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terms to all other customers competing in the distribution or resale of such products.

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

IN THE MATTER OF

THE PAPERCRAFT CORPORATION

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

Docket 8489. Complaint, June 4, 1962—Decision, Dec. 24, 1963

Order requiring a Pittsburgh, Pa., manufacturer of gift wrappings, ribbons and related products, to cease misrepresenting the size of rolls of gift wrapping papers by such practices as packaging the rolls in display boxes with two inches of empty space at either end, thus creating the false impression that the rolls were as wide as the containers.

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

PARAGRAPH 1. Respondent, The Papercraft Corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at 5850 Centre Avenue, Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale and sale of gift wrappings, ribbons and related products to distributors and retailers for resale to the consuming public.

PAR. 3. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its gift wrappings and related accessories when sold, to be shipped from its places of business in Pennsylvania to purchasers thereof located in various other

states of the United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent packages various assortments of gift wrapping papers in display boxes which reveal the number of rolls of such materials enclosed and the individual designs appearing upon each roll (Fig. 1). There is imprinted upon each box the number of rolls of gift wrapping paper contained therein, and the respective widths and lengths of the papers wrapped upon each roll, but certain of the boxes contain almost four inches of empty headspace (approximately two inches at either end) which is not readily apparent to prospective purchasers (Fig. 2). Other boxes are designed in a manner which partially covers the extended cores or tubes of a number of narrow-width papers in an assortment (Figs. 3 and 4).*

PAR. 5. While the respondent discloses the actual measurements of the wrapping papers contained in the various assortments, the method of packaging such papers creates the impression that such items are, in fact, as wide as the respective containers and that each roll of paper is of equal or uniform width.

PAR. 6. The impression created by the aforesaid method of packaging is false, misleading and deceptive. In truth and fact, certain of the wrapping papers are substantially narrower than the display boxes indicate.

PAR. 7. Respondent causes certain prices to be imprinted upon the cartons or display boxes in which gift wrappings are packaged for retail sale, thereby representing, directly or by implication, that such prices are the regular and usual retail prices for said merchandise. In truth and in fact, said imprinted prices are not the regular and usual retail prices of such items but are fictitious and greatly exaggerated prices.

PAR. 8. By packaging and pricing its merchandise as aforesaid, respondent supplies the means and instrumentalities by and through which retailers may mislead the purchasing public as to the contents and the usual and regular retail price of respondent's merchandise.

PAR. 9. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals in the sale of paper gift wrappings of the same general kind and nature as that sold by the respondent.

* Figures 1, 2, 3, and 4 are omitted in printing.

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PAR. 10. The use by the 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 by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of the 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 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. DeWitt T. Puckett, Mr. David J. Eden supporting the complaint.

Mr. Martin L. Friedman, Mr. Michael J. Shea, Chapman and Friedman, Wash., D.C., for the respondent.

Mr. Samuel Kaufman, Kaufman and Kaufman, Pittsburgh, Pa., and

Mr. Leonard H. Marks, Cohn and Marks, Wash., D.C. for the respondent.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

APRIL 3, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 4, 1962, issued its complaint charging The Papercraft Corporation, a corporation, with violation of Section 5 of the Federal Trade Commission Act. The complaint alleges the respondent corporation to be engaged for some time last past in the manufacture and the interstate sale of gift wrapping products to distributors and retailers for resale to the consuming public.

Respondent's gift wrapping papers, as in part illustrated by the photographic attachments to the complaint, are packaged in display boxes which reveal through a transparent front cover the number of rolls and the color and particular designs appearing on the paper on each of the rolls contained in the box. Imprinted on each box cover is a further statement as to the number of rolls therein and the respective width and length in inches of the wrapping paper on each

of the various rolls. It is alleged in the complaint that despite this disclosure of actual measurements, prospective purchasers are misled as to the width of some or all of the enclosed wrapping papers contained in some of such boxes.

It is alleged that certain of such boxes are so constructed as to conceal four inches of empty end space or approximately two unfilled inches at each box end; other of the challenged boxes are alleged to be constructed in such manner as to conceal the fact that some of the wrapping papers are not equal in width to other of the papers in the assortment therein presented. It is alleged that such method of packaging creates the impression that all the wrapping papers in such boxes are of equal and uniform width and approximately as wide as the box within which they are enclosed. The complaint charges this alleged impression created on the purchaser by such method of packaging to be false, misleading and deceptive, because in truth and in fact some or all of the said wrapping papers are substantially narrower in width than the size or the manner of construction of said display boxes would allegedly visually represent and indicate.

The complaint further alleges that respondent also causes certain prices to be imprinted upon the cover of the display boxes in which its gift wrappings are packaged for retail sale, and thereby represents, directly or by implication, that such imprinted prices are the regular and usual retail prices for said merchandise. It is alleged that said imprinted prices are not the regular and usual retail prices of such items but are fictitious and greatly exaggerated prices, and that by packaging and pricing its merchandise as foresaid, respondent supplied the means and instrumentalities by and through which retailers may mislead the purchasing public as to the contents and the usual and regular retail price of respondent's merchandise.

The complaint alleges respondent's said acts and practices to cause the public to purchase substantial quantities of respondent's products and charges the aforesaid acts and practices of the respondent to be to the prejudice and injury of the public and of respondent's competitors, and to constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed July 23, 1962. Said answer alleges discontinuance of the challenged packaging practices prior to the issuance of the complaint and states such practices not to be representative but to have constituted only a tiny fraction of respondent's total production. Respondent's answer also states the imprinting of

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retail prices on such merchandise to be a widespread practice in the gift wrapping industry and alleges that respondent has been unfairly singled out by being the only manufacturer subjected to a formal complaint in this particular regard.

Prior to such answer, respondent had filed a motion for more definite statement as to the complaint, and a motion to dismiss and reopen consent order proceedings with the incorporated request that such latter motion be certified to the Commission. Both motions were denied. Respondent's request for permission to reply and reply to the opposing answer to respondent's motion to dismiss and to reopen consent order proceedings was also denied. Following a prehearing conference held on August 7, 1962, and reconvened on August 22, 1962, made part of the public record by agreement of respective counsel, respondent filed another motion to suspend the proceeding and again requested that such motion be certified to the Commission. Said motion was again denied.

Notice and order setting the initial hearing herein for September 26, 1962, in Cleveland, Ohio, as agreed upon between counsel during the prehearing conference, was entered on September 5, 1962. Respondent on September 6, 1962, filed a request for permission to file an interlocutory appeal to the Commission accompanied by a request for a conference with the Commission or any designated Commission member. The Commission on September 17, 1962, entered its order denying such requests.

Pursuant to letter from respondent's counsel under date of September 18, 1962, accompanied by a medical certificate, the hearing scheduled for September 26, 1962, was ordered cancelled and reset for Cleveland, Ohio, on October 29, 1962. Respondent on October 24, 1962, filed another motion to suspend hearing date and proceeding and again requested its certification to the Commission. Said motion was denied by order dated October 25, 1962. Respondent on October 26, 1962, then filed another request for permission to file an interlocutory appeal, which was granted by the Commission on October 29, 1962, and the hearing was ordered to be suspended until disposition of said appeal. The Commission on November 19, 1962, entered its order denying respondent's said interlocutory appeal.

Following such denial by the Commission, respective counsel were directed to confer as to the earliest agreed upon available and suitable hearing date and the hearing was accordingly set for Cleveland, Ohio, to commence on January 21, 1963. Counsel supporting the complaint at such Cleveland hearing presented various witnesses and Commission exhibits marked for identification 1 through 14-B were admitted

into evidence; counsel for respondent also presented various witnesses and respondent's exhibits marked for identification 5 through 11 were admitted into evidence.

Respondent's rejected exhibits marked for identification 1, 2-A through 2-Z-30, 3-A through 3-Z-41, and 4-A through 4-Z-145 are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Both sides having completed their respective presentations, the case was ordered closed on January 23, 1963, and time was allowed for the filing of proposed findings, conclusions and briefs by respective counsel.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent, The Papercraft Corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at 5850 Centre Avenue, Pittsburgh, Pennsylvania. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale and sale of gift wrapping products to wholesalers and retailers for resale to the consuming public.¹

2. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its gift wrapping products when sold, to be shipped from its places of business in Pennsylvania to purchasers thereof located in various other states of the

¹ Comm. Ex. Nos. 9, 10, 11, 12, 13, 14; Tr. 173.
Resp. Ex. Nos. 9, 10.

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United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent sells its aforesaid products in all fifty states of the United States and its annual dollar sales volume of business in said products exceeds \$7,000,000.² Respondent's said products are sold in over 200,000 retail outlets across the United States.³

The Deceptive Packaging Charge

3. Respondent packages its various gift wrapping papers in display boxes which reveal through a transparent front cover the number of rolls of such materials enclosed and the individual designs appearing upon each roll. There is imprinted upon each front box cover the number of rolls of gift wrapping paper contained therein and a disclosure of the respective widths and lengths in inches of the papers wrapped upon each roll.⁴

Certain of the foregoing boxes contain almost four inches of empty end space or approximately two inches at each box end which is not visually apparent as being completely devoid of any gift wrapping paper.⁵ Other of such boxes are constructed in a manner which partially covers the extended cores or tubes of a number of narrow-width gift wrapping papers so that it is not visually apparent that such narrow-width papers do not extend the full width of the box as do other of the papers in the presented assortment.⁶ While the respondent discloses on the front box cover the actual measurements in inches of the width and length of the various gift wrapping papers contained in its various and numerous different display boxes, the complaint charges these two particular types of box construction or packaging to create a false, misleading and deceptive impression on prospective purchasers as to the width of the gift wrapping paper being purchased.

4. Six consumer members of the purchasing public testified in this proceeding as to the alleged deceptive packaging or slack-filling

² Tr. 165.

³ Tr. 205.

⁴ Comm. Ex. Nos. 9, 10, 11, 12, 13, 14.

Resp. Ex. Nos. 8, 11.

⁵ Comm. Ex. Nos. 1, 2, 5, 6.

Resp. Ex. Nos. 6, being a photograph of Comm. Ex. No. 1; 6-A, a photograph of Comm. Ex. No. 2; 6-D, a photograph of Comm. Ex. No. 6. No photograph of Comm. Ex. No. 5 was offered in evidence.

⁶ Comm. Ex. Nos. 3 and 4.

Resp. Ex. Nos. 6-B and 6-C, being photographs of Comm. Ex. Nos. 3 and 4.

charge of the complaint, two at the instance of Commission counsel and four on behalf of the respondent. As shown by the record herein, all appear to have been fully interrogated in such particular regard by respective counsel prior to testifying⁷ and their ensuing somewhat ambiguous, conflicting and apparently preconceived testimony sheds little light of any probative, determinable and reliable weight in the reflecting of a spontaneous, unguided individualistic first impression during the process of a second viewing of the challenged packaging from the witness stand. Under the circumstances shown herein, all such testimony is regarded as being nonproductive of any probative, determinable and reliable weight.

5. Henry J. Rossi, a packaging engineer employed in the folding carton division of the Continental Can Company, Elkhart, Indiana, also testified herein on behalf of the respondent. Mr. Rossi testified to having engineered the design or construction of the product display boxes sold by Continental to The Papercraft Corporation. Referring to Comm. Ex. Nos. 1, 2, 5 and 6, the witness described such display boxes as being cushion end boxes, commonly used, it was stated, to provide extra structural strength at both ends of the box. According to the witness, product display boxes are fashioned to show as much of the enclosed printed paper to the prospective purchaser or viewer as possible and still leave sufficient descriptive copy area at each end of the box.

The witness examined Comm. Ex. No. 2, a cushion end display box entitled, "Rhapsody, 4 big rolls, 540 inches long (total), 20 inches wide, special value \$1.49", and stated its external dimensions to be 7 by 2 by 24 inches in width. The witness then also examined Resp. Ex. No. 8, a non-cushion end display box entitled "Kaycrest, 4 Beautiful Designs, 360 inches total, 20 inches wide, 98¢", and stated its external dimensions to be 7 by 2 by 20 inches in width. The witness, with regard to Resp. Ex. No. 8, stated that the 20 inches external width dimension of this non-cushion end display box would also coincide with the actual width of the gift wrapping papers contained in said box.

Upon being questioned, after a side-by-side visual comparison of Resp. Ex. No. 8 with Comm. Ex. No. 2, the witness then testified that solely with relation only to the external size of each box that he could not tell which box contained more gift wrappings.

This testimony, of course, does not answer the pertinent question presented which is directed not to the actual quantity of gift wrap-

⁷ Witnesses Fox, Tr. 363-371; Holasek, Tr. 372-378; Steiger, Tr. 409-412; Kochis, Tr. 413-419; Lewis, Tr. 420-427; Sensel, Tr. 427-431.

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pings in either box, but rather does the cushion end display box which is Comm. Ex. No. 2, by its larger external size, visually misrepresent to the viewer or purchaser the width and thereby the apparent quantity of the wrapping papers enclosed. The hearing Examiner, as the record shows,⁸ made the same visual observation and side by side comparison of the external size of the two exhibits from the same vantage point as did the witness, and the ensuing inescapable conclusion was reached from such observation that, based on external box sizes, the width of the papers enclosed in cushion end Comm. Ex. No. 2 appeared to be obviously and substantially wider than those papers enclosed in non-cushion end Resp. Ex. No. 8.

Further, and in the light of respondent's commercial use of the non-cushion end display box, which is Resp. Ex. No. 8, the arguments advanced by the witness for the needed use of the misleading and deceptive cushion end display box, Comm. Ex. No. 2, are herewith rejected. The cushion end display boxes used by respondent, of which Comm. Ex. No. 2 is an example, are accordingly herein found to be false, misleading and deceptive to prospective purchasers with relation to the visually apparent width and thereby the quantity content of the gift wrapping papers enclosed in such boxes.

This false, misleading and deceptive first impression created by the external size of these particular boxes is further found not to be eliminated because of any imprinted lettering on such boxes as to the actual measurements of the width of the papers therein contained. To hold otherwise would unnecessarily raise and invite, under varying circumstances, unlimited questions of doubtful value as to whether or not such disclosure was likely to be or was actually noticed or unnoticed at the time of purchase, and if actually noticed, whether or not such a disclosure would be fully understood and operate to completely eliminate the false, misleading and deceptive impression first given to prospective purchasers by the external width size of such boxes.⁹

6. Mr. Rossi further testified as to the other or second type of display box construction or design also challenged by the complaint

⁸ Tr. 395; see, Commission opinion, Docket No. 7834, *Gimbel Brothers.*, (1962), page 5 and footnote 2; page 7 and footnote 4.

⁹ See, *Marlborough Laboratories, Inc., et al.*, (1941) 32 F.T.C. 1014 at 1027, where the Commission findings states:

"Some of the shaving creams and tooth pastes made and sold by respondents are put up in ordinary-sized tubes and then enclosed in much larger cartons. This method of filling misleads and deceives purchasers of such products into the belief that they are securing a greater quantity of such products than they would receive in the ordinary package or container. The packaging of products in such a manner is known in the trade as 'slack filling,' a practice which misleads and deceives the purchasing public and is unfair to honest competitors."

herein as being false, misleading and deceptive to prospective purchasers. This latter box type of construction or design differs from the first challenged cushion end type in that, while in the cushion end display box the apparent width size of all the papers in the box as visually pre-determined and expected by the viewer are not known or found to be substantially and actually different until after the box is opened, in the second or latter type of construction or design, certain of the assortment of different sized papers therein are actually of the same expected width as the external size of the display box would visually indicate to the viewer.

The question here presented by this second type construction or design is whether the prospective purchaser is misled or deceived as to the fact that some of the contained assortment of different sized papers are not of the same approximate width as the external box size, and any existing deception would be due not to the external size of the box itself, but only that which might be caused by the manner of the configuration of the nontransparent part of the front box cover.

In the first type cushion end display box construction or design challenged by the complaint, such as exemplified by Comm. Ex. No. 2, it was found upon examination that the amount of transparent front box cover display present was not materially different than that observed also present in the commercially used non-cushion end display box, Resp. Ex. No. 8. It was, therefore, apparent that cushion box ends in reality were not necessary of being commercially used to achieve a comparable product display.

Examples of record herein with relation to the challenged second type of display box construction or design are Comm. Ex. No. 3, and No. 4. Imprinted on the front box covers of these exhibits is the disclosure that two different widths of wrapping paper are enclosed, that is, a number of rolls of a 26 inch width actually coinciding with the external box size width, and a number of rolls of 20 inch width and less than external box size width. Comm. Ex. No. 3, for example, states "Economy Gift Wrappings, 26 inch wide gift wrap for those extra large packages, 20 inch wide gift wrap for those small and large packages", and further "600 inches (total), 6 beautiful designs 3 rolls 26'' wide 150'', 3 rolls 20'' wide 450'', total 600'', \$1.98 special". Another example of such construction and design, Comm. Ex. No. 4, also has imprinted on its front box cover much the same disclosure, to the effect that it contains an assortment of rolls of two different sizes, a number of rolls of 26 inches width, the actual external box size width, and a number of rolls of a lesser 20 inches width.

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With regard to Comm. Ex. Nos. 3 and 4, the witness testified¹⁰ that constructing or designing a display box for rolls of two different widths of gift wrapping paper posed a problem different than constructing a display box for rolls of only one and the same width of wrapping papers, because the box containing rolls of two different widths must be wide enough to accommodate the widest rolls used. This, according to the witness, gave rise to a situation which necessarily left a void and unsightly space caused by the exposed and uncovered bare core of the less wide rolls which was not suitable for display purposes and was required to be covered up for an acceptable appearing product. It was the gist of the witness's testimony that with the commercial need of displaying to the viewer or prospective purchaser as much of the gift wrapped paper covered rolls in the box as possible, it was found necessary that Comm. Ex. Nos. 3 and 4 be constructed and designed in their present manner and form so as to supply as much of this visible display as feasible.

The question here is accordingly different than that posed by the cushion end display box, because there is absent the basic deception caused by a falsely enlarged box size. The prospective purchaser in the present situation obtains the larger width size expected by the external box dimensions, and the only remaining question for decision is whether it is to be reasonably further expected that all the paper sizes therein contained will be of the larger width size. It thus becomes apparent that a prospective purchaser looking for different sized gift wrapping paper widths would look for and could only but expect from the imprinted disclosure on the box that some shorter width sizes other than the box dimensions would provide for and indicate to be the largest width sizes are therein contained.

The disclosure on the front box cover in these situations reveals all wrapping papers therein are not of equal but of different width sizes. There is present no deception as to any width sizes due to or caused by the external width dimensions of the box, and it would appear that there could reasonably be no deception to prospective purchasers seeking different widths, that there would be lesser width sizes contained in the box which were not related to the external dimensions of the box. To require the packaging of only one uniform width of gift wrapping papers in a single display box and thus deprive prospective purchasers of a wanted width size assortment obtainable only through the purchasing of one or more additional boxes in an effort to achieve such wanted widths, does not appear to be a desired end.

¹⁰ Tr. 405-406.

