatic Canteen, supra*, 346 U.S. at 79–80. Each of them knew that the manufacturers themselves, not NPW, were paying the commissions of the salesmen that called on him and took his orders. Each of them knew that NPW's total expenses, including the warehousing expense, was only 8%. Each knew that he personally received "services" from the manufacturers (*e.g.*, extra attention from salesmen, special "exhibitions" at the NPW "trade shows") and from NPW itself (*e.g.*, more frequent deliveries, and in smaller quantities) that were not accorded by those manufacturers to his competitors. Each knew that, in addition to all those extra "services," he was receiving and pocketing, as a "patronage rebate," the difference between the 8% that NPW expended on his behalf (including the extra services) and the 20% "discount" NPW received from the manufacturers.

We conclude that the cost savings, if any, effected by NPW for its suppliers were so "very small compared with the price differential" that these jobber partners "could not reasonably have * * * thought" them sufficient "to justify the price difference * * *." *Automatic Canteen, supra*, 346 U.S. at 80.

V

Respondents' contention that complaint counsel has failed to prove the discriminatory prices they have induced and received were not given by their suppliers in an effort to meet equally low prices of competing sellers misconceives the burden of proof on this issue. In

[58] *Ibid.*
[59] See Stipulation, tr. 1882–1883.

Automatic Canteen, supra, the Court did not pass on this question, but observed:

> Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. 346 U.S. at 79, n. 23.

As we said in *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963): "If a discriminating seller gives a lower price * * * to a particular buyer in response to a similar offer to that buyer from other sellers, the buyer himself, from the nature of the case, would be expected to know more about it than the discriminating seller. After all, a buyer who receives a discriminatory concession should know what offers it has itself received from other sellers. * * * If [respondents have received such offers], we think it is their burden to come forward with such evidence." Opinion of the Commission [p. 66 herein].

But even if proof on this point were a part of the affirmative case, we think that burden has been met. The situation here is the same as the one that was involved in *D & N Auto Parts Co., Inc.*, 55 F.T.C. 1279 (1959):[60]

> The respondents also knew, or should have known, that the various sellers could not have defended the price discriminations on the basis of the proviso contained in Section 2(b). The respondents knew that the defense of cost justification was unavailable to the sellers for the reasons stated in the preceding paragraphs, and for the same reasons knew that such a defense would not be available to any competing sellers granting such prices on the same basis. Knowing, therefore, of the illegality of the pricing systems involved, the respondents knew that the sellers could not defend such prices on the basis of meeting in good faith the equally low prices of competitors for the reason that the prices so met would not be lawful prices. 55 F.T.C. at 1301–1302.

VI

Respondents also contend that the order to cease and desist contained in the initial decision is too general, and is vague, too broad in its coverage, and burdensome. We think it should be modified in several respects. First, it prohibits respondents not only from knowingly inducing and receiving discriminatory prices in connection with the "purchase" of automotive supplies, but also in connection with the "offering to purchase" of such products. The latter phrase will

[60] *Aff'd., Mid-South Distributors, Inc.* v. *Federal Trade Commission*, 287 F.2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961).

be stricken. Secondly, the examiner's order would prohibit respondents from knowingly inducing and receiving such discriminatory prices not only in the situation where respondents themselves are competing with other customers of those sellers, but also in the situation where "the seller is competing with any other seller for respondents' business." This, of course, is a primary line provision, whereas the record shows only a probability of secondary line injury. *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963), Opinion of the Commission, [p. 73 herein]

Finally, in the interests of clarity, we think the order should make it plain that it is not directed against respondents' "buying group" organization as such, but against their use of it as a device to secure unlawful, discriminatory prices, an end that is forbidden by the statute to all "persons" (whether acting as individuals, or through an organization) both large and small. Hence our order will disregard all "ambiguous [functional] labels, which might be used to cloak discriminatory discounts," and simply prohibit respondents from inducing or receiving prices they know or should know are lower than those being paid by other purchasers "who *in fact* compete with [respondents] in the resale or distribution of such products." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 472, 475 (1952) (emphasis added).

This order will not preclude respondents from continuing to own and operate NPW or any other "group buying" organization. First, it will not even touch that part of NPW's business which involves sales to independent, third-party jobbers. As to these, respondents may continue to receive a 20% lower price since their competitors for that *jobber* patronage will be either other warehouse distributors who have similarly received the 20% discount, or the manufacturers themselves, and respondents, therefore, will not have received a lower price than other customers "who in fact compete" with them for that business.

Nor will the order preclude these respondent jobbers from receiving, on their purchases for resale in their own respective jobbing businesses, lower prices that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to [respondents] sold or delivered." This "cost justification" proviso is "implicit in every order issued under the authority of the Act, just as if the order set [it] out *in extenso*." *Ruberoid Co.*, *supra*, 343 U.S. at 476. Respondents may not be paid by their suppliers, however, for "services" performed for themselves.

Respondents' exceptions are denied and the initial decision, modified to conform to the views expressed in this opinion, will be adopted as the decision of the Commission.

Commissioner Elman does not concur and has filed a separate opinion.

Commissioner Higginbotham concurred.

SEPARATE OPINION

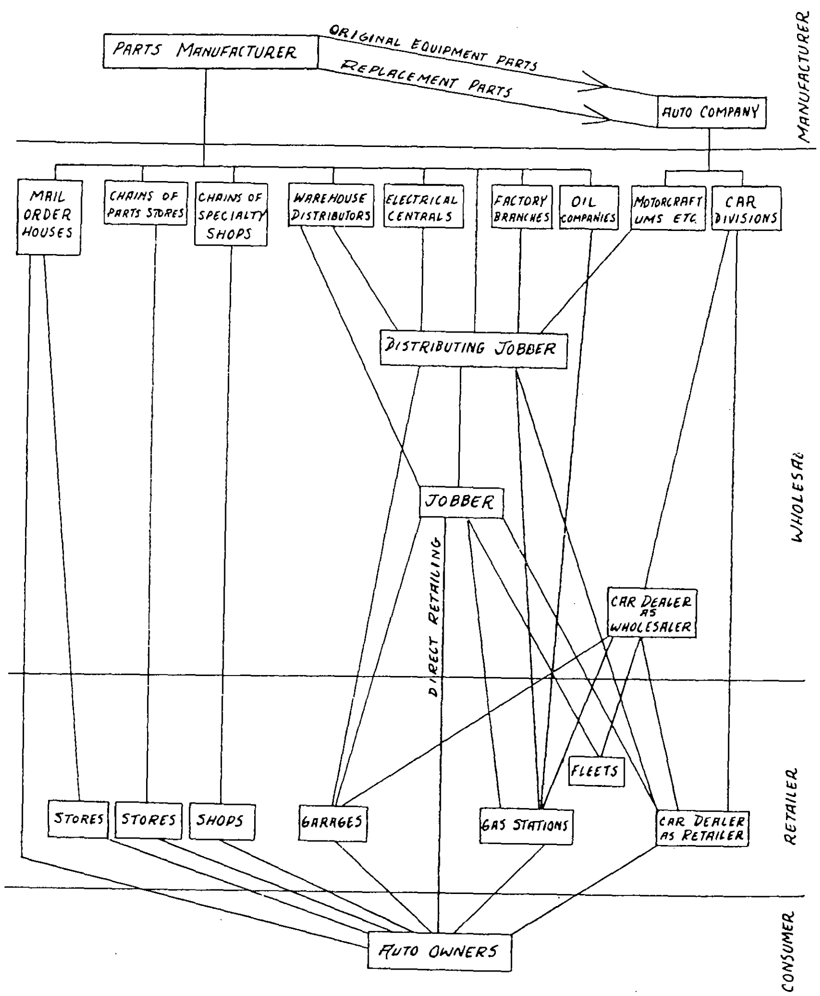
DECEMBER 16, 1963

By ELMAN, *Commissioner:*

As the attached diagram (p. 1740) vividly demonstrates, the distribution of automotive parts is not accomplished, as the Commission opinion seems to assume, by a simple flow of products from manufacturer to warehouse distributor to jobber to retailer. Instead, the industry is characterized by a confusing series of inter-relationships between companies at the various levels of distribution. Such a complicated industry structure should warn against easy generalizations concerning the competitive effects of specific methods of distribution. But this much, at least, is true of the industry: it is going through a period of rapid and radical change. "Traditional" methods of distribution are becoming outmoded. What used to be the regular and usual channel of distribution of automotive parts, i.e., through independent distributors, jobbers and garages, is no longer inevitably followed. Other and competing methods of distribution have evolved. Automobile manufacturers sell parts through their franchised dealers; oil companies sell parts through their gasoline stations; mail order houses sell parts both directly and through their retail stores; chains of specialty shops, such as those in the tire industry, and chains of general parts stores, have also come into the picture. In this complex structure the independent jobbers would seem to be, competitively, the weakest—not the strongest—members.