Accordingly, the witness's contentions as regards the commercial necessity of such manner of packaging is accepted and, there being no evidence presented to the contrary in such respect, the charge of the complaint as to deception in this regard is found to be unsupported by the record.

The Fictitious Pricing Charge

7. Respondent manufactures and sells three lines of gift wrapping products which respondent markets under the trade names of Kaycrest, Rhapsody and PR. The PR line is also known or referred to as Promotional, Super Value and Economy. The PR line is a less expensive line than either Kaycrest or Rhapsody and represents approximately 7% of respondent's annual sales of gift wrapping products. The Kaycrest and Rhapsody lines are identical as to quality and as to sales price, and the balance or remaining 93% of respondent's total annual sales are accounted for by the Kaycrest and the Rhapsody lines of gift wrapping products. The record, however, is silent as to what proportion of such percentage balance of respondent's gift wrapping products sales were in the Kaycrest or in the Rhapsody product lines. Respondent's total sales of all lines exceed \$7,000,000 annually, and respondent's said product lines reach the consumer through over 200,000 retail outlets in the United States.

8. Mr. Sy Scheckner, Vice-President, Marketing, The Papercraft Corporation, 5850 Centre Avenue, Pittsburgh, Pennsylvania, testified that prior to his present position with the respondent he had served the respondent for seven years as National Field Sales Manager. The witness stated that even prior to his employment the respondent had been pre-ticketing its gift wrapping products and described the utility of such practice as follows:¹¹

There is a definite demand on pre-ticketing at all levels of the trade. Normally at the retail level it is of utmost importance for the convenience of the retailer. It saves him the effort and work of opening up all these cartons and then pre-ticketing the material before he puts it on sale. If this material is not pre-ticketed, it is necessary for him to open each of the cartons, pre-ticketing each item, closing the cartons, and putting them in the storeroom, then using them as required.

In the case of the wholesaler, the pre-ticketing establishes his selling price. In most cases the wholesaler uses the retail price or the pre-ticketed price as his sales price. He takes his discount off the printed price of the package. From the direct position of the consumer, it establishes in her mind a level, a level of the price and the quality of the package that she is purchasing. Most consumers when they buy a pre-ticketed product, pre-ticketed by the manufacturer, assume that the standard and the high level of the manufacturer are in the

¹¹ Tr. 200.

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product that she is buying, and she is going along with this assumption as a guide to her for true and honest value.¹²

Mr. Scheckner stated that respondent's Kaycrest line of gift wrapping products, to his knowledge, was regularly and usually sold at retail at its pre-ticketed price. The witness testified in this regard:¹³

Well, part of my duties are to be in the field. I am in the field at least six months a year, usually more than that. In my trips, working with our accounts, I have many opportunities to visit retail stores all over the country and observe what is going on. This is part of my job to check marketing areas, check retail stores to see what competition is doing, to see what products are being sold for.

All our salesmen are instructed to watch very carefully the sale of Kaycrest products at retail and if they at any time see any violations of the Kaycrest brand at retail being sold for less than the pre-ticketed price, they are instructed to contact the retailer or the chain, whoever the case might be, and try to explain to the man or the buyer or merchandiser that we want to have the Kaycrest brand sold at the pre-ticketed price. In many cases he is successful.

Where situations arise that he is not successful in doing this, we then will not ship any more Kaycrest products to this account.

As I said, we will not ship Kaycrest to this account. There have been instances where we have even gone so far as to have our salesman go into the store and buy up all of the Kaycrest stock to clean him out when he failed to cooperate with us.

The witness further stated that the Rhapsody line of gift wrapping products was initiated by the respondent in 1958 because the company did not want the Kaycrest line sold to discount houses. In this connection, the witness testified with relation to the initiation of the Rhapsody line:¹⁴

Primarily we were witnessing a tremendous change in the retailing organizations of the United States. The phenomenon known as the discount house was born during that period, and the obvious name of discount house applies to the fact that preparatory to selling a given product which normally sells for such a color and level at a certain price, they could discount it. The reason they could do this is because they bought direct. They didn't have to deal through a wholesaler. They usually operated out of the downtown areas. They didn't have high overhead. They didn't have any fancy fixtures. Their very existence depended on pre-ticketed merchandise. It was the only way

¹² Appropriate to the above is the following finding of the Commission in the *Mari-borough Laboratories* matter, *supra*, 32 F.T.C. 1014 at 1026:

"To a substantial extent the public measures the quality and retail value of an article of merchandise by its usual selling price. When a printed retail selling price appears on an article of merchandise, it is generally understood that it indicates the usual retail selling price. A comparatively high price conveys an impression to the public of higher quality. Reputable manufacturers price-mark articles of merchandise sold by them to retailers with the intention that the suggested prices will be followed, at least approximately."

¹³ Tr. 203-204.

¹⁴ Tr. 202.

they could show the customers they were getting an even better value in terms of their purchase. If it was pre-ticketed it was established as the value or as a value for that product.

Mr. Scheckner, under cross-examination, further testified that the respondent did not take the same protective measures with the Rhapsody line as it did with the Kaycrest line when it found a retailer selling below the preticketed price. The witness also admitted to knowledge that the Rhapsody line of the respondent would be sold by discount houses at prices below the preticketed prices, and the record shows the following testimony of the witness relative to the Rhapsody line:¹⁵

Q As a matter of fact, you sold a great proportion of these to the discount houses?

A The majority of the Rhapsody line was sold to discount houses.

Q And the discount prices were below the pre-ticketed items as a general proposition?

A That is correct.

The record in this matter other than as may be found to be indicated by the foregoing admission is completely barren of any factual showing or proof of the total annual dollar sales by respondent of its Rhapsody gift wrapping product line, the number of discount houses in any trade area or areas reselling any of such products, and the amount, description and the retail price of any of said products being sold below the preticketed price. The record also fails to disclose the number of other retail outlets in the same trade area or areas of any of said discount houses which also may be reselling respondent's said brand of products, and, further, whether or not said products are being resold at or below the preticketed price.

The record herein does show that products in respondent's three gift wrapping lines are sold in over 200,000 retail outlets across the United States but does not disclose the products handled nor the number of such retail outlets for any given trade area. The record shows that respondent's Kaycrest and Rhapsody lines account for 93% of the annual total dollar sales and the PR line for the remaining balance of 7%. The record also shows that the Kaycrest and Rhapsody lines are of equal quality and of like cost and corresponding pre-ticketed price¹⁶ and that while the Kaycrest product line is not sold by the respondent to discount houses, products of the Rhapsody line are sold to and accepted by retail outlets other than discount houses.¹⁷

¹⁵ Tr. 244.

¹⁶ Tr. 164; 181; 203.

¹⁷ Tr. 270; 336; 346.

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No breakdown of sales as between the Kaycrest and the Rhapsody lines is contained in the record. The only respondent official called to support the charges of the complaint in this respect stated his inability to furnish such information but indicated that Mr. Scheckner, another of respondent's officials present, might serve to answer in such regard.¹⁸ Mr. Scheckner, Vice-President, Director of Merchandising and former National Field Sales Manager for the respondent, was not called as a witness in the presentation of the Commission case.¹⁹

9. Eight witnesses testified in support of the charge of the complaint relative to alleged fictitious pricing by the respondent. One witness from the trade area of Detroit, Michigan and seven from the Cleveland, Ohio trade areas. Four witnesses from only the Cleveland, Ohio trade area testified on behalf of the respondent in opposition to such charge.

Detroit, Michigan: (1) Mr. Oscar Levy, 12300 Mark Twain, Detroit, Michigan, a buyer for Borman Food Stores, a 79 store chain, testified to the purchase of gift wrapping papers from the respondent.²⁰ The witness testified Borman Food Stores to have sold respondent's merchandise in an annual volume of around \$40,000 to \$50,000 for the year 1961 and for the year 1962. The witness stated Borman Food Stores sold none of the respondent's products in evidence²¹ and to have handled mostly its 98¢ merchandise. This merchandise was confined to respondent's Kaycrest line and was stated by the witness to have been preticketed or pre-marked at 98¢ and to have been retailed by the chain at 69¢ during certain times.

The witness testified that the chain had adopted the Kaycrest line in 1959 and had maintained the preticketed price thereon in 1959 and 1960. The price departure, according to the witness, was because competitive grocery stores and dime stores or syndicated stores were all cutting prices. The witness testified that the respondent was not notified of this change of policy with reference to this lower resale pricing by Borman Food Stores of its preticketed merchandise, and that respondent's sales price to the chain for such merchandise had, during such price cutting time, remained the same.

The witness also testified to having accepted, during one of the foregoing years, an item from the Rhapsody line as a fill-in substitute

¹⁸ Tr. 171.

¹⁹ The prehearing conference herein, made part of the record by agreement of respective counsel, developed the need for certain indicated information and sales data that would be furnished through this witness. See, Tr 52-56; 70-71; 114-118; 142-143; and further, Tr. 196-197; 252.

²⁰ Tr. 329-337.

²¹ Comm. Ex. Nos. 1, 2, 3, 4, 5, 6, 7, 8.

in lieu of a Kaycrest product. The witness was uncertain as to the exact year but stated that respondent's preticketed price on the Rhapsody product would have been maintained if that was one of the non-priced cutting years. The witness stated that respondent's price to the chain for the Rhapsody item and the equivalent Kaycrest product was the same for both products, and that the same preticketed or retail sales price was imprinted on each product.

The record is silent as to the various locations of the stores of this 79 retail store chain, and as to whether each store actually handled respondent's said merchandise. The record is also silent as to how many other retail outlets reselling respondent's like merchandise may be located in the trade area or areas serviced by this chain, and which of such other stores, if any, are or are not maintaining the preticketed price for such merchandise. Finally, the record is silent as to whether this cut price by Borman Food Stores was made to meet the sale of respondent's products being sold below the preticketed price or those of another manufacturer. The record does not show the number of stores and the extent of the retail sales in the Detroit trade area of respondent's said products, nor that the cut price by Borman's Food Stores was the prevailing usual lower price of other retail outlets similarly selling respondent's said products. Accordingly, the charge of the complaint relative to the Detroit trade area fails of adequate proof. The cut-price sale by Borman Food Stores, standing alone, does not prove that the regular, usual and prevailing price for respondent's said products was other than the preticketed price for said products in the trade area or areas concerned, and that said preticketed price was further a greatly exaggerated and fictitious price as alleged in the complaint.

Cleveland, Ohio: (1) Mr. Morton Levine, 1566 East 124th Street, Manager, Ohio Stationery Company. The witness testified that the business of the said company was the wholesale distribution of toys, novelties and school supplies. The witness testified to purchasing two different items during 1961 but the record does not show whether these items were products from respondent's Kaycrest, Rhapsody or PR lines, nor that they were resold under the preticketed price other than by the Ohio Stationery Company acting as a wholesaler selling to retailers. The purchases during 1961 from the respondent by Ohio Stationery Company of the two items in question amounted to only \$291.60.²²

²² Tr. 255-259.

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(2) Mr Jules Spector, employed by Louis L. Schaffer Company, Cleveland, Ohio, which according to the witness, was engaged in buying for four retail stores known as Economy Stores and respectively located one each in Cleveland, Mayfield, Brunswick and Lorain, Ohio. Mr. Spector stated he assisted in the buying of respondent's gift wrapping products for sale in the above stores and that these items were retailed under the preticketed price. The record again is silent as to the identity of any of the products as to which the witness had testified of sales having been at one-third off the preticketed price, and further as to whether they were products in the respondent's Kaycrest, Rhapsody or PR line. Mr. Spector's approximation as to the retail sales volume of these products, admittedly based "on an estimate or maybe a guess" by the witness, was stricken from the record upon motion by respondent's counsel.²³

(3) Mr. Irving Kopit, Manager, Club Sales Company, 1268 Ontario Street, Cleveland, Ohio. Mr. Kopit testified his business was that of a wholesaler-retailer of general merchandise. In 1961 and years preceding, the witness stated he had purchased products from respondent's Kaycrest line which were resold at a reduction of one-third off the preticketed retail price. What amount of sales of the respondent's products was made in a wholesaler or in a retailer capacity is not disclosed by the record. The annual purchases from respondent by the Club Sales Company during 1960 and 1961 were less than \$1,000.²⁴

(4) Mr. E. Robert Marcus, Vice-President and Treasurer, H & H Distributing Company, 3622 Prospect Avenue. The witness stated his business to be that of a jobber selling at wholesale to industrial accounts in case lots amounts for premium or gift use. Sales were also made to employees of these industrial accounts and friends of such employees. The company was described as being a catalog house and individuals coming to the premises would do so only because of having access to the catalog, as the company's location was not such as to attract off-the-street or walk-in traffic by the general public.

It was testified that respondent's said products have always been sold at less than the preticketed price whether in case lots to the industrial concerns or by the carton to individual purchasers. The record, however, does not disclose at what prices the respondent's products were resold either by the carton or in case lots. The witness stated respondent's products to have been recently eliminated from his

²³ Tr. 442-458.

²⁴ Tr. 289-302.

company's catalog but that they are still being sold during the Christmas season. When the catalog was in use, none of the copy therein was prepared or supplied by the respondent, according to the witness.

The witness testified that the company handled only respondent's Kaycrest line, but the record neither shows the annual dollar amount involved nor that part of such amount allegedly sold as a wholesaler to industrial concerns in case lots or at retail to individual purchasers in single cartons.^{24-a}

(5) Mr. Byer Mazur, President, State Wholesale Merchandise Company, 624 St. Clair Avenue, West Cleveland, Ohio. The testimony of this witness developed that his only purchases over the years from the respondent was what was described as being a 30-sheet thrift pack, an unboxed item not identified as being in either the Kaycrest, Rhapsody or PR lines.

The testimony of the witness was that he did not recall whether the item was preticketed or not but that the company always sold at less than the retail price marked on the package but at what lesser price and what amount was sold as a wholesaler or as a retailer was not disclosed. The purchases of this one item by the witness from the respondent as disclosed by the record were \$165.76 for 1958; \$151.20 for 1959; nothing for 1960; and \$357.50 for 1961.²⁵

(6) Mr. John M. Shelby, Manager of Store No. 13, Western Auto Stores, 4253 Fulton Road, Cleveland, Ohio. This witness testified to sales of respondent's products by his store, stating "We sell on an average, I would say as a guess, oh, about 24 cases per year, which would be about 12 packages to a case. I would say that would be pretty close to it." The products involved were not identified as being from either the Kaycrest, Rhapsody or PR lines. The witness stated there were eight other company stores in the Cleveland area which he assumed would also have carried the same Papercraft items, but that he would have no personal knowledge of this other than he knew that purchases for all company-owned stores were made by a central buying department.

The witness stated these items to be seasonal and usually sold at less than their preticketed prices based on a master price list established by the company for their resale. The witness testified that he had not recently consulted this master price list but from memory such resale would have been either \$1.95 or \$1.98 for items possibly preticketed at \$2.49, \$2.98 or \$1.98. In this connection the witness

^{24-a} Tr. 303-312; see Docket No. 8140, *Leeds Travelwear, Inc.* (1962) citing *L. & C. Mayers Co. v. FTC* (1938) 97 F. 2d 365.

²⁵ Tr. 313-328.

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stated, "You see, this merchandise here is not a year around product with us. We bring it into the store for a couple of months of the year, we sell it and we get out from under it as quickly as possible. Therefore, the prices are not such that I would remember as I would my regular line of merchandise."²⁶

(7) Mr. Herbert H. Durr, vice-president, Gray Drug Stores, Inc., 2400 Superior, Cleveland, Ohio, stated his prime responsibility to be that of merchandise buyer for the company. The witness testified that Gray Drug Stores was a retail store chain of 148 stores operating throughout the State of Ohio as well as in other states. Twenty-three stores were stated to be located in the greater Cleveland trade area. The chain purchases respondent's Kaycrest, Rhapsody and PR lines of gift wrapping products, but again the annual volume of purchases was not developed and the record is silent as to the amount of sales by these stores in any trade area, including the pertinent greater Cleveland area.

The Kaycrest line is handled by the chain as a full line of products and, according to the witness, it was company policy not to deviate from the preticketed price in the resale of the Kaycrest line product merchandise.²⁷ The Rhapsody line, on the other hand, was sold by the chain through leased departments in various discount stores operating under different store names, in which it was said to be the general policy to sell at a reduced price. The witness stated that while the preticketed price of the Rhapsody line was cut, he could not say as to how much, because it was sold through discount operations and that it would vary market to market. The record does not disclose the name or location of any of these markets or the name or number of any of these discount stores that might be therein located.

With reference to the PR line, the witness testified to handling only two different items and that such were sold by the chain at less than the preticketed price, a 98¢ package sold for 66¢ and a \$1.98 package sold for 99¢. The annual dollar volume of these sales of these packages and whether all or any of the Cleveland stores of the chain resold these items does not appear in the record. The record also fails to disclose the names and number of all retail stores in the greater Cleveland trade area which might also handle products in the respondent's PR line and the prices at which said products were resold. For example, see pages 23-24 herein following.

²⁶ Tr. 271-289.

²⁷ Resp. Ex. No. 7 shows an advertisement by Gray Rexall Drug Stores of Kaycrest Gift Wrap \$1.49, stated by the witness to be the preticketed price for such item (Tr. 266).

The witness concluded by stating it to be his belief that Rhapsody was merely another name used by the respondent in place of Kaycrest because of competitive conditions whereunder certain people do not like to have the same name as somebody else, and further, that the contents of Rhapsody were the same as the contents of Kaycrest and that the pricing was the same.²⁸

10. *Cleveland, Ohio*: Called as witnesses on behalf of the respondent were (1) Mr. Maurice G. Lader, Crown Drug & Sundries Company, 1383 West Ninth Street, Cleveland, Ohio. The witness stated the company to be in the wholesale toy business and that in such connection sales of gift wrappings were made to retail stores and department stores. The witness testified to purchasing respondent's Kaycrest line of gift wrap products and reselling such to retail stores, although the number of said stores, their locations and the volume of such sales are not disclosed by the record.

The witness testified these products to be preticketed and said that to his knowledge such products were resold at the preticketed price in the stores he visited, stating, "I would say that they do so, yes, because we basically sell to the smaller stores and they very well cannot afford to discount or mark the stuff down." The witness stated the company only handled infant gift wrapping during the entire year as distinguished from Christmas gift wrapping, and that the infant gift wrapping was sold to department stores like May's or Higbees. The witness further testified he had visited the latter stores and had observed the preticketed price of this merchandise on display and that it was not marked down in price.²⁹

(2) Mr. Morris Lefkowitz, Cardcraft Company, 1220 West Sixth Street, Cleveland, Ohio. The witness stated the company to be in the business of the wholesale selling of greeting cards and gift wrappings to retailers. The company purchased and resold products from both respondent's Kaycrest and Rhapsody lines, and, according to the witness, approximately 95% of his retailer customers resold these products at the preticketed price. The witness stated in such connection, "Well, I contact my slow selling accounts approximately once in two months and my good accounts, oh, at least once a month, some better ones I see every two weeks; so I am in the store quite often. I am able to see the prices that they have marked on their merchandise." The witness also testified to having observed some marked down prices on products in both the Kaycrest and Rhapsody lines of respondent in what were said to be a very few of his accounts and

²⁸ Tr. 260-270.