It would seem unwise for the Commission, on the basis of a simplistic view of the law and of the distributional structure of the automotive parts industry, and without having examined and determined the actual competitive significance of the respondents' practices, to condemn out of hand what may be a legitimate, and indeed beneficial, competitive device. We should hesitate to prevent the independent jobbers from adopting a new marketing method which, by eliminating one step in their channel of distribution, would increase their competitive strength vis-à-vis that of their more fully integrated

Flow of Parts to Consumer



Source: Automotive News, May 15, 1961.

competitors, at least in the absence of facts showing that such an effort by the independents to meet competition is, itself, anti-competitive in its results. There are no such facts here.

As a result of numerous Commission actions against buying groups through which jobbers of automotive parts have aggregated their purchases to obtain discriminatory discounts,[1] or against the manufacturers which have granted them such discounts,[2] some jobber groups have abandoned their simple "order-desk" method of business, whose only function was to combine the separate purchase orders of their members, and have developed warehouse operations which perform the same economic function, and are compensated by parts manufacturers on the same basis, as traditional warehouse distributors.

In *Alhambra Motor Parts* v. *F.T.C.*, 309 F. 2d 213, 220 (9th Cir. 1962), the court recognized that because, among other things, such a buying organization "performed substantially the same economic function as other warehouse distributors who received the same functional discount", its status was not governed by the earlier cases. As the court pointed out, "the economic and legal significance" of the operation of a jobber-owned warehouse falls within "the area in which the Commission's accumulated experience should provide the helpful guidance which Congress expected the Commission to furnish to the courts."

The difficulty with the present case is that the Commission has not accepted this invitation to use its "accumulated experience" to evaluate the competitive significance of jobber-owned warehouses and to arrive at an economically realistic solution. Although the opinion states, "We are not unaware of the fact that such operations can frequently enable groups of small merchants to duplicate some of the efficiencies of the larger, single-entity enterprises, and we are certainly not unsympathetic toward the efforts of any organization, 'buying groups' or otherwise, to achieve savings of this kind" (p. 1730), the test of legality announced by the opinion, i.e., whether NPW's jobber partners had "control" of the terms on which they obtained parts through NPW (pp. 1719–1721), leaves no opportunity for the lawful operation of such a buying group. Control of the group by its members is inherent in the purpose of the arrangement: to obtain "savings" for the members. If, as the Commission assumes, the existence of such savings establishes competitive injury, a finding of illegality is inevitable in every case.

I find nothing in "the law as Congress has given it to us" (p. 1730) which compels such a rigid and unbending test of illegality. Specifically, the test ignores whether NPW "performed substantially

[1] See, e.g., *Mid-South Distributors* v. *F.T.C.*, 287 F. 2d 512 (5th Cir. 1961); *American Motor Specialties Co.* v. *F.T.C.*, 278 F. 2d 225 (2d Cir. 1960).