²⁹ Tr. 338-344.

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which were described as being discount stores. According to the witness, these were retail stores paying the same cost price but which were willing to operate on a lesser margin of profit per item for a faster turnover and more sales.

The number, names and location of the foregoing stores are not shown on the record but the Cardcraft Company over-all wholesale sales for the last year were stated to have been \$98,000. Included in this amount were some sales made at the wholesale price and below the preticketed price to employees in the building wherein the Cardcraft Company is located. These were said by the witness to have been accommodation sales and to have amounted to one or two hundred dollars throughout the entire year.³⁰

(3) Mr. Ronald Kohn, National Merchandising Service, 1523 East 45th Street, Cleveland, Ohio. The witness stated his business to be that of a rack jobber servicing approximately 200 supermarkets in Cleveland, Ohio and northeastern Ohio. The witness testified that a rack jobber maintained displays and guaranteed the resale of the merchandise by the store to which it is sold and in which it is placed on display. Unsold merchandise is allowed to be returned to the store for credit under this method of operation. During the Christmas season, National Merchandising Service handles respondent's Kaycrest and PR lines of gift wrappings and has sold these products to the 200 retail stores it services.

The witness stated these Kaycrest and PR lines to have all been preticketed and to have been sold by the said stores at the preticketed price.³¹ The witness testified that in the event any of the supermarkets had not resold at the preticketed price, he would reclaim the merchandise and credit the price at which he had sold it to the store and refuse to deal further unless the store agreed to maintain the preticketed price. The record discloses the witness estimated the volume of sales by National Merchandising Service in the said products to have been around \$15,000 during the past year.³²

(4) Mr. Varned Stilgenbauer, 16110 Brookpark Road, Cleveland, Ohio. The witness stated his business to be that of a rack jobber, that is, a service jobber of non-foods, primarily to the grocery industry. As a rack jobber, the witness stated ninety percent of the business was in preticketed items which helped cut overhead business costs and that he, therefore, preferred to deal in such items. During the Christmas season of 1961, the witness testified to servicing approximately 500 stores of which 200 were in the Cleveland trade area.

³⁰ Tr. 345-351.

³¹ Tr. 353, 355.

³² Tr. 352-359.

The witness at this time handled preticketed items from the respondent's Kaycrest product line, which were sold to approximately 200 of these 500 stores. It was the witness's testimony that he checked all these stores, knew what each piece of merchandise went into the store for and at what price it went out, and that the Kaycrest products had been sold at their preticketed price.

The witness, although not acting as the Manager in 1962, further testified as to the handling of respondent's Kaycrest line in 1962 together with one or two promotional items of the respondent's PR line, which were allegedly sold at less than the preticketed price. As to the Kaycrest line, the witness again testified that it was sold by the aforesaid stores at the preticketed price. The witness estimated the retail sales of the Kaycrest line for 1961 as being between \$50,000 and \$60,000. The retail sales of respondent's aforesaid products for 1962 were estimated as being about one-half of the 1961 sales or \$25,000 to \$30,000, and of this latter sales amount, the respondent's PR items were stated to have constituted ten or fifteen percent of the 1962 sales.³³

The witness on cross-examination indicated that respondent's PR items were resold by the aforesaid stores at less than their preticketed price. On redirect examination, however, the witness stated that he did not actually know whether these PR items were preticketed in 1962 because he was not active in the 1962 line of merchandising.³⁴

11. The record shows respondent to be selling products in the Kaycrest, Rhapsody and PR lines in the greater Cleveland trade area to which are affixed preticketed retail prices. The total annual dollar volume of such sales by the respondent in this area is not disclosed for any of the said lines, nor does the record reveal what number of wholesalers or retail stores in this area are reselling said products from the said different lines. The record also fails to show in relation to respondent's total sales any substantial volume or percentage of retail sales being made at less than the preticketed price by a representative group of the total number of the wholesalers and stores handling these product lines in this area.

With regard to the Kaycrest line, the record shows sales in only a small annual dollar amount by the witness Kopit, a wholesaler-retailer; in an unknown annual dollar amount by the witness Marcus, a wholesaler-retailer; in an unknown annual dollar amount by the

³³ Tr. 378-383.

³⁴ A prior witness had testified to selling products of the PR line or promotional items during 1962 and stated they were not preticketed. See, witness Levy (Tr. 337). Still another witness stated to the contrary of Mr. Levy. See, witness Durr (Tr. 264).

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witness Durr, a chain retailer; in an unknown annual dollar amount by the witness Lader, a wholesaler; in some part of \$98,000 over-all sales by the witness Lefkowitz, a wholesaler; in some part of \$15,000 annual sales in 1962 by the witness Kohn, a rack jobber; and in some part of \$50,000 to \$60,000 annual sales for 1961 and \$25,000 to \$30,000 annual sales for 1962 by the witness Stilgenbauer, a rack jobber.

Witnesses Kopit and Marcus testified to the retail selling of an undisclosed annual dollar amount of products in the Kaycrest line below the preticketed price. Witnesses Durr, Lefkowitz, Kohn and Stilgenbauer testified to the retail selling of products in the Kaycrest line at the preticketed price, based on an annual sales volume as above shown. With respect to the PR line, the testimony shows products of this line to have been sold only in part of the above annual sales by the witness Kohn, servicing 200 retail supermarkets in Cleveland and northeastern Ohio said to be selling at the preticketed price.

With regard to the Rhapsody line, the testimony shows it to have been sold by only the witnesses Durr and Lefkowitz. Witness Durr testified products from the Rhapsody line to have been sold in an unknown volume, at an undisclosed retail price below the preticketed price, through a discount operation in an unrevealed number of stores. Witness Lefkowitz testified to some part of annual over-all sales of \$98,000 being made to approximately 95% of an undisclosed number of retailer customers stated to sell products from this line at the preticketed price.

Based on this state of the record, no finding can be made sustaining the fictitious pricing charge made as to respondent's Kaycrest and PR product lines in the Cleveland trade area. The record is also inadequate to make a proper finding sustaining such charge as regards respondent's Rhapsody product line in said area.

Evidence of price cutting, standing alone and without more, is not sufficient despite a testimonial admission of its known occurrence. Absent in this proceeding is the factual presentation shown in various past-decided cases.³⁵

In dismissing the complaint in the *Sun Gold Industries* matter, (1960) 56 F.T.C. 1368, the opinion of the Commission held that upon a showing that products have an affixed preticketed price, the only additional proof required is that the preticketed price is not the usual and regular retail price of such products but is an exaggerated or

³⁵ For example, see *Baltimore Luggage Company v. FTC*, (1961) 296 F. 2d 608, cert. denied 369 U.S. 860; Docket No. 8140, *Leeds Travelwear, Inc.* (1962); Opinion Vacating Initial Decision and Remanding Matter to Hearing Examiner, Docket No. 7714, *J. Weingarten, Inc.* (1963).

fictitious price. If it is shown that the product ordinarily retailed for less than the preticketed price, regardless of what these prices may be, the burden of proof imposed on counsel supporting the complaint has been met.³⁶ With relation to the evidence of record in support of this charge of the complaint in the *Sun Gold Industries* matter, the opinion stated further, that there was no evidence as to the amount of the sales at retail by the witnesses testifying, that the percentage relationship of such sales to the total sales at retail of the preticketed products in their trade area or areas was not disclosed, nor was it shown that these witnesses were the only sellers of the preticketed products in their respective trade area or areas.

Accordingly, and for the reasons herein set forth with relation to the Detroit trade area, *supra.*, this charge of the complaint relative to the Cleveland trade area also fails of adequate proof. The cut price sales testified to by some of the foregoing witnesses, standing alone and without more, does not prove that the regular usual and prevailing price for respondent's said products was other than the preticketed price for said products in the trade area or areas concerned, and that the said preticketed price for the same was further a greatly exaggerated and fictitious price as alleged in the complaint.

12. Received in evidence as respondent's exhibit no. 5 is a tabulation disclosing the dates of discontinuance by respondent of the packaging techniques alleged by the complaint to be false, misleading and deceptive. Examples in evidence are Commission exhibits 1, 2, 3, 4, 5, 6 and 7. Commission exhibits no. 1, 2, 5, 6 and 7 are the cushion-end type box found to be false, misleading and deceptive to prospective purchasers as hereinbefore related in finding number 5, *supra.* These packaging techniques were discontinued at various dates during the year 1961. Respondent, although denying such packaging was false, misleading and deceptive, represents that it will not again resume such manner of packaging.³⁷

In the *Gimble Brothers, Inc.* matter, cited *supra.*, the Commission discussed the effect of such discontinuance and cited numerous legal precedents. It was stated that in essence a showing of facts is required which guarantees or assures against resumption of the practice, particularly so where respondent asserts the challenged practice

³⁶ The court in *Helbros Watch Company, Inc. v. FTC*, (1962), 310 F. 2d 868, speaks of "sales at substantially less than the preticketed price".

³⁷ Respondent also urges that such packaging was *de minimis* in relation to over-all product sales. Respondent's interlocutory appeal herein denied by the Commission under date of November 19, 1962, however, reveals that such packaging constituted about 5% of said sales of over \$7,000,000 annually.

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to be non-deceptive. Such required showing is not found to be present in the instant proceeding as to the discontinuance of certain packaging nor for any discontinuance of certain preticketing by the respondent.

In this latter connection, it would appear appropriate to mention respondent's rejected exhibits marked for identification 2-A through 2-Z-30, 3-A through 3-Z-41, 4-A through 4-Z-145, being surveys conducted by respondent as to alleged preticketing practices of respondent's competitors. It should be noted that preticketing itself is not prohibited, only that which is fictitious. If respondent's preticketing had been herein proven not the usual and regular price for such products in the same marketing or trade area and thus fictitious, and respondent's competitors' pricing therein was of the like calibre and thus also fictitious, it still would not have made these rejected exhibits admissible. It is immaterial that competitors employ the same or similar methods.³⁸

Further, any alleged resulting business hardship because of any respondent being restricted to honest practices while competitors are still free to employ the prohibited practices would not operate to make the rejected exhibits admissible.³⁹

13. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of gift wrapping products of the same general kind and nature as those sold by respondent.⁴⁰ By use of the acts and practices set forth and described herein in finding number 5, *supra*, respondent places in the hands of others a means and instrumentality by and through which the purchasing public may be misled as to the width and the quantity of the gift wrapping paper enclosed and contained in the said display boxes.

14. The use by the respondent of the said false, misleading and deceptive packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the aforesaid display boxes contain gift wrapping paper of greater width and quantity than is the fact and into the purchase of substantial amounts of respondent's said products by reason of said erroneous and mistaken belief.⁴¹

³⁸ *International Art Company v. FTC* (1940) 109 F. 2d 393, cert. denied 310 U.S. 632.

³⁹ *Clinton Watch Co. v. FTC* (1961) 291 F. 2d 838, cert. denied 368 U.S. 952.

⁴⁰ Tr. 165; 205-206.

⁴¹ *Marlborough Laboratories, Inc., et al., supra; FTC v. Winstead Hosiery Co.* (1922) 258 U.S. 483; *Charles of the Ritz Dist. Corp. v. FTC* (1944) 143 F. 2d 676.

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CONCLUSIONS

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

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

3. The aforesaid acts and practices of respondent as hereinbefore found and as are particularly set forth and described in finding number 5, were, and are, all to the prejudice and injury of the public and of respondent's 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.

4. The aforesaid acts and practices of respondent as hereinbefore found and as are particularly set forth and detailed in findings number 7 through 11, do not disclose adequate proof of and do not sustain the fictitious pricing charge of Paragraph Seven of the complaint, and such charge of the complaint should accordingly be dismissed without prejudice.

ORDER ⁴²

It is ordered, That respondent, The Papercraft Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of gift wrapping or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by the device of slack-filling or by any means or other manner of packaging which gives the appearance, states or implies that the products therein are larger in size, such as width, length, area, weight, thickness or quantity than is the actual fact

2. Engaging in any act, practice or plan which will provide wholesalers, retailers or other distributors of the above products with the means of misrepresenting said products as set forth in Paragraph 1 above.

It is further ordered, That the charges in Paragraph Seven of the complaint be, and they hereby are, dismissed without prejudice.

⁴² See, order entered by Commission in Docket No. C-206, Superior Insulating Tape Company, et al. (1962) [61 F.T.C. 416, 418].

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OPINION OF THE COMMISSION

DECEMBER 24, 1963

By ELMAN, *Commissioner*:

Respondent, a Pennsylvania corporation, manufactures gift wrapping papers, ribbons, and related products and sells them throughout the United States to distributors and retailers for resale to the consuming public.¹ The Commission's complaint, issued on June 4, 1962, charged respondent with having violated Section 5 of the Federal Trade Commission Act through deceptive packaging and fictitious pricing of its gift wrapping paper.² After evidentiary hearings, the hearing examiner, on April 3, 1963, filed his initial decision, in which he dismissed the complaint as to fictitious pricing for failure of proof, but upheld it as to the principal deceptive-packaging allegations and entered a cease and desist order.³ The matter is before the Commission on the cross-appeals of respondent and complaint counsel.

Respondent's appeal challenges various aspects of the analysis by which the examiner reached the conclusion that respondent's packaging was deceptive. We find it unnecessary to decide whether these objections to the initial decision are valid. The members of the Commission have inspected the actual boxes, which are a part of the record, upon which the charge of deceptive packaging is based; and our finding of deception is based, not on the analysis in the initial decision, but on our independent, first-hand examination of these boxes. That the Commission may, where appropriate, predicate a finding of deception on its own visual examination of the alleged means of deception, unassisted by "consumer testimony", is too well settled to require citation or discussion.

Commission Exhibit 2,⁴ for example, is a box in which respondent packs its rolls of gift wrapping papers for display and sale to the

¹ It is conceded that respondent sells its gift wrapping papers (the only product involved in this case) in commerce.

² The fictitious-pricing charge was based on respondent's having imprinted allegedly exaggerated retail prices on boxes, designed to be displayed to the consuming public, of its gift wrapping paper rolls.

³ The examiner dismissed the part of the complaint dealing with alleged deceptive packaging of rolls of different width in a single box (see initial decision p. 1975). Complaint counsel has not appealed from this part of the initial decision, and we shall not consider it further.

⁴ Photographs of the exhibit, showing (1) the box as it is sold to the consumer, and (2) the empty box with the rolls of gift wrapping paper contained in it placed alongside the box, are appended to this opinion [pp. 2001, 2002 herein].

consuming public. The box, which contains four rolls of gift wrapping papers of different design laid side by side, is 24 inches long, and has a transparent acetate "window" approximately 19 inches long, through which the rolls are visible. To one examining or handling (but not opening) the box it appears that the width of the rolls is coextensive with the length of the box, for the ends of the rolls cannot be seen through the window. In fact, however, the rolls have a uniform width of only 20 inches, and the box contains two inches of empty space at either end. Respondent contends that this "cushion end" construction is necessary to enable the rolls to be fully displayed through the window, and points out that the true width of the rolls is stated, in terms of inches, on the box. We find, nevertheless, that this manner of packaging is deceptive and unlawful.

"Slack filling"—broadly, any use of oversized containers to create a false and misleading impression of the quantities contained in them—is an unlawful trade practice.⁵ For a seller to package goods in containers which—unknown to the consumer—are appreciably oversized, or in containers so shaped as to create the optical illusion of being larger than conventionally shaped containers of equal or greater capacity, is as much a deceptive practice, and an unfair method of competition, as if the seller were to make an explicit false statement of the quantity or dimensions of his goods. While the Commission is not concerned with requiring standardized or uniform packaging as such, it is concerned with all forms and methods of deceptive packaging of goods in commerce, no less than with false and misleading advertising or labeling of such goods.

The tendency of oversized or deceptively shaped containers to mislead is not, as respondent urges, cured by accurately stating on the container the actual quantity (here, the width of the rolls of gift wrapping papers) of the goods, any more than an explicit false statement of quantity would be cured by use of a non-deceptive container. To be sure, a shopper looking for gift wrapping paper of a specific width might not be greatly influenced, in making his purchase, by the

⁵ *Baltimore Paint & Color Works, Inc.*, 9 F.T.C. 242, *aff'd.* 41 F.2d 474 (4th Cir. 1930); *Esport Petroleum Co.*, 17 F.T.C. 119; *Trade Laboratories, Inc.*, 25 F.T.C. 937; *Marlborough Laboratories, Inc.*, 32 F.T.C. 1014; *Burry Biscuit Corp.*, 33 F.T.C. 89; *United Drug Co.*, 35 F.T.C. 643; *Harry Greenberg*, 39 F.T.C. 188. The practice has also been a matter of concern to the Congress. Cf. the proposed "truth in packaging" legislation aimed in part at slack filling and related misrepresentations of quantity. S. 387, 88th Cong., 1st Sess., p. 5, §3A(e)(2).

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length of the box; he would be more concerned with the stated than with the apparent width of the rolls. However, many, and perhaps most, shoppers probably have no more than a rough idea of the width they desire in gift wrapping paper. Such a person will measure with his eyes, and will be influenced to purchase respondent's rolls by the length of the box. Even if he notices the statement of actual width, in inches, on the box, he is not likely to infer therefrom that the rolls do not extend the full length of the box; and, needless to say, most shoppers do not carry tape measures with them. After he has purchased respondent's rolls and brought them home, he may discover with surprise and dismay that the rolls are narrower than he had thought and inadequate to his needs. Clearly, a person deceived in this fashion is not one of the "foolish or feeble-minded" who are not entitled to the Commission's protection. *Heinz W. Kirchner*, F.T.C. Docket 8538 (decided November 7, 1963) [p. 1282 herein].

This form of deception is, moreover, an unfair method of competition. Consider the case of a manufacturer of gift wrapping paper who packages his 20-inch rolls in 20-inch boxes; he will lose sales to respondent because respondent appears to be offering more for the price. Or consider the manufacturer of 24-inch rolls, which he packages in 24-inch boxes; he will lose sales to respondent because many consumers will believe that respondent is offering paper of the same width at a lower price.

We do not suggest that a discrepancy between the inside and outside dimensions of a container is deceptive and unlawful under any and all circumstances. There may be instances in which an oversized container creates no substantial danger of deception. That might be true of respondent's "cushion end" box if the entire width of the rolls (including both ends) was visible (as it is not) through the window, so that even the casual shopper would immediately perceive that the rolls were not coterminous with the box.⁶ Also, technical factors (e.g., fragility) may require the use of oversized containers, though if such a *bona fide* oversized container could create a misleading impression, the seller must take all reasonable precautions to prevent deception.

⁶In this connection, we note that the purchaser of gift wrapping paper probably realizes that the rolls contain a hollow cardboard core, and hence this form of "slack filling" is probably not deceptive—on the assumption, of course, that the core is not so abnormal in size as to deceive, and that the seller does not represent that there is no core or that the core is smaller than is the fact.