[2] See, e.g., *Standard Motor Products* v. *F.T.C.*, 265 F. 2d 674 (2d Cir. 1959); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956); *Moog Industries* v. *F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

the same economic function as other warehouse distributors who received the same functional discount" (*Alhambra, supra*)—a question the opinion expressly regards as irrelevant (p. 1722)—and, if so, whether the advantage accruing to NPW's jobber parners constitutes the kind of competitive advantage which the Robinson-Patnam Act was intended to forbid.

The answer to these questions requires a closer examination of the economic significance of a jobber-owned warehouse. The success of a manufacturer of automotive parts depends, to a degree found in few other industries, upon the instant availability of his products to automobile owners in every section of the country. "Since the majority of repairs have limited deferability, ready availability of parts is the keynote of this industry." Davisson, *The Marketing of Automotive Parts*, p. 6 (1954). See also Lincoln, *The $7 Billion Aftermarket Gets an Overhaul*, *Fortune*, March 1962, p. 83. To secure the widest possible availability of their products, parts manufacturers accept different prices from different classes of intermediate distributors, depending upon the function which they perform. The class in which a particular intermediary falls is determined not by the precise method of its operation but by the function which it performs in the manufacturer's scheme of distribution.[3]

When a manufacturer compensates a warehouse distributor, in the form of a discount, for carrying its line of automotive parts and maintaining the inventory necessary for their ready availability, it is, in effect, "buying distribution". Davisson, *op. cit. supra*, pp. 910–12. If this essential function is performed instead by a jobber cooperative or similar organization, we have an example of vertical integration, i.e., the combining of two otherwise distinct stages in the distributional process.

To be sure, the integrated jobber may, by reason of the discount which he receives in recognition of his distributing function, enjoy a competitive advantage over his non-integrated competitors, but the advantage lies not in any arbitrary or unjustifiable price discrimination but in the fact that he performs both the jobbing and the distributing function and is legitimately compensated for both.

[3] In the present case, the record indicates that some of the parts sold through NPW were drop-shipped to its members and that salesmen of the manufacturers took orders from such members. There is no showing that the same practices were not employed in selling to jobbers who purchased through independent warehouse distributors; in fact, there is some evidence that these practices were common in selling through such distributors, Tr. 1141–1143, 1528, 1557, 1587–1588. Nor is there any showing that, because NPW and these independent distributors accepted some orders for drop-shipment to jobbers and filled orders which had been placed through manufacturers' salesmen, they thereby forfeited their classification as legitimate warehouse distributors with respect to such transactions.

Assuming that NPW does in fact perform the essential economic function of a warehouse distributor, the problem is one of vertical integration, not price discrimination, and although its competitive implications may deserve attention, the solution is not to be found in the Robinson-Patman Act.

The Robinson-Patman Act, which was designed by Congress to deal only with problems of price discrimination, is for that reason an inappropriate instrument for dealing with the broader and more complex problems of vertical integration, which in many instances is not accompanied by the differences in price which are the prime requisite for application of the Act. Since application of that statute would depend on the existence *vel non* of price differentials, only those cases of vertical integration where there are such differentials could be dealt with under the Robinson-Patman Act; and it could not be invoked in those other cases, perhaps involving more serious competitive evils, where no differences in price existed. Hence, reliance on the Robinson-Patman Act for dealing with problems of vertical integration will inevitably produce uneven and inequitable results. For example, where a fully integrated manufacturer sells both through its own retail outlets and through independent distributors, its competitive advantage over such independent competitors does not derive from differences in price, and the Robinson-Patman Act could not reach the problem. In the automotive parts industry, wholesale and retail functions are often combined in single integrated companies, e.g., mail order houses and chains of specialty shops and parts stores (see diagram, p. 1740). These integrated retailers enjoy an undoubted competitive advantage vis-à-vis independent garages who purchase through the warehouse distributor-jobber chain of distribution. However, so long as manufacturers charge the same prices to both integrated retailers and warehouse distributors, there is no price discrimination.

It would seem to me that a more realistic approach to the possible competitive problems of jobber integration would attempt not to prevent such integration, thus lowering all jobbers to the lowest common denominator of competitive strength, but would look to the removal of any impediments which may prevent jobber organizations from performing the functions, and receiving the benefits, of an integrated warehouse distributor-jobber operation. Thus, if shown to be necessary to prevent competitive injury, the Commission might justifiably require that a warehousing discount be granted to all competing purchasers who perform the same economic function. Cf. *Mueller Co.* v. *F.T.C.*, 7th Cir., September 6, 1963, where the court, in upholding a Commission decision condemning warehousing discounts which had been made available to some, but not others, of the respondent's customers, pointed out: "The Commission, in its brief, referring to the practice of compensating jobbers who perform a warehousing function, states: '* * * this is a perfectly proper procedure, provided it be done in a fair and legal manner.' We approve the order on that basis." Or if membership in a group buying organization were shown to be a competitive necessity for the small jobber, his exclusion on a discriminatory or otherwise unjustifiable basis might be regarded as an unfair method of competition under Section 5 of the Federal Trade Commission Act.[4] Cf. *U.S.* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Associated Press* v. *U.S.*, 326 U.S. 1 (1945); *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

Concurring Opinion

DECEMBER 16, 1963

By Higginbotham, *Commissioner:*

1. About one million dollars worth of the principal respondent's five million dollar annual business represents drop-shipments from the manufacturers direct to the respondent's members, see Initial Decision, Fdgs. 1706. As to these drop-shipment sales, the respondent does not perform any bona fide warehousing function, and it cannot properly be concluded that the respondent is "selling distribution" to the manufacturers from which it has induced a discount or payment.[1] For this reason, I think a § 2(f)-type order is appropriate to suppress what is clearly an unlawfully discriminatory practice. *American Motor Specialities, Inc.* v. *Federal Trade Commission*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960); *Mid-South Distributors, Inc.* v. *Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961).

2. I also agree with Commissioner Elman that it would be proper to invoke § 5 against a group buying association which unfairly ex-

[4] Cf. *Ark-La-Tex Warehouse Distributors, Inc.*, Docket 7592, Order Vacating Initial Decision and Remanding Case to Hearing Examiner, June 5, 1963 [62 F.T.C. 1557], where the Commission directed the examiner to consider, *inter alia*, "* * * whether the nonfavored jobbers were able to purchase the same products at the prices charged respondents, either from Ark-La-Tex or as a member of it or a similar group."

[1] Examination of the record does not indicate that independent warehouses were involved in substantial drop-shipments, as in the instant case. Certainly, the record does not indicate that jobber purchasers, who received shipments on orders placed through independent warehouses, enjoyed the benefits of the same discounts as did National Parts Warehouse jobber members.

cluded some jobbers and acted as a "bottleneck" to competition. Compare *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912), with *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963), and *Alhambra Motors Parts* v. *Federal Trade Commission*, 309 F. 2d 213, 219–221 (9th Cir. 1962). However, this issue was neither pleaded nor is it presented by the record before us.