Respondent in this case introduced evidence to show that its "cushion end" box was justified because it enabled the rolls of gift wrapping papers to be fully exhibited through the acetate windows. Such evidence is wide of the mark. If respondent desired to disclose the full width of its rolls, it could easily have done so in a non-deceptive fashion, as has been suggested, by mounting them so that their full width, including their ends, was visible through the window. Since respondent could so readily have avoided deceiving the consumer, we think its failure to do so vitiates the asserted defense. We need not consider what respondent's liability would have been if, for some reason not present here, the requirements of effective, legitimate packaging were in irreconcilable conflict with the needs of consumer protection. Compare *United States v. 174 Cases, More or Less, Delson Thin Mints*, 287 F. 2d 246 (3d Cir. 1961); Note, *Federal Regulation of Deceptive Packaging: The Relevance of Technological Justification*, 72 Yale L. J. 788 (1963).⁷

Commissioner Anderson concurs in the result; Commissioner MacIntyre dissents and has filed a separate opinion.

DISSENTING OPINION

DECEMBER 24, 1963

By MACINTYRE, *Commissioner*:

With the action of the majority I cannot agree. However, it is my hope that the Gift Wrappings and Tyings Industry will understand it better than I do.

The representatives of the Gift Wrappings and Tyings Industry not only acknowledge but contend that fictitious pricing is widely

⁷ With respect to the fictitious-pricing charge in the complaint, we have decided that, in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge. The Commission is at present engaged in a comprehensive reexamination and revision of its policy toward deceptive pricing, as expressed in the current (1958) version of the Guides Against Deceptive Pricing, and we believe that entry of a cease and desist order at this time, even if justified by the record, would be inappropriate. If conditions in the gift wrapping paper industry indicate the need for industry-wide, non-adjudicative correction action (cf. *Papercraft Corp.*, F.T.C. Docket 8489 (Order Denying Interlocutory Appeal, November 19, 1962)) [p. 1998 herein], that course is also open to the Commission. Cf. *Atlantic Products Corp.*, F.T.C. Docket 8513 (Order of December 13, 1963) [p. 2237 herein]. For these reasons, in the exercise of our discretion to choose among the various remedies and courses of action available to the Commission for the effectuation of its statutory responsibilities, we have decided to terminate the present proceeding, in its fictitious-pricing aspect, without a final adjudication of the merits.

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practiced in this industry. The complaint charged that the respondent was engaged in the practice of pre-ticketing fictitious prices on its merchandise. During the course of the hearings, its Vice-President in Charge of Marketing, Mr. Scheckner, at Transcript Page 244, testified regarding that practice. The hearing examiner was sufficiently impressed by that testimony that he not only referred to it but quoted it in the initial decision as follows:

Mr. Scheckner, under cross-examination, further testified that the respondent did not take the same protective measures with the Rhapsody line as it did with the Kaycrest line when it found a retailer selling below the preticketed price. The witness also admitted to knowledge that the Rhapsody line of the respondent would be sold by discount houses at prices below the preticketed prices, and the record shows the following testimony of the witness relative to the Rhapsody line:

Q. As a matter of fact, you sold a great proportion of these to the discount houses?

A. The majority of the Rhapsody line was sold to discount houses.

Q. And the discount prices were below the pre-ticketed items as a general proposition?

A. That is correct. (See page 1978, Initial Decision.)

Such admissions regarding the facts and other testimony regarding the evidentiary facts proved unconvincing to the Hearing Examiner. Therefore, he proceeded to conclude that on the record in the case he would make no findings sustaining the fictitious pricing charge. I am unable to determine what factors persuaded him to dismiss the charge. Counsel for the respondent at page 30 of the brief in reply to counsel supporting the complaint when appeal was taken to the Commission, had this to say:

1. Preticketing is an industry-wide practice in the gift wrapping industry and Respondent contends that the public interest requires that it be dealt with on an industry-wide basis.

2. The Commission's action in singling out and issuing a complaint against Respondent alone does not really further the public interest and it is unfair and prejudicial to Respondent.

In the face of all these admissions and contentions the majority found it difficult to dismiss the charge of fictitious pricing on the basis of any decision that it just simply does not exist. Instead, the majority stated:

With respect to the fictitious-pricing charge in the complaint, we have decided that, in the particular circumstances of this case, the public interest requires that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge.

The majority has thus acted, although on September 17, 1962, in an order denying respondent permission to file an interlocutory appeal for suspension of this proceeding, it was stated:

Respondent's motion for suspension recites that the Commission is investigating fictitious pricing practices of nine competitors of respondent and that the Gift Wrapping and Tyings Association has petitioned the Commission to initiate a Trade Regulation Rule proceeding in connection with industry-wide price preticketing practices in the gift wrapping industry. Respondent requests suspension of the present proceeding until the Commission's investigation of its competitors has been completed and until the Commission has disposed of the petition for a Trade Regulation Rule proceeding for the industry.

Thereafter, on November 19, 1962, in an order denying respondent an interlocutory appeal, the Commission stated:

The Commission having determined, for the reasons set out in its order of September 17, 1962, denying respondent's initial request for permission to file an interlocutory appeal, that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred.

From the foregoing it can be seen that the Commission disposed of this matter without acting upon it in this case. Also, it has avoided acting upon it in the broader sense of an industry-wide proceeding as was suggested by the respondent. The majority accomplished the latter through its suspension of an application for a Trade Regulation Rule Proceeding which had been filed with the Commission by representatives of the Gift Wrappings and Tyings Industry. On December 4, 1963, the Commission notified those representatives, who had filed that application, of its action in suspending the application. That notice is quoted as follows:

The Commission has considered the application of the Gift Wrappings and Tyings Association for a trade regulation rule proceeding and has directed that further action in this matter be suspended pending the promulgation and issuance of revised Guides Against Deceptive Pricing.

Commissioner MacIntyre did not concur in this action of the Commission. It is his wish that the following statement of his be made a part of this letter.

"It is my view that the Commission should have acted favorably on the application made in 1962 on behalf of the Gift Wrappings and Tyings Industry for the institution of a Trade Regulation Rule Proceeding. In that application a showing was made that fictitious pricing by way of pre-ticketing presents a serious competitive problem in the Gift Wrappings and Tyings Industry. Moreover, the Commission has made sufficient investigation of its own to provide it with information to the effect that fictitious pricing by way of pre-ticketing is, in fact, a serious competitive problem in the Gift Wrappings and Tyings Industry. This is true despite the fact that the Commission in 1958 promulgated and published widely 'Guides' containing a statement of the law

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applicable to fictitious pricing by way of pre-ticketing. With this experience and knowledge at hand the Commission, certainly for the time being, has disposed of the application for a Trade Regulation Rule proceeding regarding fictitious pricing by way of pre-ticketing in the Gift Wrappings and Tying Industry. It did this by directing that 'further action in this matter be suspended pending the promulgation and issuance of revised Guides against deceptive pricing.' On the basis of our experience, I cannot agree with that action of the Commission."

Commissioner Anderson did not participate in this action for the reason that he was absent.

By direction of the Commission.

The Commission's failure to make a decision on the pricing practices challenged in this proceeding has left that aspect of the case in a kind of quasi-judicial limbo. In effect, the Commission in this instance has refrained from action in its judicial capacity and from taking effective administrative measures.

Turning to the deceptive packaging allegation, I concur with the majority's disposition of that charge. The discussion of this issue is discerning and should prove a helpful guide to the Commission's staff in charting future action to protect the public from activities which are becoming increasingly troublesome and which have recently become the object of considerable Congressional concern. However, I wish to disassociate myself from the majority's statement that the portion of the public deceived by respondent's practices in this respect is not the "foolish or feeble minded" segment undeserving of the Commission's protection. That statement is gratuitous under the facts of this case. It may be innocuous on its face, but should this observation be construed as a retreat from our long-held position that the public as a whole is entitled to protection, including even "the ignorant, the unthinking and the credulous"¹, then the result may well be confusion in the Commission's activities in the deceptive practices field as well as less protection for the consumer.

ORDER GRANTING PERMISSION TO FILE INTERLOCUTORY APPEAL *

The hearing examiner having denied the respondent's motion to suspend the October 29, 1962, date for the hearing in this proceeding or, in the alternative, to certify the question to the Commission for its consideration; and

The respondent having filed a request for permission to file an interlocutory appeal from said ruling, contending that it is being

¹ *Dorfman, et al. v. Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944); *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2nd Cir. 1944).

* Issued Oct. 29, 1962.

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seriously injured as a result of having been singled out as the only member of the gift wrappings industry to be formally charged with fictitious price pre-ticketing practices, which practices allegedly are widely used throughout the industry and indeed are the subject-matter of a petition for an industry-wide Trade Regulation rulemaking proceeding now under consideration by the Commission's staff; and

The Commission, being aware of the pending petition for an industry-wide rulemaking proceeding relating to fictitious pre-ticketing practices in the gift wrappings industry, and being of the opinion that if the respondent can show that the public interest would not be prejudiced thereby, further action in this proceeding should be abated pending disposition of the petition for the rulemaking proceeding; and

The Commission being of the further opinion that the respondent should be afforded an opportunity to make such showing:

It is ordered, That the respondent's petition for permission to file an interlocutory appeal from the hearing examiner's ruling be, and it hereby is, granted.

It is further ordered, That the hearing in this proceeding scheduled to begin at 2 p.m. on October 29, 1962, in Cleveland, Ohio, be and it hereby is, suspended pending disposition by the Commission of the respondent's appeal.

ORDER DENYING INTERLOCUTORY APPEAL *

Upon consideration of respondent's interlocutory appeal from the order of the hearing examiner denying its request for the suspension of this proceeding until such time as the Commission acts upon a petition filed by the Gift Wrappings and Tyings Association for a Trade Regulation Rule proceeding in connection with industry-wide price-preticketing practices in the gift wrapping industry, and

The Commission having determined, for the reasons set out in its order of September 17, 1962, denying respondent's initial request for permission to file an interlocutory appeal, that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred:

It is ordered, That respondent's interlocutory appeal be, and it hereby, is denied.

* Issued Nov. 19, 1962.

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ORDER DENYING PERMISSION FOR INTERLOCUTORY APPEAL *

By its motion filed September 6, 1962, respondent requests permission to file an interlocutory appeal from the hearing examiner's order dated August 30, 1962, denying its motion for suspension of this proceeding.

Respondent's motion for suspension recites that the Commission is investigating fictitious pricing practices of nine competitors of respondent and that the Gift Wrapping and Tying Association has petitioned the Commission to initiate a Trade Regulation Rule proceeding in connection with industry-wide price-preticketing practices in the gift wrapping industry. Respondent requests suspension of the present proceeding until the Commission's investigation of its competitors has been completed and until the Commission has disposed of the petition for a Trade Regulation Rule proceeding for the industry.

The Commission believes that a suspension of this proceeding at the present time would not be in the public interest. Fictitious pricing of respondent's merchandise is only one of the deceptive practices alleged in the complaint. Respondent makes no claim that its packaging practices, which are also challenged by the complaint, are of an industry-wide nature. No reason exists, therefore, for suspension of this proceeding so far as it relates to these practices. In any event, respondent will have the opportunity, prior to entry of any final order in this proceeding, to present to the Commission any reasons why the effective date of such order should be deferred to await industry-wide action with respect to illegal practices shown to be industry-wide. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal be, and it hereby is, denied.

FINAL ORDER

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that the initial decision should be vacated and set aside; that a final order to cease and desist, based on the findings of fact and conclusions of law contained in the accompanying opinion, should be entered at this time against respondent

* Issued Sept. 17, 1962.

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with respect to all but one deceptive-packaging allegation of the complaint, the remaining such allegation to be dismissed; and that with respect to the fictitious-pricing allegations of the complaint, the complaint and complaint counsel's appeal should, in the exercise of the Commission's administrative discretion, be dismissed. Accordingly,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That respondent, The Papercraft Corporation, a corporation, and its officers, directors, agents, representatives, employees, successors and assigns, directly or indirectly, under any name or through any corporate or other device, in connection with the offering for sale, sale or distribution, in commerce, of rolls of gift wrapping papers, do forthwith cease and desist from:

(1) Packaging rolls of gift wrapping paper in oversized boxes or other containers so as to create the appearance or impression that the width or other dimensions or quantity of the gift wrapping paper contained in the box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the rolls contained therein and establishes that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

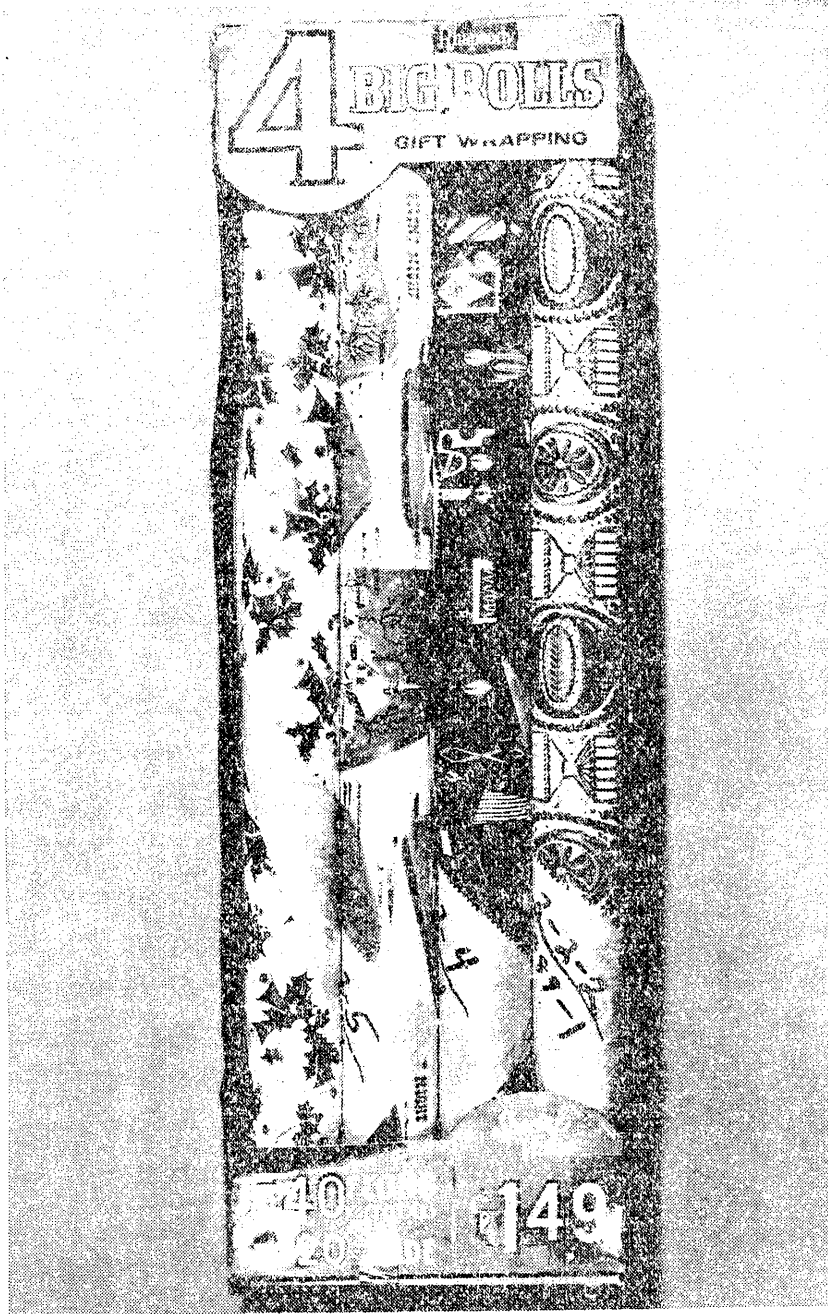
(2) Providing wholesalers, retailers or other distributors of respondent's rolls of gift wrapping papers with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

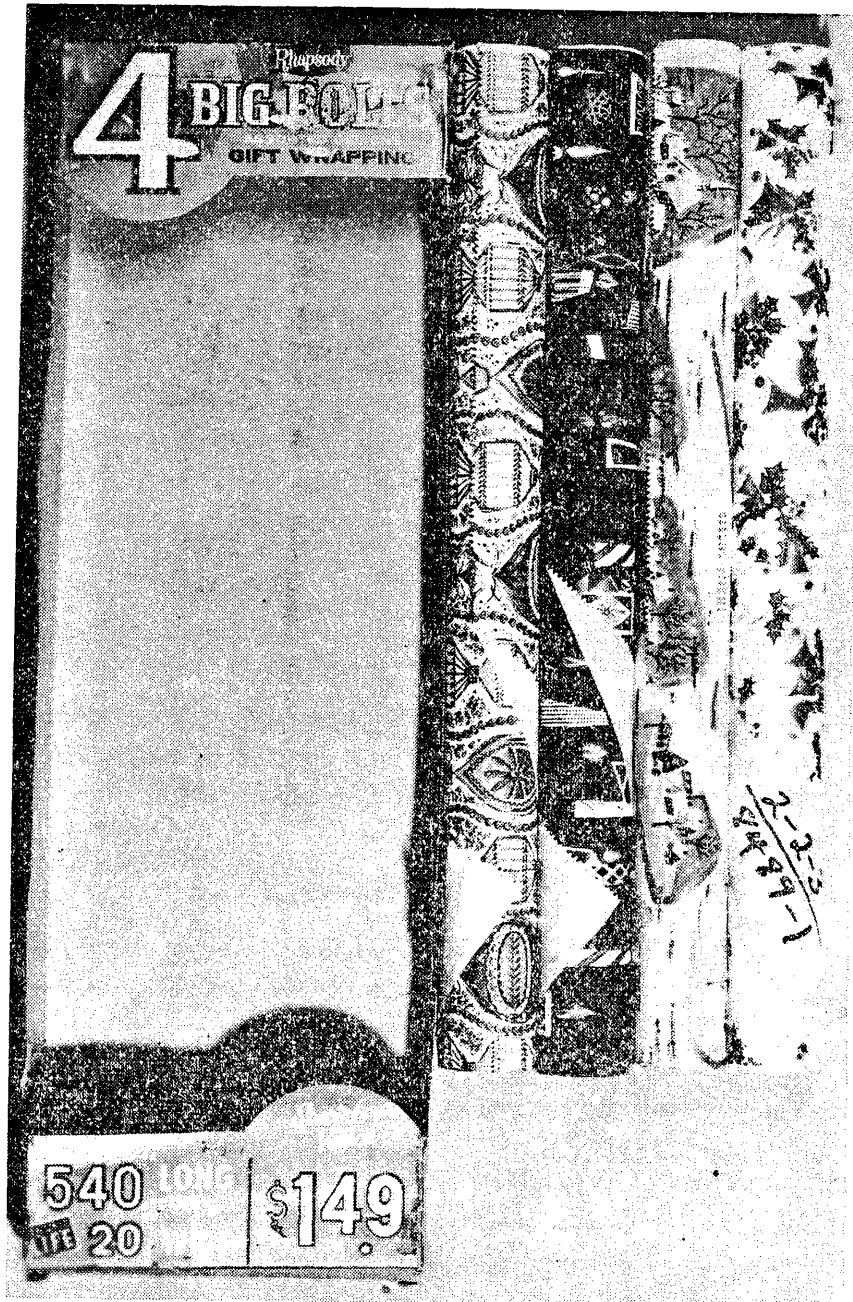
It is further ordered, That the complaint be, and it hereby is, dismissed with respect to the packaging of rolls of gift wrapping paper of different width in a single box.

It is further ordered, That Paragraph Seven of the complaint (fictitious pricing), and complaint counsel's appeal from the initial decision, be, and they hereby are, dismissed.

It is further ordered, That respondent shall, within sixty (60) days of receipt of this order, file with the Commission a report in writing setting forth in detail the manner in which respondent has complied with the terms of this order.

By the Commission, Commissioner Anderson concurring in the result; Commissioner MacIntyre dissenting.





Complaint

IN THE MATTER OF

AMT CORPORATION ET AL.

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

Docket C-633. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963

Consent order requiring distributors of toys and related products in Troy, Mich., to cease representing by means of television commercials that their toy designated "Authentic Model Turnpike" included two cars when it had only one, and representing falsely that it included track infield grass, shrubbery and trees, driving course obstacles, and numerous miniature pieces such as, lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard and human figures.

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 AMT Corporation, a corporation, and West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma, and Harold R. Smith, 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 AMT Corporation 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 1225 East Maple Road, in the City of Troy, State of Michigan.

Respondents West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma and Harold R. Smith 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. The address of respondent West H. Gallogly is 3793 Delano Road in the City of Oxford, State of Michigan. The address of respondent John A. Bacon, Jr., is 239 Pilgrim Road in the City of Birmingham, State of Michigan. The address of respondent Harry C. Haaxma is 24337 Orangelawn in the City of Detroit, State of Michigan. The address of respondent Harold R. Smith is 2528 Buhl Building in the City of Detroit, State of Michigan.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including a toy designated "Authentic Model Turnpike", to distributors and to retailers for resale to the public.

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

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase in commerce of the said "Authentic Model Turnpike", respondents have made certain statements, representations and pictorial presentations with respect thereto by means of commercials transmitted by television stations located in various States of the United States and in the District of Columbia.

PAR. 6. Enlargements of individual frames extracted from said television commercials, illustrating typical representations, with respect to the components contained in the "Authentic Model Turnpike", as allegedly packaged and sold to the public, as alleged in Paragraph Seven below, are attached hereto, marked Exhibits "A" to "C", inclusive, and incorporated herein by reference.*

PAR. 7. Through the use of the aforesaid advertisements, and others containing representations of the same import not specifically set forth herein, respondents have represented, directly and by implication:

That the "Authentic Model Turnpike", as packaged and sold to the purchasing public, includes:

- 1) two cars;
- 2) track infield grass, shrubbery and trees;
- 3) driving course obstacles; and
- 4) numerous miniature pieces, including among others, lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard and human figures.

* Exhibits "A" to "C" are omitted in printing.

PAR. 8. In truth and in fact:

The "Authentic Model Turnpike", as packaged and sold to the purchasing public, does not include two cars but only one and does not include track infield grass, shrubbery or trees; driving course obstacles; or miniature pieces, such as lamp posts, grandstand, first-aid shack, start and finish markers, scoreboard or human figures.

Therefore, the statements, representations and depictions referred to in Paragraphs Five and Six are false, misleading and deceptive.

PAR. 9. Respondents' toys and related products, including the "Authentic Model Turnpike", are designed primarily for children, and are bought either by or for the benefit of children. Respondents' false, misleading and deceptive advertising claims thus unfairly exploit a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representation may be exaggerated or untrue. Further, respondents unfairly play upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related products through false, misleading and deceptive claims of their appearance or performance, which claims appeal both to adults and to children who bring the toys to the attention of adults. As a consequence of respondents' exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform in a manner not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the products of respondents 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

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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 AMT Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1225 East Maple Road, in the City of Troy, State of Michigan.

Respondent West H. Gallogly is an officer of said corporation. His address is 3793 Delano Road in the City of Oxford, State of Michigan.

Respondent John A. Bacon, Jr., is an officer of said corporation. His address is 239 Pilgrim Road in the City of Birmingham, State of Michigan.

Respondent Harry C. Haaxma is an officer of said corporation. His address is 24337 Orangelawn in the City of Detroit, State of Michigan.

Respondent Harold R. Smith is an officer of said corporation. His address is 2528 Buhl Building in the City of Detroit, State of Michigan.

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 AMT Corporation, a corporation, and its officers, and West H. Gallogly, John A. Bacon, Jr., Harry C. Haaxma and Harold R. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with

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the offering for sale, sale or distribution of toys or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, by use of any illustration, depiction or demonstration, alone or accompanied by oral or written statements, purporting to illustrate, depict or demonstrate any toy or related product, or the characteristics thereof, or representing in any other manner, directly or by implication, that any toy or related product possesses any characteristic, or contains or includes any pieces, parts or components not in accordance with fact.

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

SARAH COHEN, INC., ET AL.

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

Docket C-634. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963

Consent order requiring the operators of a ladies' specialty shop in Norfolk, Va., engaged in the retail sale of coats, dresses, sweaters and other apparel, to cease violating the Textile Fiber Products Identification and the Wool Products Labeling Acts by failing to label certain textile fiber and wool products with required information and by removing, prior to final sale, the stamps or other identification required to be affixed to such products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sarah Cohen, Inc., a corporation, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, 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

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Textile Fiber Products Identification Act and the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sarah Cohen, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its offices and principal place of business located at 107 College Place, Norfolk, Virginia.

Respondent Sarah Cohen, Inc., is a ladies' specialty shop engaged in the retail sales of coats, dresses, sweaters, and other apparel.

Proposed individual respondents Anna Klein, Herbert Goldberg and Jeanette Goldberg are officers of said corporation and they formulate, direct and control the policies, acts and practices of said corporation and their home address is 908 Pembroke Towers, Norfolk, Virginia while the business address is 107 College Place, Norfolk, Virginia.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for sale, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce", and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. After certain textile fiber products were shipped in commerce, respondents have removed, or caused or participated in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to such

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products, prior to the time such textile fiber products were sold and delivered to the ultimate consumer, in violation of Section 5(a) of said Act.

PAR. 5 The acts and practices of respondents as set forth above were, and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and constituted, and now constitute, unfair and deceptive acts and practices, and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 7. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as required by the Rules and Regulations promulgated under said Act.

PAR. 8. After wool products were shipped to them in commerce, respondents with the intent of violating the provisions of the Wool Products Labeling Act of 1939 have removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Wool Products Labeling Act of 1939 to be affixed to such wool products, prior to the time such wool products were sold and delivered to the ultimate consumer, in violation of Section 5 of said Act.

PAR. 9. The acts and practices of the respondents as set forth above in Paragraph Six, Seven and Eight were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said de-

termination 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, Sarah Cohen, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 107 College Place, in the city of Norfolk, State of Virginia.

Respondents, Anna Klein, Herbert Goldberg and Jeanette Goldberg, 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 Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, 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, delivery for introduction, sale, advertising or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber

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Decision and Order

Products Identification Act do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product is sold and delivered to the ultimate consumer.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, 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 introduction into commerce, or the offering for sale, sale, transportation, or delivery for shipment, in commerce, of any wool product, as "wool product" and "commerce" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from failing to securely affix to or place on each product, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Sarah Cohen, Inc., a corporation, and its officers, and Anna Klein, Herbert Goldberg and Jeanette Goldberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of any stamp, tag, label, or other means of identification affixed to any wool product subject to the provisions of the Wool Products Labeling Act of 1939 with intent to violate the provisions 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.

Complaint

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IN THE MATTER OF

STATE BLIND SALES, INC., ET AL.

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

Docket C-635. Complaint, Dec. 24, 1963—Decision, Dec. 24, 1963

Consent order requiring Detroit, Mich., sellers of rugs, brooms, mops and other household articles direct to the public and to distributors for resale, to cease representing falsely in advertisements in magazines, hand circulars, telephone solicitations, radio broadcasts and by other means, that their commercial businesses operated for their own profit were charitable enterprises operated for the benefit of blind and handicapped persons, that only blind and handicapped persons were employed, and that such persons produced or packaged all their products and benefited from the sale thereof.

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 State Blind Sales, Inc., a corporation, and Norman W. Henson, individually and as an officer of said corporation, and Philip K. Dauvin, an individual trading and doing business as State Blind Sales, 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 State Blind Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 2972 East Seven Mile Road in the City of Detroit, State of Michigan.

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

Respondent Philip K. Dauvin, is an individual trading and doing business as State Blind Sales. He is an agent of the corporate respondent and licensed to use the name of State Blind Sales by the corporate respondent. His office and principal place of business

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is located at 2108 Mount Vernon Avenue in the City of Alexandria, State of Virginia.

The aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of rugs, brooms, mops, and other miscellaneous household articles directly to the public and to distributors or jobbers 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 places of business in the States of Michigan and Virginia to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their businesses, and for the purpose of inducing the purchase of their products, respondents and their agents and representatives have made certain statements and representations with respect thereto in advertisements inserted in magazines, hand circulars, telephone solicitations, radio advertisements, and through other advertising media, of which the following are typical:

State Blind Sales ----- Lic. No. 232 (picture of a man being led by a seeing-eye dog).

Help Light The Way.

Your Purchase is Appreciated (picture of a blind man being led by a seeing-eye dog).

State Blind Sales.

I am calling ----- to take orders for household articles that blind people make, package or process.

Patronize your blind salesman.

Patronize your blind representative.

This is a message from State Blind Sales, a national sales organization dedicated to the employment of blind and handicapped ----- "Help Light The Way For Others" is State Blind Sales' slogan. You too, can help light the way for others by placing an order with the State Blind Sales Representative who contacts you ----- At State Blind Sales, the blind and the handicapped work to supply you with quality merchandise. Your patronage is essential to carry on this vital program. (Radio Commercial).

PAR. 5. By and through the use of the aforementioned statements and representations, including respondents' use of the word "blind" in

their corporate and trade names, and others of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that:

1. Charitable or eleemosynary enterprises for the benefit of blind and handicapped persons are being conducted.
2. All products produced, processed or packaged by the respondents are produced, processed or packaged by blind and handicapped persons.
3. Profits from the sale of products are used for the benefit of blind and handicapped persons.
4. Only blind and handicapped persons are employed by the respondents.

PAR. 6. In truth and in fact:

1. Respondents' businesses are not charitable or eleemosynary enterprises operated for the benefit of the blind or the handicapped but are commercial enterprises operated for the benefit of the respondents.
2. Many products produced, processed or packaged by the respondents are not produced, packaged or processed by blind or handicapped persons.
3. Profits from the sale of respondents' products are not used for the benefit of the blind or handicapped.
4. Respondents have employees who are not blind or handicapped.

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

PAR. 7. By the aforesaid practices, respondents place in the hands of jobbers, retailers, and salesmen, means and instrumentalities by and through which they may mislead the public into the mistaken belief that the purchase of respondents' products will inure to the benefit of blind or handicapped persons.

PAR. 8. In the conduct of their businesses, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of rugs, brooms, mops, and other miscellaneous household articles of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

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

1. Respondent State Blind Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 2972 East Seven Mile Road, in the city of Detroit, State of Michigan.

Respondent Norman W. Henson is an officer of said corporation, and his address is the same as that of said corporation.

Respondent Philip K. Dauvin, is an individual trading and doing business as State Blind Sales. He is an agent of the corporate respondent and licensed to use the name of State Blind Sales by the corporate respondent. His office and principal place of business is located at 2108 Mount Vernon Avenue in the city of Alexandria, State of Virginia.

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 State Blind Sales, Inc., a corporation, and its officers, and Norman W. Henson, individually and as an officer of said corporation, and Philip K. Dauvin, individually and trading and doing business as State Blind Sales, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of rugs, brooms, mops, or other miscellaneous household articles, or other products, 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:
 - a. A charitable or eleemosynary enterprise is being conducted for the benefit of the blind or the handicapped.
 - b. Any product which is not produced, processed or packaged by a blind or handicapped person is produced, processed or packaged by a blind or handicapped person.
 - c. The profits from the sale of merchandise are used for the benefit of the blind or the handicapped.
 - d. Only blind or handicapped persons are employed; or that blind or handicapped persons are employed, unless it is clearly and conspicuously disclosed in immediate connection and conjunction therewith the percentage of such blind or handicapped persons so employed.
2. Using the word "blind" or any other word or words of similar import or meaning in a corporate or trade name or in any other manner, to designate or describe merchandise, unless in immediate connection and conjunction therewith a clear and conspicuous disclosure is made that a substantial percentage of merchandise sold or distributed by the respondents is produced, processed or packaged by other than blind persons.
3. Placing in the hands of jobbers, retailers, salesmen and others, the means and instrumentalities by and through which they may mislead and deceive the purchasing public concerning merchandise in the respects set out above.

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

Complaint

IN THE MATTER OF

THE QUAKER OATS COMPANY

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

Docket 8160. Complaint, Nov. 4, 1960—Decision, Dec. 26, 1963

Order vacating initial decision and dismissing complaint charging a manufacturer of briquets produced basically from corncobs to be used for cooking, with representing falsely—through use of the word “charcoal” and “Real Hickory Flavor” to describe its product—that the briquets were made of wood.

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 Quaker Oats Company, 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 Quaker Oats Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Its office and principal place of business is located at Merchandise Mart Plaza, Chicago 54, Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in manufacturing, offering for sale, sale and distribution, among other products, of briquets produced basically from corncobs, to be used for cooking purposes.

Respondent causes said product to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent is in competition, in commerce, with corporations, firms and individuals engaged in the sale and distribution of briquets made from wood and other products.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of its said product, the respondent has

described such product as "CHUCK WAGON CHARCOAL WHEELS", "CHUCK WAGON CHARCOAL BRIQUETS" and "CHUCK WAGON CHARCOAL BRIQUETS — real Hickory Flavor!"

PAR. 5. The public generally understands and believes that a product described as "charcoal" is made from wood and prefers such a product to be made of wood. The use of the word "charcoal" as descriptive of or in connection with its said product has the capacity and tendency to lead the public into the erroneous and mistaken belief that respondent's product is made from wood, and into the purchase of substantial quantities of its said product by reason of said erroneous and mistaken belief. Respondent by use of the phrase "Real Hickory Flavor!" enhances the erroneous and mistaken belief of the public that respondent's said product is produced from wood.

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

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constituted, and new constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. William A. Somers for the Commission.

Chadwell, Keck, Kayser, Ruggles & McLaren, Chicago, Ill., by *Mr. Paul H. LaRue*; and

Mr. Jack T. Redwine, Chicago, Ill., for the respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The Commission's complaint in this matter charges the respondent, The Quaker Oats Company, with misrepresenting the composition of certain briquets manufactured and sold by it, in violation of the Federal Trade Commission Act. Hearings have been held at which a substantial volume of evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by counsel and the case argued orally before the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

2. Respondent markets its briquets under the name "Chuck Wagon Charcoal Briquets". They were first placed on the market in 1957. They are produced principally from the residue of corncobs. The corncobs are first used for production of furfural (a chemical used in the plastics industry) and the residue of the corncobs is then used in manufacturing the briquets.

3. For some two years (1957 to mid-1959) the composition of the briquets was approximately 92 percent corncob residue, the remainder being starch and moisture. Since June 1959 respondent has been including in the briquets 10 percent, by weight, of raw (uncharred) hickory chips, which reduced the corncob residue proportion to approximately 82 percent. The hickory chips were added in order to impart an aroma or flavor to food cooked with the briquets.

4. The briquets are packaged in 10-pound paper bags and reach the consuming public through grocery stores, supermarkets, etc. They are manufactured at respondent's Memphis, Tennessee, plant and are sold and shipped to purchasers in some twenty-two states in the central and southern portions of the United States. On the bags the name "Chuck Wagon Charcoal Briquets" is featured, and since 1959 to words "Real Hickory Flavor" also.

5. In 1959 the briquets appear to have been advertised by respondent rather extensively in newspapers, but the record discloses no newspaper advertising since that year. Like the bags in which the briquets are packaged, the newspaper advertisements featured the name "Chuck Wagon Charcoal Briquets", and one of them (Comm. Ex. 4) added the words "With Hickory-Kissed Flavor."

6. The issue raised by the complaint is whether respondent's briquets, being made principally from nonwood material, may properly be referred to as charcoal. The complaint (Paragraph Five) alleges:

The public generally understands and believes that a product described as "charcoal" is made from wood and prefers such a product to be made of wood. The use of the word "charcoal" as descriptive of or in connection with its said product has the capacity and tendency to lead the public into the erroneous and mistaken belief that respondent's product is made from wood, and into the purchase of substantial quantities of its said product by reason of said erroneous and mistaken belief. Respondent by use of the phrase "Real Hickory Flavor!" enhances the erroneous and mistaken belief of the public that respondent's said product is produced from wood.

7. There is testimony from two expert witnesses in support of the complaint. The first was Mr. Edward Beglinger of Madison, Wisconsin, who for many years has been a chemist in the Division of Wood Chemistry of the Forest Products Laboratory. This is a part

of the Forest Service of the United States Department of Agriculture. In Mr. Beglinger's opinion charcoal can be made only from wood, at least insofar as fuel purposes are concerned.

8. The second witness was Dr Victor R. Deitz of the National Bureau of Standards, Washington, D.C. Dr. Deitz is an expert in the field of physical chemistry. Dr. Deitz recognizes that fuel charcoal may be made from a number of materials in the mineral and vegetable fields. (Mineral: bituminous coal; peat; lignite, which is a low-grade coal; sludge from the petroleum industry. Vegetable: coconut and hard nut shells; sulphite waste from the paper industry; wood.) Wood, however, has always been the most common source material for fuel charcoal, and Dr. Deitz is of the opinion that from an historical viewpoint wood has the foremost claim to recognition as the prime source material for such charcoal. He further points out that one of the principal reasons why fuel charcoal has in the past usually been made from wood has been the abundance of wood as a source material—its easy availability. (Charcoal is also made from animal materials—bone and blood—but such charcoal ordinarily is not used for fuel.)

9. There is also testimony in support of the complaint from eight members of the public, four of whom reside in Chicago, Illinois, and four in Madison, Wisconsin. In substance the testimony of the witnesses is that they understand charcoal to be made from wood. As to any preference on their part for charcoal made from wood over charcoal made from other materials, the witnesses were evenly divided. Four expressed a preference for wood charcoal, while four said it would make little or no difference to them, provided the non-wood charcoal performed as satisfactorily.

10. Like the case in support of the complaint, respondent's case includes both expert testimony and testimony from members of the public.

Analyses made by a commercial testing laboratory in Chicago of respondent's briquets and several leading brands of briquets made from wood show that insofar as chemical properties are concerned respondent's product is substantially similar to the wood briquets. And burning tests made by the chief chemical engineer at respondent's Memphis plant indicate that respondent's briquets ignite as quickly and burn as well as briquets made from wood. These facts, of course, would constitute no defense to the proceeding if the public is in fact misled as to the composition of respondent's product.