Final Order

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by respondents and on briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That respondents National Parts Warehouse, a limited partnership; Bryant M. Smith, Sr., individually and as manager and general partner of National Parts Warehouse; Auto Machine and Parts Co., Inc., a corporation; Arnau Tire and Accessory Co., a corporation; Appalachian Auto Parts Co., Inc., a corporation; Mrs. George H. Ridgeway, doing business under the firm name and style of Madison Auto Supply Co., a sole proprietorship; Moyer Auto Parts, Inc., a corporation; Auto Parts Company, Inc., a corporation; Auto Parts and Service Company, Inc., a corporation; Brunswick Auto Parts Company, a corporation; Bessemer Auto Parts, Inc., a corporation; Buchanan-Lyon Company, a corporation; Barnes Motor and Parts Co., Inc., a corporation; Battery and Electric Co., Inc., a corporation; L. R. Wells, and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co.; Cains' Parts and Service Co., a corporation; Condrey Motor Parts, Inc., a corporation; Cottle's Auto Supply, Inc., a corporation; A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts; Bluefield Supply Company, a corporation, doing business under the firm name and style of Counts Automotive Supply Company; E'town Distributing Company, Inc., a corporation; Dickson Auto Supply, Inc., a corporation; I. N. Kohorn, doing business under the firm name and style of Dixie Auto Parts Co., a sole proprietorship; The Fergerson Company, Inc., a corporation; George M. Greer, Barney Nation, and Mrs. George M. Greer, copartners doing business under the firm name and style of Greer Auto Supply Company; Genuine Auto Parts Co., Inc., a corporation; Gadsden Auto Parts, Inc., a corporation; General Auto Supplies, Inc., a corporation; Jordan Auto Parts, Inc., a corporation; Lakeland Battery and Auto Supply, Inc., a corporation; George O. Franklin, III, doing business under the firm name and style of Metter Auto Supply Co., a sole proprietorship; A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon and Miriam Grey Bowling, copartners, doing business under the firm name and style of Motor Bearings and Supply Co.; Morgan Supply Co., Inc., a corporation; B. H. Fenn, doing business under the firm name and style of Millville Auto Parts, a sole proprietorship; The Megahee-Speight Co., a corporation; Motor Supply Company, Inc., a corporation; McLean Auto Supply Company, a corporation; T. Felton Millians, doing business under the firm name and style of Newnan Auto Supply, a sole proprietorship; Pensacola Automotive Supply Co., a corporation; Piston Ring and Supply Co., Inc., a corporation; Parts Supply Company, a corporation; Barney R. Riner, doing business under the firm name and style of Riner Radiator and Battery Co., a sole proprietorship; George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co.; Guy Fumbanks, doing business under the firm name and style of Standard Auto Supply, a sole proprietorship; R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company; Tanner Auto Parts, Inc., a corporation; White Stores, Inc., a corporation, doing business under the firm name and style of White Electric and Battery Service; Calhoun H. Young and Ruth C. Young, copartners, doing business under the firm name and style of Young Parts and Supply Co.; MacGregor Flanders, doing business under the firm name and style of Flanders Parts Company, a sole proprietorship; M. S. Church Auto Parts Company, a corporation; A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co.; Hyatt Parts and Supply Co., a corporation; Marianna Auto Parts & Supply Co., a corporation; Wendell Frazier, Norris Frazier and Winston C. Nunn, copartners doing business under the firm name and style of Nunn Auto Supply Co.; Thompson Auto Supply Co., Inc., a corporation; Wood's Automotive, Inc., a corporation; Huggins Motor Parts, Inc., a corporation, limited partners in National Parts Warehouse, and their respective officers, agents, representatives and employees, in connection with the purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products.

(2) Maintaining, operating, or utilizing respondent National Parts Warehouse or any other organization as a means or instrumentality to induce or receive discounts or rebates which result in a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products. The provisions of this paragraph (2) are not applicable to respondent National Parts Warehouse or respondent Bryant M. Smith, Sr.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

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

By the Commission, Commissioner Elman not concurring and Commissioner Higginbotham concurring.

IN THE MATTER OF

AMERICAN CYANAMID CO. ET AL.

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

Docket 7211. Complaint, July 28, 1958—Decision, Dec. 17, 1963

Final order modifying desist order of August 8, 1963, page 1895 herein requiring six antibiotic manufacturers and distributors accounting for 100% of the industry's sale of tetracycline, to cease concerted price fixing and collusive