11. Also testifying on behalf of respondent was Dr. Raphael Katzen of Cincinnati, Ohio, a consulting chemical engineer. Dr. Katzen

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has had long experience in the field of chemical engineering and has on a number of occasions been retained by respondent in connection with various problems arising in that field. In Dr. Katzen's opinion respondent's briquets are in fact charcoal. While he recognizes that wood has been the most common source material for fuel charcoal, his testimony is that such charcoal may properly be made and is in fact made from a number of other materials. Actually there appears to be little or no conflict between the testimony of Dr. Katzen and that of Dr. Deitz.

12. In connection with Dr. Katzen's testimony there was received in evidence a definition of charcoal taken from an authoritative scientific work, Mantell's "Industrial Carbon." In Chapter XV, headed "Charcoal as Fuel", is the following:

Charcoal is the more or less impure form of carbon obtained from the various vegetable and animal matters by their ignition out of contact with air (Resp. Ex. 21).

13. Another witness testifying on behalf of respondent was Dr. Bergen Evans, Professor of English in Northwestern University. Dr. Evans is an expert in the English language and the use and meaning of words. After examining many dictionaries Dr. Evans expressed the opinion that the definition of the word charcoal includes products made from non-wood materials as well as those made from wood. And in expressing this opinion Dr. Evans had in mind the use of charcoal as a fuel. In his testimony Dr. Evans emphasized that dictionaries do not attempt to dictate to the public how words should be used; rather, the function of a dictionary is simply to record how words are in fact used by the public.

14. Among the leading dictionaries examined by Dr. Evans were the following, together with the definition of the word charcoal found in each:

(a) *The Oxford English Dictionary*, Vol. 2, p. 282: Charcoal—1. The black porous pulverizable substance, consisting (when pure) wholly of carbon, obtained as the solid residue in the imperfect combustion of wood, bones, and other vegetable or animal matter. (Resp. Ex. 28.)

(b) *The Century Dictionary* Vol. 2, p. 928: Charcoal—1. Coal made by subjecting wood to a process of smothered combustion; more generally, the carbonaceous residue of vegetable, animal, or combustible mineral substances which have been subjected to smothered combustion. (Resp. Ex. 29.)

(c) *A Dictionary of American English* Vol. 1, p. 470: Charcoal—1. The black substance left as a solid residue after the imperfect combustion of wood, bones, or similar matter. (Resp. Ex. 30.)

(d) *Funk & Wagnalls Standard Dictionary of the English Language, International Edition (1958)*: Charcoal—1. A black, porous, odorless carbonaceous

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substance, burning with little or no flame, obtained by the imperfect combustion of organic matter, as of wood. (Resp. Ex. 31.)

(e) *Webster's New World Dictionary of the American Language, College Edition (1954)*: Charcoal—1. A black form of carbon produced by partially burning or oxydizing wood or other organic matter in large kilns or retorts from which air is excluded. (Resp. Ex. 32.)

(f) *The American College Dictionary*: Charcoal—1. The carbonaceous material obtained by the imperfect combustion of wood or other organic substances. (Resp. Ex. 33.)

(g) *Webster's New Secondary School Dictionary (Merriam-Webster) (1959)*: Charcoal—1. A black or dark porous form of carbon made by charring, or partly burning, wood or other vegetable or animal substances in a kiln from which air is excluded. (Resp. Ex. 34.)

(h) *Webster's New International, Second Edition, Unabridged (Merriam-Webster)*: Charcoal—1. A dark-colored or black porous form of carbon prepared from vegetable or animal substances, as that made by charring wood in a kiln, retort, etc., from which air is excluded. (Resp. Ex. 35.)

(i) *Webster's Third New International Dictionary Unabridged (Merriam-Webster) (1961)*: Charcoal—1. A dark-colored or black porous form of carbon made from vegetable or animal substances (as from wood by charring in a kiln or retort from which air is excluded) and used for fuel and in various mechanical, artistic, and chemical processes. (Resp. Ex. 36.)

15. There is also testimony on behalf of respondent from eight members of the public, all of whom reside in Chicago. In addition it was stipulated by counsel that the testimony of two other public witnesses who, because of illness, did not appear would be substantially the same as that given by the eight. The witnesses testified in substance that they understood charcoal could be made from coal, wood, or almost any other material which would burn, and that they would have no preference for wood charcoal if non-wood charcoal would perform as well. As to the term "Real Hickory Flavor" the witnesses said it meant to them only that the briquets would give a hickory aroma or flavor to food cooked with them.

16. Finally, there is testimony from Dr. Hans Zeisel, Professor of Law and Sociology at the University of Chicago Law School. Dr. Zeisel is a specialist in the field of statistics, public opinion surveys, and market research. He was highly critical of the public testimony introduced by both parties in the present case. The first requirement of a public opinion survey, he stated, is that the persons interviewed must constitute a representative sample of the public or the particular segment involved. They must be chosen by lot or chance or some other method of "random" selection. The second requirement is that the interviews with the persons chosen must be unbiased, that is, disinterested.

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17. Neither of these principles, Dr. Zeisel said, was followed here. The witnesses were offered only because it was found by the respective parties that the individuals entertained the views expressed by them; there was no attempt at random sampling. Moreover, Dr. Zeisel stated, the interviews with the individuals were not unbiased. The individuals were aware of the pending litigation, the issue involved, and that their testimony was desired by the party interviewing them. In summary, Dr. Zeisel testified, the testimony of the witnesses indicated nothing more than that the particular individuals entertained the views expressed by them. The testimony in his opinion afforded no basis whatever for an inference that any substantial portion of the public entertained similar views.

18. All of the experts testifying in the proceeding, both in support of the complaint and on behalf of respondent, appear to be well qualified in their respective fields. And all made a favorable impression as witnesses, answering frankly and fully all questions addressed to them.

19. In the light of the record as a whole, it seems clear that the complaint has not been sustained by the greater weight of the evidence. Among the expert witnesses only one took the flat position that fuel charcoal must be made from wood. All of the public testimony offered by both sides is of very doubtful probative value on the question of public understanding. Of particular significance are the dictionary definitions. In the face of these definitions it is difficult to see how a finding could properly be made that charcoal, even when restricted to fuel charcoal, can be made from no material other than wood, or that such is the understanding of the public.

CONCLUSION

It is concluded that the complaint has not been sustained.

ORDER

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

MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT

By the Commission:

The Commission's complaint charged respondent with having violated Section 5 of the Federal Trade Commission Act by failing to make affirmative disclosure that its "Chuck Wagon Charcoal Briquets" are manufactured principally from the residue of corncobs, and not wood. Without necessarily agreeing with all of the analysis in the initial decision, the Commission has determined that the public

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interest in preventing consumer deception does not warrant entry of a cease and desist order in this matter.

Accordingly, the complaint is dismissed.

Commissioners Anderson and MacIntyre dissent and have filed a separate opinion.

By ANDERSON and MACINTYRE, *Commissioners, dissenting*:

We dissent from the majority's decision since we do not believe it takes into account the protection of those persons who believe that charcoal is made from wood.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

Upon consideration of the appeal of complaint counsel from the initial decision of the hearing examiner, and in accordance with the views stated in the accompanying memorandum,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

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

By the Commission, Commissioners Anderson and MacIntyre dissenting.

IN THE MATTER OF

MAGNAFLO COMPANY, INC., ET AL.

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

Docket 8422. Complaint, June 2, 1961—Decision, Dec. 26, 1963

Order requiring Youngstown, Ohio, manufacturers of a battery additive known as "Lifetime Charge" designed to be used in both new and used lead acid storage batteries, to cease making a variety of false claims for their product in advertising in newspapers, trade publications and sales literature and on labels, cartons and other advertising material—including misrepresentations concerning its effectiveness, guarantees, demand and use, endorsements, government approval and tests, as in the order below set forth; and to cease using the trade name "Lifetime Charge" for their said product.

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

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Trade Commission, having reason to believe that Magnaflo Company, Inc., a corporation, and Webster B. Harpman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Magnaflo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 4132 West Market Street, Youngstown, Ohio.

Respondent Webster B. Harpman is President of said corporation and his address is the same as that of the corporate respondent. Said respondent Webster B. Harpman formulates, directs and controls the acts, policies and practices of said corporate respondent, including those hereinafter alleged.

PAR. 2. Respondents are now, and for the past several years have been, engaged in the manufacture, sale and distribution of a battery additive known as "Lifetime Charge", designed to be used in both new and used lead acid storage batteries. Its chief constituents are magnesium sulphate and potassium sulphate.

Respondents cause, and have caused, said product to be shipped from their place of business in Youngstown, Ohio to dealers and others, including members of the public, located in the various States of the United States and in the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business therein is, and has been, substantial.

PAR. 3.* In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their product, respondents have made numerous statements and claims concerning said product in advertisements inserted in newspapers and trade publications, in sales literature, circulars, testimonials, letters, and on labels, cartons, and other advertising material circulated and distributed generally throughout the United States. Among and typical, but not all inclusive, of such claims and representations are the following:

1. The Guaranteed Battery Additive. The original guaranteed.
2. Is Backed by Ohio Farmers Indemnity Co.

*Reported as amended by order of Jan. 18, 1962.

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3. Two million users of Lifetime Charge have found it will do everything we say. Proved by a million car owners.

4. One of the Nation's leading battery makers agrees BATTERY LIFE CAN BE INCREASED WITH A CHEMICAL ADDITIVE

5. Get original Lifetime Charge today and drive confidently all year long.

6. "Lifetime Charge" gives a permanent charge to battery.

7. U.S. Government Approved. Now it's Lifetime Charge in Fort Knox

8. Lifetime-Charged Batteries hold charge Three Times longer in Ford Plant

9. Free Winter Start Insurance You start or we pay

PAR. 4. Through the use of the foregoing statements and claims, and others of similar import not specifically set out herein, respondents represented, directly or by implication, that:

1. Said product is unconditionally guaranteed.

2. Respondents' guarantee of performance is backed by the Ohio Farmers Indemnity Company.

3. Respondents' product has been used by one million to two million car owners.

4. A battery manufacturer agrees that battery life can be increased with a chemical additive.

5. Respondents' product will enable the purchaser thereof to operate his car for a year without battery trouble.

6. Respondents' product will permanently charge a battery.

7. Respondents' product is United States Government approved.

8. Batteries treated with respondents' product have been found by the Ford Motor Company to hold a charge three times longer than normal.

9. Respondents insure winter starting or will pay the cost of starting purchasers' automobiles.

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

1. The guarantee provided was and is subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representations were made.

2. Respondents' guarantee of performance or "insurance" against failure to start is not backed by the Ohio Farmers Indemnity Company as respondents' insurance policy with this company is in fact a vehicle and product liability policy only.

3. Respondents' product has not been used and proved by one to two million car owners.

4. No battery manufacturer has agreed that the life of a battery can be increased by the addition of a chemical additive to the battery.

5. Respondents' product will not insure the purchaser thereof a year's operation of his automobile without battery trouble.

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6. Respondents' product will not charge a battery.

7. Respondents' product has not been approved by the United States Government.

8. No test has been made by the Ford Motor Company which found that respondents' product caused a battery to hold a charge longer than normal.

9. The purchaser of respondents' product will not be insured winter starting of his car as respondents will pay for the starting of the car only once.

PAR. 6* Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. The name "Lifetime Charge" is false and deceptive. Among other things, said product will not of itself charge or recharge a battery, and it is not a lifetime charge.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive claims, statements and representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such claims, statements and representations were, and are, true, and to induce the public to purchase substantial quantities of respondents' said product as a result of such erroneous and mistaken belief.

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

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

Mr. Albert A. Carretta, of *Carretta & Counihan*, for respondent *Magnaflo Company, Inc.*

Mr. Webster B. Harpman, pro se.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

MAY 24, 1962

The main respondent here is Magnaflo Company, Inc. The other respondent is Webster B. Harpman, its president up to the time of the issuance of the complaint, June 2, 1961, and apparently up to June 13, 1961. In resigning he apparently sold his ownership stock interest to the present principals of the corporation.

*Reported as amended by order of Feb. 20, 1962.

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THE PROCEEDINGS

The complaint herein alleges that respondents have been engaged in the manufacture and sale in commerce of a battery additive known as Lifetime Charge.

Paragraph THREE of the complaint sets forth the alleged representations—numbered, by amendment, as 1 to 9—made by respondents in conducting their business. The representations are, or were, that the additive—(1) is guaranteed, (2) is backed by an insurance company, (3) is approved by millions of users, (4) is in effect approved by a leading battery maker, (5) will result in year-long driving without battery trouble, (6) will charge and permanently charge a battery, (7) is Government approved, (8) has been found by a Ford Plant to hold a charge three times the normal time, and (9) is backed by free winter start insurance.

Paragraph FIVE of the complaint alleges that said representations 1 to 9 are false and misleading and states the alleged actual facts.

Respondents eventually stipulated that these representations are misleading, except as to 9, and agreed to a cease and desist order, with the limitation, however, as to 9 that the order applied only if respondents do not pay for starts as often as necessary.

Paragraph SIX, as amended by leave of the hearing examiner, alleges that by their use of the trade name Lifetime Charge respondents have represented that the additive will keep a battery charged for life, that actually it will not charge a battery nor is it a lifetime charge, and that the name is therefore false and misleading. The use of this trade name, by itself, which respondents finally stipulated "may be deceptive", or its use with other wording, which respondents contend cures any deception, presents the chief issue in this case. The trade name Lifetime Charge, and the other wording, chief of which is Doubles Battery Life, appear on the front of the paper box (RX 1) in which the additive has been packaged.

The first answer to be interposed herein was that by respondent Harpman, who is also an attorney. A motion was also made by him to dismiss the complaint, issued June 2, 1961, on the ground that he was not connected with the corporation when served, but the motion was denied.

The next answer to be filed was that of the corporate respondent appearing without attorney although the answer is fairly comprehensive. Finally, pursuant to leave, an amended answer was served in behalf of the corporation by Albert A. Carretta, Esq., attorney of record here. Both answers in behalf of the corporation deny responsibility for acts prior to June 13, 1961.

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Various issues raised by the answers in this case need not be discussed in view of the stipulation thereafter made herein.

A prehearing conference, with 154 pages of minutes, brought about consents and stipulations on the record, noted in a prehearing order of February 19, 1962, practically dispensing with the hearing, and consenting to a cease and desist order as to representations 1-9, as well as agreeing that the name Lifetime Charge "may be deceptive". As to Lifetime Charge it was stipulated that the question is whether Doubles Battery Life and other accompanying wording removes the possible deception in the trade name. The oral stipulation made on the record at the prehearing conference is quoted on p. 2 of the prehearing order.

Counsel on both sides are to be commended for their cooperation in avoiding what could have been an unduly protracted hearing with extensive expert as well as consumer testimony.

Stipulation—Re 1 to 9

As contemplated in the prehearing proceedings a formal stipulation, dated March 1, 1962, was executed by counsel supporting the complaint, and by Albert A. Carretta, Esq., for respondent corporation, as well as by respondent Harpman individually. The stipulation sets forth the facts much the same as alleged in the complaint, except that it makes explicit that respondent Harpman was president of the corporation, controlling its practices, and owning its stock, only up to June 13, 1961.

The stipulation admits that respondents in conducting their business made the representations 1 to 9 as alleged, although "some have not been used since 1959"; that representations 1 to 9 have, in general, the meaning severally attributed to them by the complaint, and that Commission witnesses could adequately establish the facts allegedly contradicting said representations.

As to 9, representing that respondents insure "winter starting" — although, as alleged in the complaint, the actual guarantee insured starting the car only once — it is stipulated that respondents in some instances did pay more than once, and it is further stipulated that the new officers of the corporate respondent do not intend to limit the number of starts to one.

It is further agreed in the stipulation that CX 1-15, 17 and 18, all attached to the stipulation, were used by respondents during the years 1959 to 1961. The exhibits are mostly advertisements, but include some posters and displays. They establish, in general, that commencing in 1959 respondents have been using the trade name Lifetime

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Charge only in conjunction with Doubles Battery Life plus other wording.* However, these exhibits show that the conjunctive wording is secondary not only on the container, as appears by looking at the container, but, as will be demonstrated, also in the advertisements, posters, and displays, all of which maximize, emphasize, and reiterate the name Lifetime Charge at the expense of Doubles Battery Life and the other wording.

It is also agreed in the written stipulation that the advertisements reproduced in CX 16, which show the use in 1959 of the representations Permanent Charge and Government Approved (both now discontinued), were placed by certain reselling retailers, and that RX 3 is respondents' explanation, namely, the use by mistake of old mats by the retailers, promptly corrected at respondents' insistence. Much the same applies to CX 19 and 20, showing use in 1959 and 1960, of the representation Permanent Charge (also now discontinued), and similarly explained by the statement in RX 2.

It is also agreed in the written stipulation that CX 21 is the paper box container used by respondents in 1959 for packaging. The front contains the old and discarded conjunctive representation Gives a Permanent Charge, instead of Doubles Battery Life, the present wording.

It is also provided in the written stipulation that, on the facts as agreed, a cease and desist order, in the wording set forth in said stipulation, may be issued as against representations 1 to 8 — and also as against representation 9, "unless respondents will pay for the starting of automobiles the number of times required." (No. 10 in the stipulation.)

Stipulation — Re Lifetime Charge

Finally, and very importantly, it is stipulated in Paragraph VII of the stipulation that (a) the trade name Lifetime Charge by itself "may be deceptive", (b) that for the past two years respondents have not used it in their advertising (including the container) without other language such as Doubles Battery Life, Gives New Power to Battery, and Helps Keep Battery Fully Charged, and (c) that the efficacy of the additive does not exceed the claims set forth in (b).

It is agreed that the hearing examiner may decide whether the additional language removes from the trade name the tendency to deceive, and that he may issue an order accordingly. The exact wording of this part of the stipulation will be quoted in the discussion below.

* Apparently this was pursuant to an informal arrangement with Commission personnel.

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A hearing was held herein on March 6, 1962, wherein the stipulation above described and the various exhibits were received in evidence. Apart from this, the hearing was used to receive oral argument on the legal issues involved in that respondents' contention that any deceptiveness in the name Lifetime Charge is cured by Doubles Battery Life and the other wording.

Proposed findings and conclusions, as well as proposed order, were submitted by complaint counsel on March 16, 1962, and by counsel for corporate respondent on March 19, 1962, no proposals being submitted by respondent Harpman. The submitted proposals were limited, however, to the question as to whether any deceptiveness of Lifetime Charge was cured by Doubles Battery Charge and the other wording.

The hearing examiner considers that the agreed facts and proposed order in the written stipulation—particularly as they relate to representations 1 to 9 and to jurisdictional matters basic to the entire complaint—are further proposals herein submitted jointly by both sides. In general, the hearing examiner accepts them, as appears in the Findings, Conclusions, and Order below.

This, as contemplated by the parties, leaves over only the issuance of further findings and conclusions, namely, as to the deceptiveness or non-deceptiveness of Lifetime Charge with or without additional wording, and the insertion of possible additional provisions accordingly in the cease and desist order.

DISCUSSION

As stated in Paragraph II of the written stipulation herein, respondents' battery additive Lifetime Charge was designed to be used in both new and used lead acid storage batteries. The complaint, as amended, alleges:

Paragraph SIX: Through the use of the Trade name Lifetime Charge respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. The name Lifetime Charge is false and deceptive. Among other things, said product will not charge or recharge a battery, and it is not a lifetime charge.

The written stipulation states the following:

VII. It is further stipulated with reference to the charges set forth in paragraph Six of the complaint relating to the use of the trade name Lifetime Charge:

- (a) That the trade name Lifetime Charge by itself as descriptive of respondents' products may be deceptive to the purchasing public.
- (b) Respondents for the past two years have not used the trade name Lifetime Charge in their advertising without the addition of other language, such

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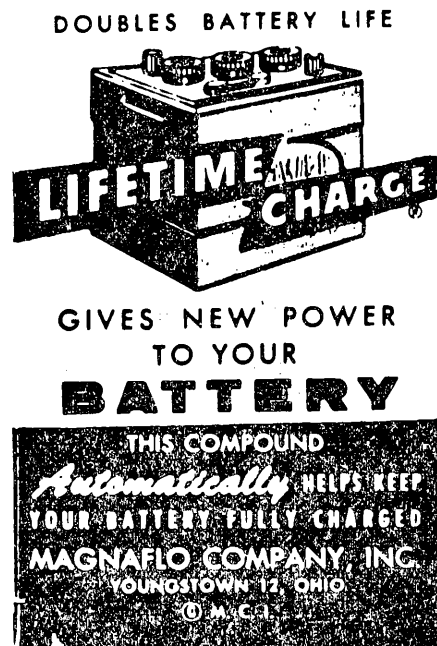
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as Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged.

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof and that counsel supporting the complaint concedes that he has no testimony to offer as to the efficacy of the product with reference to the above three statements in view of the fact that the efficacy of the product relating to these three statements is not questioned in the complaint.

VIII. It is further stipulated that on the basis of the statements stipulated in Paragraph VII, above, the hearing examiner may make his determination as to Paragraph Six of the complaint and issue his order based thereon after arguments, oral and written, as to the contention of counsel supporting the complaint that the trade name Lifetime Charge is deceptive whether or not it is modified by other language and the contention of respondents that the phraseology now used on the Lifetime Charge package, Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged, removes from the trade name Lifetime Charge, the tendency to deceive.

The trade name Lifetime Charge appears prominently in conjunction with Doubles Battery Life, as well as the other two items of explanatory wording, on the front of the paper box container (RX 1), which is the principal, although not the only, exhibit in determining the questions now being considered. There is reproduced here a facsimile representation, except for color, of said RX 1.



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The name Lifetime Charge, usually further emphasized, and the conjunctive wording, or portions thereof, also appear on or in advertisements, posters, and displays, as will be detailed in a later portion of this discussion.

A

Lifetime Charge.—Lifetime.—Charge.

Lifetime Charge

In the opinion of the hearing examiner the express stipulation of the respondents that the trade name Lifetime Charge, used apart from any other wording, "may be deceptive" to the purchasing public is tantamount to an admission that the name constitutes misrepresentation within the meaning and scope of Section 5 of the *Federal Trade Commission Act*. On this stipulation, the hearing examiner finds that Lifetime Charge does constitute such misrepresentation. The stipulation was apparently so intended. It is well settled that tendency to deceive is all that is necessary to prove deception under Section 5, as contrasted with actual deception. However, it will also be shown now that the same result flows from other stipulated matters and from other considerations.

Lifetime

Respondents in the written stipulation agreed that "the efficacy of respondents' product does not exceed the claims set forth in (b) hereof"—the said claims being Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged.

It thus seems to be almost expressly agreed that the lifetime efficacy or longevity promised by Lifetime Charge is no more than Doubles Battery Life and the other two conjunctive claims. Respondents in effect further agree to this by arguing that Doubles Battery Life and the two other claims limit the meaning of Lifetime Charge.

Furthermore, respondents again seem expressly to admit that the lifetime promise of Lifetime Charge is false (as distinguished from Doubles Battery Life) by a further item in the written stipulation. This is the consent to a cease and desist order as to representation 6, of 1 to 9, directing them to cease and desist from representing that the "product will charge or *permanently* charge a battery" (our emphasis).—It is true that Paragraph VIII of the written stipulation seems to limit the examiner to matters stated in Paragraph VII, but it was agreed at the hearing (Minutes p. 22) that the hearing exam-

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iner could consider "all the evidence", which would include the parts of the stipulation relating to representation 1 to 9.

* * * * *

Moreover, the hearing examiner believes and finds that Lifetime Charge means lifetime in a broad sense such as lifetime of the user, of the car, or of the structural battery. The hearing examiner believes that this would be a normal and reasonable construction on the part of an altogether substantial and significant number of consumers.

Charge

There is nothing in Paragraph VII of the stipulation whereby respondents claim that their product is a charge, i.e., in the ordinary sense of introducing an electrical current into a battery.

Actually, in Paragraph V (subdivision 6) it is expressly stipulated: "Respondents' product will not charge a battery". In referring here to Paragraph V of the stipulation, the hearing examiner again feels that he is not confined to Paragraph VII, relating only to the three legends appearing with Lifetime Charge.

There can be no doubt, therefore, that the Charge part of Lifetime Charge is clearly deceptive.

* * * * *

Actually, the hearing examiner's construction of the Charge part of Lifetime Charge, and he so finds, is that it is a representation that the additive keeps a battery charged without the necessity of charging it with an electrical current—and that it represents that this is true even after the battery has run down, perhaps completely or almost so. Again it would seem that this would be a normal and reasonable construction of a substantial and significant number of consumers.

This construction made by the hearing examiner is not too unlike the third item of additional wording, Automatically Helps Keep Your Battery Fully Charged.

B.

Doubles Battery Life Gives New Power Keeps Fully Charged

The discussion under A has fully disposed of the question as to whether Lifetime Charge, apart from the addition of other wording, is deceptive. It has been found that it definitely is.

But the real question in this case, of course, is whether the allegedly qualifying wording such as Doubles Battery Life, more par-

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ticularly, "removes from the trade name Lifetime Charge the tendency to deceive" (Stipulation, Paragraph VIII).

Doubles Battery Life

There is no doubt in the hearing examiner's mind that, as contended by respondents, the meaning of Doubles Battery Life, at least its primary and more natural meaning, is doubles the normal life or longevity of a battery—figured, perhaps, at eighteen months for normal usage. This is not the only meaning, but it deserves serious consideration in connection with respondents' claim that the wording sufficiently qualifies any deceptiveness in Lifetime Charge.

As already found, of course, Lifetime Charge means a product that will keep the battery in action for life, that is, for the life of the user, the car, or the structural battery; and it means a product which obviates recharge with an electrical current.

What does Doubles Battery Life, in its primary meaning of doubling battery longevity, do to explain, qualify, or delimit this deceptive meaning of Lifetime Charge, as herein found?

In the hearing examiner's opinion, the wording Doubles Battery Life in its primary sense, at least, of doubling battery longevity does indeed qualify and limit the wording of Lifetime Charge, as respondents contend. It limits the claim for the additive to doubling the ordinary longevity of a battery. It negates the claim in Lifetime Charge of greater longevity than double the ordinary battery longevity than double the ordinary battery longevity.—To be sure, the Charge part of Lifetime Charge is not negated, but this may not be too important if the word Charge represents merely that the battery can be kept charged without an electrical current.

However, this conclusion that there is adequate qualification is not beyond question or doubt. It may well be argued that Doubles Battery Life, in its primary meaning of doubling longevity, simply adds confusion to confusion, and it may be argued that it strikes such a discordant note in relation to Lifetime Charge, playing the word Life against Lifetime, as reasonably to cause this confusion. It may further well be argued that such possible confusion is greatly increased by reason of the fact that Lifetime Charge is a somewhat technical and functional representation for laymen to grasp and also because it is not categorically denied, in fact not denied at all as to the Charge part, the deceptiveness of which seems to be admitted by the stipulation. On this argument, Lifetime Charge in its full meaning might still, in spite of Doubles Battery Life, be believed by the consumer, perhaps psychologically motivated by the "big lie" tech-

nique, even if not used deliberately, and further influenced by the low price of \$1.69 for the additive.

Moreover, and even more importantly, Doubles Battery Life also has a secondary meaning of doubles the liveliness or strength of the battery — an alleged additional effect which respondents have expressly claimed for the additive in some of their advertisements. This secondary meaning is consistent, or at least not inconsistent, with Lifetime Charge, and therefore when used in conjunction with Lifetime Charge, it might be designated as the natural meaning of Doubles Battery Life.

This secondary meaning of doubling battery liveliness may well be the one that a consumer will give to Doubles Battery Life when it appears in conjunction with Lifetime Charge. The consumer need hardly have to assume that he is being told two different and contrary things on the same label. Nor, of course, need he assume that Lifetime Charge is false or that it means anything less than it says, as found here. The consumer may well assume that Doubles Battery Life does not contradict or negate Lifetime Charge, but that it simply alludes to an additional effect of doubling battery liveliness or vigor, entirely apart from battery longevity.

This secondary meaning of Doubles Battery Life ascribed thereto in this discussion is corroborated by Gives New Power To Your Battery. Moreover, respondents have advertised (CX 7) their product as making the Battery Run Stronger, Last Longer (printed in this order), and have also advertised it as making the battery Snap and Snarl, a clear reference to liveliness rather than to longevity. It can not be seriously contended, therefore that the secondary meaning ascribed here to Doubles Battery Charge is unrealistic.

Accordingly, the hearing examiner affirmatively finds that as a matter of wording alone, and even apart from other considerations such as insufficient display prominence, which will be discussed later, Doubles Battery Life does not remove from Lifetime Charge the tendency to deceive.

Gives New Power To Your Battery

This wording represents nothing about the lifetime of the battery, and thus in no way can be construed as limiting the deception contained in Lifetime Charge, as contrasted with Doubles Battery Life in its primary meaning. This Gives New Power wording definitely refers to the liveliness of the battery, rather than its life expectancy. Its meaning, as already noted, is more like the secondary meaning of Doubles Battery Life, which also relates to the quality of battery action. This meaning also fits in with the advertisements of respondents, as above referred to, stating that the additive makes the battery

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Snap and Snarl, Makes It Run Stronger as well as Last Longer. Accordingly, the Gives New Power wording possibly adds to the deceptiveness of Lifetime Charge, at least to the extent that it does not qualify the Lifetime Charge, but unmistakably and unequivocally adds another claim, namely additional power or liveliness.

Helps Keep Your Battery Fully Charged

This wording *does* represent something about the duration of battery life, although perhaps somewhat haltingly, particularly in view of the inclusion of the word Helps. Actually the wording is consistent with Lifetime Charge, although less categorical, and it seems fairly clear that many consumers could reasonably construe it as affirming, rather than qualifying, the full deceptive representations of Lifetime Charge.

At the very least this Fully Charged wording adds confusion to confusion in respect to the Lifetime Charge claim as used.

* * * * *

It is hereby affirmatively found that the second and third legends appearing with Lifetime Charge, to wit, Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged, do not remove from the trade name Lifetime Charge the tendency to deceive — whether these two legends are considered separately, together, or both joined with Doubles Battery Life.

Lifetime Charge the Dominant Wording
Doubles Battery Life Merely Small Print

The deception in this case is enhanced by the dominance of Lifetime Charge on the paper box with only one line assigned to Doubles Battery Life, and indeed by the dominance, as well, of the other two legends over Doubles Battery Life.

There can be no doubt, as already indicated, that respondents rely primarily on the wording Doubles Battery Life to show elimination of any deceptive effect of Lifetime Charge.

However, even if Doubles Battery Life could be given the most favorable meaning and construction respondents could ask for, it is doubtful, because of its "small print" character, that it could remove the deceptiveness of Lifetime Charge.

The front panel of the paper box (RX 1) is 3½" x 2¼", and, as will be seen by the illustration above, shows the following:

(1) At the top of the panel and in simple printed black letters 3/16" high on a single line, narrower than the width of the box, appears the wording Doubles Battery Life.

(2) Immediately below this single line appears respondents' standard cut, 1" high, depicting a battery with the trade name Lifetime Charge prominently spread out in front and actually stretched to the full width of the box, in large white letters on a blue background. The word Lifetime is, significantly, the larger of the two words and it appears on the upper level, left, and the word Charge is somewhat smaller and appears on the lower level, right.

(3) Below the standard cut appears the wording Gives New Power To Your Battery, but in large printed black letters spread on three lines and occupying a space over 1/2" high — thus minimizing the single line of Doubles Battery Life at the top of the box, or consolidating with the latter's small black lettering to give it the secondary meaning of liveliness.

Below this New Power wording there in turn appears the wording Helps Keep Your Battery Fully Charged, in white letters on a blue background 1 1/4" high, and itself occupying two lines — thus definitely minimizing the single line of Doubles Battery Life at the top of the box, and, with its color print and its longevity implication, consolidating with the color print and the Lifetime of Lifetime Charge.

* * * * *

Accordingly it is clear that Doubles Battery Life is completely dwarfed and rendered quite inconsequential by all the other wording on the box, including Lifetime Charge in particular; or at the very best for respondents it is relegated to its secondary meaning of battery power or liveliness.

It is dwarfed by Lifetime Charge, with its admitted deceptiveness as to the effect of the additive on the longevity of the battery.

It is dwarfed by the New Power wording, or merged into this wording, which states nothing about the longevity of the battery and in effect tends to relegate Doubles Battery Life to its secondary meaning of increasing power and liveliness.

It is dwarfed by the Battery Fully Charged wording, which supports the deceptive representation in Lifetime Charge and visually merges into Lifetime Charge.

Increased Dominance of Lifetime Charge In Advertisements and Posters

The hearing examiner has taken pains to study and compare all of the exhibits (CX 1-15, 17, 18) stipulated as used by respondents in the period 1959-1961. These are largely advertisements or "mats"

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of advertisements, as well as posters and displays. The advertisements and mats disclose the following general pattern:

(1) There is a picturization of the entire front of the box container, RX 1, as heretofore described, although there may be no color as on RX 1 itself. First, in this picturization, there is the small top line Doubles Battery Life, which, however, becomes unreadable or almost unreadable in the reduced form of some of the picturizations. Second, as in RX 1, underneath Doubles Battery Life is a reproduction of respondents' standard cut showing Lifetime Charge prominently spread out in front of a battery for the full width of the box. Third, below the standard cut, as in RX 1 appears successively the wording Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged, each for more than one line, as well as in large type, and definitely more prominent than Doubles Battery Life.

(2) Respondents' standard cut, again featuring the name Lifetime Charge spread out in front of a battery, is repeated, (CX 2) for example — this time appearing, of course, without the one-line wording Doubles Battery Life found on the box. Furthermore, sometimes the name Lifetime Charge is so repeated twice, by showing two standard cuts, or it is repeated quite a few times, *i.e.*, by showing a cut of a number of boxes assembled in a cardboard box display tray (CX 17), which itself further features the name Lifetime Charge.

(3) The name Lifetime Charge may be featured once more, this time entirely apart from using the standard cut, but usually by means of large display printing, perhaps white on black or white on blue (CX 2), for example.

(4) The wording Doubles Battery Life, inconspicuous as it appears, is either not repeated or, if repeated, is definitely subordinate to Lifetime Charge (CX 3,4,5 mat 40), (CX 6 mat 34), 10, (somewhat contra, CX 5 mat 37). It may be noted that a number of these exhibits play up the secondary meaning of Doubles Battery Life, consistent with Lifetime Charge in its broad sense — particularly CX 7 mat 30, displaying the picture of a snarling dog and the claim of Snap and Snarl, as well as CX 1 stating that Your Battery Leaps With New Life, and CX 5 mat 38, stating that It Puts Your Car On The Go.

It is thus clearly apparent that as actually used in advertisements the wording Doubles Battery Life has little mitigating effect on Lifetime Charge, and at the very least is quite confusing.

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The same conclusion is reached from an examination of the posters and other materials included in the Commission Exhibits enumerated above:

CX 3 is a poster 3' x 1'. Step (1), *supra*, which would show the box front containing at least the words Doubles Battery Life is completely omitted. Step (2), showing the standard cut featuring Lifetime Charge is, of course, included. Step (3), giving independent prominence to Lifetime Charge, is accomplished by setting up the trade name in huge blue letters in a space measuring approximately 2' x 1/2'. Step (4), relating to the minimization of Doubles Battery Life is accomplished by printing the wording in ordinary black ink in a space 3" x 3", as further contrasted with the brilliant red lettering, in a space 2' x 1/2', reading Makes Your Car Battery Run Stronger — Last Longer and actually giving Doubles Battery Life its secondary meaning of liveliness.

CX 9 is a poster in red, black and green, 3' x 2/3', using no cuts at all, and simply displaying the trade name Lifetime Charge in large red letters, with no reference to Doubles Battery Life whatever, or to the other two legends.

Similarly on the very small exhibits CX 11(A), (B) and (C), relating to free winter starts insurance, only the trade name Lifetime Charge appears, without any reference whatever to Doubles Battery Life or the other two legends.

* * * * *

In the hearing examiner's opinion, the above review thus shows quite beyond doubt that even if the combined representations on the box (RX 1) did not constitute deception, and would be saved from deception particularly by the legend Doubles Battery Life, their extension and projection into the general advertising, poster, and display field lead to such an emasculation of the claimed Doubles Battery Life qualification, and result in such clear emphasis on Lifetime Charge alone, that deception indeed does result or becomes full-blown.

It is obvious, therefore, that the use of the name Lifetime Charge is the very seed, and potently so, of deception in this case, irrespective of the claimed qualifications allegedly brought about by Doubles Battery Life or other legends, and that the trade name Lifetime Charge is the instrumentality of deception or further deception.

When one considers that what consumers must ask for and talk about, particularly under the impact of this kind of advertising, is the trade name Lifetime Charge, and not any other wording, there

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can be little doubt as to the conclusion here made that the name is indeed an instrumentality of deception.

LAW

In view of the facts in this case, showing, among other things, such confusion of meaning as well as complete de-emphasis of the allegedly qualifying wording, it is doubtful that cases cited for respondents by able counsel herein can be of much assistance to them, however plausible a legal argument they might present on different facts.

Moreover, there is the curious factor in this case that there is no actual proof whatever as to the truthfulness of Doubles Battery Life or of the other two legends, or, for that matter, of the additive's having any beneficial effect whatever. Entirely apart from the undoubted burden of proof resting on complaint counsel to prove a case on all the relevant facts, it would be at least somewhat anomalous if the respondents could obtain what in effect might be deemed to be affirmative equitable relief solely by the use of allegedly qualifying wording the truthfulness of which is an unknown quantity.

The leading case cited for respondents is *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933). It held that a misleading trade name (there in use some 30 years) should not be completely excised where a less drastic remedy is available. However, the case must be read in the light of subsequent cases, at least as to the finality of the Commission's determination of the propriety of excision of a trade name. *Parke, Austin, & Lipscomb, Inc., v. F.T.C.*, 142 F. 2d 437 (C.C.A. 2nd 1944), *cert. denied*, 323 U.S. 753 (1944). *Herzfeld v. F.T.C.*, 140 F. 2d 207, 9 (C.C.A. 2nd, 1944) *Bakers Franchise Corporation, v. F.T.C.* (C.A. 3rd, May 1, 1962). *Elliot Knitwear, Inc., v. F.T.C.*, 266 F. 2d 787 (C.C.A. 2nd 1959), actually cited in behalf of respondents. In the last case named the Commission, after remand, adhered to its decision excising the name Cashmora in its entirety (Docket No. 6637, October 24, 1961; no appeal taken).

There are some earlier and therefore, perhaps, less persuasive cases cited for the respondents. These cases are also distinguishable from the present case by the simplicity of their product facts — Satinized qualified by Cotton Fabric (*Fluegelman*, 37 F. 2d 59), White Shellac by Shellac Substitute (*Casoff*, 38 F. 2d 790), and Good-Grape qualified by Imitation Grape (*Good-Grape*, 45 F. 2d 70).

In all cases cited by respondents sufficient prominence of the qualifying words is made a prerequisite.

* * * * *

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In *Algoma Lumber*, 291 U.S. 67, complete excision of part of the trade name was held proper to prevent confusion. As to confusion, it was stated in *Ford Motor Co.*, 120 F. 2d 175, 182, as if directed at facts such as in the present case:

The advertisement herein questioned is susceptible to the construction that it contains two ideas. * * * Either idea is so obscure that one blends into the other.

In *Atlanta Sponge & Chamois Corp.*, 52 F.T.C. Decisions 500, 531, relating to the trade name Chamois and allegedly qualifying wording, it was stated:

After reading both, the ordinary consumer would still not know the truth about the product without resort to specialized information he does not possess.

In determining whether or not there is confusion it must be remembered that the law on unfair trade practices protects the gullible and credulous, as well as the cautious and prudent person. As stated in *Florence Mfg. Co.*, 178 F. 73, 75 (C.C.A. 2nd, 1910),

The law is not made for the protection of experts, but for the public—that vast multitude which include the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.

See also *F.T.C. v. Standard Education Society* 302 U.S. 112, 116 (1937).

The following are the Findings of Fact and Conclusions of Law herein, which summarize the findings and conclusions in the decision proper:

FINDINGS OF FACT

I. Respondent Magnaflo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 2714 Montclair, N.E., Warren, Ohio. Prior to the issuance of the complaint its office and principal place of business was located at 4132 West Market Street, Youngstown, Ohio.

Respondent Webster B. Harpman is an individual and at the time the complaint was issued was president of said corporation. His address is 4132 West Market Street, Youngstown, Ohio. Up to June 13, 1961, said respondent Webster B. Harpman formulated, directed and controlled the acts, policies and practices of the said corporate respondent, including those hereinafter alleged.

II. Respondents are now, and for the past several years have been, engaged in the manufacture, sale and distribution of a battery additive known as "Lifetime Charge", designed to be used in both

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new and used lead acid storage batteries. Its chief constituent is magnesium sulphate.

Respondent Magnaflo Company, Inc., now causes its products to be shipped from its place of business in Warren, Ohio to dealers and others, including members of the public located in the various states of the United States and in the District of Columbia. Prior to the issuance of the complaint said products were shipped by respondents from their place of business in Youngstown, Ohio.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business therein has been substantial.

III. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their product, respondents have made numerous statements and claims concerning said product in advertisements inserted in newspapers and trade publications, in sales literature, circulars testimonials, letters, and on labels, cartons, and other advertising material circulated and distributed generally throughout the United States. Among and typical, but not all-inclusive of such claims and representations are the following:

1. The Guaranteed Battery Additive. The original guaranteed.
2. Is backed by Ohio Farmers Indemnity Co.
3. Two million users of Lifetime Charge have found it will do everything we say.
Proved by a million car owners.
4. One of the Nation's leading battery makers agrees BATTERY LIFE CAN BE INCREASED WITH A CHEMICAL ADDITIVE.
5. Get original Lifetime Charge today and drive confidently all year long.
6. "Lifetime Charge" gives permanent charge to battery.
7. U.S. Government Approved. Now it's Lifetime Charge in Fort Knox.
8. Lifetime-Charged Batteries hold charge Three Times longer in Ford Plant.
9. Free Winter Start Insurance
You start or we pay.

However, some of the above quoted statements have not been used since 1959.

Commission Exhibits 1 to 15, inclusive, 17 and 18 were used by respondents during the years 1959 to 1961.

Commission Exhibits 16, 19 and 20 are advertisements of retailers reselling respondents' products to the public, and Respondents' Exhibits 2(a), (b) and 3(a), (b) are respondents' expression as to the publication of Commission Exhibits 16, 19 and 20; and Commission Exhibit 21 is a box used by respondents for packaging their product in 1959.

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IV. Through the use of the statements quoted under Paragraph III hereof respondents have represented that:

1. Said product is unconditionally guaranteed.
2. Respondents' guarantee of performance is backed by the Ohio Farmers Indemnity Company.
3. Respondents' product has been used by one million to two million car owners.
4. A battery manufacturer agrees that battery life can be increased with a chemical additive.
5. Respondents' product will enable the purchaser thereof to operate his car for a year without battery trouble.
6. Respondents' product will permanently charge a battery.
7. Respondents' product is United States Government approved.
8. Batteries treated with respondents' product have been found by the Ford Motor Company to hold a charge three times longer than normal.
9. Respondents insure winter starting or will pay the cost of starting purchasers' automobiles.

V. In respect to the foregoing representations, it is hereby found as follows:

1. The guarantee provided was and is subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representations were made.
2. Respondents' guarantee of performance or "insurance" against failure to start is not backed by the Ohio Farmers Indemnity Company, as respondents' insurance policy with this company is in fact a vehicle and product liability policy only.
3. Respondents' product has not been used and proved by one to two million car owners.
4. No battery manufacturer has agreed that the life of a battery can be increased by the addition of a chemical additive to the battery.
5. Respondents' product will not insure the purchaser thereof a year's operation of his automobile without battery trouble.
6. Respondents' product will not charge a battery.
7. Respondents' product has not been approved by the United States Government.
8. No test has been made by the Ford Motor Company which found that respondents' product caused a battery to hold a charge longer than normal.
9. Commission Exhibit 11(c) shows that respondents' guarantee insures winter starting only once. However, in some instances respondents did pay for one or more starts when requested by the pur-

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chaser of their product, and the new officers of the corporate respondent do not intend to limit the number of starts to one, as set forth in Commission Exhibit 11(c).

VI. The parties hereto have stipulated that there is a legal and factual basis for issuing a cease and desist order as to the above-numbered items 1 through 9 in form and wording hereinafter adopted and followed in the order issued below.

Lifetime Charge

VII. As further stipuated by the parties herein, it is hereby found as follows in regard to the use of the trade name Lifetime Charge:

(a) That the trade name Lifetime Charge by itself as descriptive of respondents' product may be deceptive to the purchasing public.

(b) Respondents for the past two years have not used the trade name Lifetime Charge in their advertising without the addition of other language, such as Doubles Battery Life, Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged.

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof.

VIII. Supplementing VII(a), in the prior paragraph, it is hereby found and determined that the trade name Lifetime Charge used by itself is false, misleading, and deceptive. The respondents' product is neither a charge nor is it effective for a lifetime.

IX. As to VII(b), it is hereby found and determined that the supplementary language Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged does not qualify the trade name Lifetime Charge so as to remove the deceptiveness thereof.

The wording is even possibly altogether consistent with the deceptive misrepresentations made by the trade name.

To the extent that the wording may be inconsistent with the trade name it is confusing and adds confusion to confusion.

Furthermore, the main part of the wording relied on, Doubles Battery Life, is merely "small print" on the box container, and it has been completely de-emphasized in general advertising, posters, and displays.

CONCLUSIONS

1. The acts and practices of respondents, particularly the designation of their product as Lifetime Charge, are all to the prejudice and injury of the public.

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2. Such acts constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

3. The deceptiveness of the name Lifetime Charge is not cured by the legend Doubles Battery Life and other legends used, and is reinforced by the way the name and legends have been used.

4. All the allegations of the complaint have been proved, based on all the facts in evidence, including use of the legends relied on by respondents to qualify and cure any deceptive meaning of the name.

ORDER

It is ordered, That Magnaflo Company, Inc., a corporation, and its officers, and Webster B. Harpman, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their product now known as Lifetime Charge, or any other battery additive of substantially similar composition or possessing substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A

Representing, directly or by implication, that:

(1) Said product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(2) Ohio Farmers Indemnity Company, or any other insurance company, insures the performance of respondents' product.

(3) Said product has been used by one million, two million, or any other number of automobile owners in excess of that which has used such product.

(4) Any battery manufacturer agrees or states that the use of a chemical battery additive will increase the life of a battery, unless such statement is unequivocally made by a battery manufacturer.

(5) The use of respondents' product will enable the purchaser thereof to operate his car free from battery trouble for a year or any other specific period of time.

(6) Respondents' product will charge or permanently charge a battery.

(7) Respondents' product has been approved by the United States Government.

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(8) Said product has been tested by the Ford Motor Company and found to cause a battery to hold a charge longer than normal. Respondents' product has been approved or has been tested by any organization or agency which has not in fact approved or tested such product; or misrepresenting in any manner the results of tests conducted on respondents' product.

(9) Respondents insure winter starting of automobiles or will pay the cost of starting the automobiles of purchasers of their product, unless respondents will pay for starting of the automobiles the number of times that may be required.

B

Using the trade name Lifetime Charge, or any other name of the same or similar import, for said product.

MEMORANDUM-OPINION

DECEMBER 26, 1963

By the Commission:

Before coming to grips with the immediate problem, a short review of the prior proceedings in this case is in order.

The complaint, issued June 2, 1961, and amended February 20, 1962, charges that respondents violated Section 5 of the Federal Trade Commission Act by falsely advertising a product designed to be added to the electrolyte in lead acid storage batteries. Respondents were alleged to have made nine false or deceptive claims for their product and, through use of the trade name "Lifetime Charge," to have falsely "* * *" represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged."

In proceedings before the hearing examiner eight of the separate allegations of deception were disposed of by respondents' stipulation that the challenged representations were, in fact, misleading. The ninth allegation was settled by agreement as to the form of prohibition to be entered with respect to it. As to the charge that the trade name itself is misleading, the parties stipulated:

VII. It is further stipulated with reference to the charges set forth in Paragraph Six of the complaint relating to the use of the trade name "Lifetime Charge":

(a) That the trade name "Lifetime Charge" by itself as descriptive of respondents' product may be deceptive to the purchasing public.

(b) Respondents for the past two years have not used the trade name "Lifetime Charge" in their advertising without the addition of other language, such

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as "DOUBLES BATTERY LIFE", "GIVES NEW POWER TO YOUR BATTERY" and "AUTOMATICALLY HELPS KEEP YOUR BATTERY FULLY CHARGED".

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof, and that the counsel supporting the complaint concedes that he has no testimony to offer as to the efficacy of the product with reference to the above three statements in view of the fact that the efficacy of the product relating to these three statements is not questioned in the complaint.

In a reasoned and persuasive initial decision the hearing examiner held "* * * the trade name Lifetime Charge used by itself is false, misleading, and deceptive. The respondents' product is neither a charge nor is it effective for a lifetime." He further held that the language used or suggested by respondents for use along with the trade name did not ameliorate, but possibly actually added to the deception. Accordingly, he ordered respondents to cease using the trade name, and respondents appealed to the Commission.

In their brief and argument before the Commission, respondents stoutly maintained that the trade name was not deceptive when accompanied by such phrases as "Doubles Battery Life", "Gives New Power to Your Battery", and "Automatically Helps Keep Your Battery Fully Charged". And while contending that the truthfulness of these statements was not attacked in the complaint, respondent Harpman at a pretrial conference had stated that respondents were possessed of proof that the product would in fact prolong the useful life of a battery.¹ No such proof was introduced, however, and the Commission, feeling that evidence on this point would be helpful, on March 29, 1963, directed that the matter be remanded to the hearing examiner for the receipt of

* * * such additional evidence as may be required for a finding on the issue of whether or not respondents' product will preserve an existing charge in a battery to the extent necessary to give a purposeful and truthful meaning to the word "Lifetime" in the trade name.

In the subsequent proceedings before the hearing examiner the matter became bogged down in a welter of conflicting contentions as to which party had the burden of proof, the directed scope of the remand and other procedural difficulties. An interlocutory appeal was taken from the examiner's ruling, and the Commission, on July 12, 1963 [p. 2201 herein], issued an order in which it attempted to define with some particularity the fashion in which the case

¹ E.g., at page 57 of the record the following colloquy appears:

"Mr. HARPMAN. We can prove that it does exceed that particular phrase. We have laboratory tests that prove it, and we had actual tests—"

"Hearing Examiner KAUFMAN. That will prove what?"

Mr. HARPMAN. More than double the life."

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should be processed under the order of remand. On July 19, 1963, respondents' counsel petitioned us to reconsider our order of July 12, 1963, and that is the present posture of the matter.

The proceedings before the hearing examiner on the remand have persuaded the Commission to reconsider not only its order of July 12, 1963, but also its decision and order of remand issued on March 29, 1963 [62 F.T.C. 1531]. This determination is based primarily upon the respondents' disclosure to the hearing examiner that they have "* * * no scientific or similar tests to submit to the Commission" (statement filed August 5, 1963) and that a minimum of three years would be required to conduct such tests. It thus appears that the minimum time in which the case could be concluded would be three years and it is more than probable that four or five years would pass before it could be finally disposed of. In the meantime the public would have no protection from the nine misleading claims concerning which there is no dispute and use of the name Lifetime Charge would continue its possible deception.

As the record now stands, respondents have admitted that the trade name when unqualified may be deceptive²; that it is ambiguous in that it does not disclose the "lifetime" which will be affected³ (*i.e.*, the battery's, the car's or the user's); and that the product will not impart a charge to a battery.⁴

To continue the trial of this case before the hearing examiner as we originally ordered obviously would not serve the public interest, for the respondents have made it plain that they presently have no evidence on the issue of the extent, if any, to which their product will preserve an existing charge in a battery and could produce such evidence only after a period of prolonged testing. It would be only after such testing that respondents themselves would know if "Lifetime Charge" could in fact preserve an existing charge in a battery. In view of this development, we are setting aside our orders of March 29, 1963, and July 12, 1963, and are adopting the order contained in the initial decision, prohibiting, *inter alia*, the future use of the trade name "Lifetime Charge."

An appropriate order in conformity with this opinion will be entered. If in the future the respondents can satisfactorily demonstrate to the Commission that the trade name may be used non-deceptively, they, of course, are free to request appropriate modification of the order.

² Paragraph VII(a), Stipulation.

³ Pages 17-21, oral argument transcript.

⁴ Item 6, Paragraph V, Stipulation.

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FINAL ORDER

For the reasons set forth in the accompanying memorandum-opinion, *It is ordered,*

1. That the orders issued March 29, 1963 [62 F.T.C. 1531], and July 12, 1963 [p. 2201 herein], vacating the hearing examiner's initial decision and remanding this case to the hearing examiner for further proceedings be, and they hereby are, set aside.

2. That the initial decision, filed May 25, 1962, be, and it hereby is, adopted as the decision of the Commission.

3. That the respondents, Magnaflo, Inc., a corporation, and Webster B. Harpman, an individual, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

IN THE MATTER OF

AMERICAN TEXTILE COMPANY OF NEW ENGLAND, INC.,
ET AL.

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

Docket C-636. Complaint, Dec. 27, 1963—Decision, Dec. 27, 1963

Consent order requiring Boston, Mass., sellers of upholstery fabrics to furniture manufacturers and upholstery shops, to cease violating the Textile Fiber Products Identification Act by using terms for their products which falsely represented the fiber content, such as "Silkora", and failing to use the correct generic name on labels and in advertising; labeling products misleadingly as "Nylock" and setting forth the fiber content on labels as "100% Nylon" when only the surface yarns were composed of 100% Nylon; failing to label samples and swatches with required information; removing labels or other identification prior to final sale; furnishing false guaranties that their textile fiber products were not misbranded or falsely invoiced; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of

the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that American Textile Company of New England, Inc., a corporation and Benjamin Weissman, Esther Weissman and Allen Weissman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations under the Textile Fiber Products Identification 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 American Textile Company of New England, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Individual respondents Benjamin Weissman, Esther Weissman and Allen Weissman are officers of the corporate respondent and control, direct and formulate the acts, practices and policies of the corporate respondent. Respondents are engaged in the sale of upholstery fabrics for the outer covering of furniture to furniture manufacturers and upholstery shops. The office and principal place of business of all respondents is located at 1330 Centre Street, Newton Centre, Massachusetts, formerly doing business at 36 Canal Street, Boston, Massachusetts.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960 respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation and causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and have caused to be transported, textile fiber products, which have been advertised and offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and cause to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce", and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise

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identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products but not limited thereto were textile fiber products with labels which:

1. Contained terms which represented, either directly or by implication, certain fibers as present in the said product when such was not the case.

Among such terms but not limited thereto were the terms "Nylock" and "Silkora".

2. Set forth the fiber content as "100% Nylon" whereas in truth and in fact only the surface yarns of said product were composed of 100% Nylon.

PAR. 4. Certain of said textile fiber products were further misbranded by respondent in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form as prescribed by the Rules and Regulations promulgated under said Acts.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products without labels and with labels which failed to show in words and figures plainly legible the correct generic name of the fibers present.

PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Fiber trademarks and generic names appeared on labels without a full and complete fiber content disclosure in accordance with the Act and Regulations being made the first time the generic name or fiber trademark appeared on the label, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

(b) A fiber trademark or generic name was used in non-required information on a label in such a manner as to be false, deceptive, and misleading as to fiber content and to indicate directly or indirectly that a textile fiber product was composed wholly or in part of a particular fiber when such was not the case, in violation of Rule 17(d) of the aforesaid Rules and Regulations.

(c) Words, symbols, or other depictions constituting or implying the name or designation of a fiber which was not present in the product appeared on the label in violation of Rule 18 of the aforesaid Rules and Regulations.

(d) Samples, swatches, and specimens of textile fiber products subject to the aforesaid Act, which were used to promote or effect sales of such textile fiber products, were not labeled to show their respective fiber content and other information required by Section 4(b) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in violation of Rule 21(a) of the aforesaid Rules and Regulations.

PAR. 6. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and assist directly or indirectly in the sale or offering for sale of said products failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were fabrics which were falsely and deceptively advertised by means of price lists distributed by respondent throughout the United States in that the true generic names of the fibers in such fabric were not set forth.

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 textile fiber products in violation of Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects.

(a) Fiber trademarks were used in advertising textile fiber products containing more than one fiber, other than permissive ornamentation, and such fiber trademarks did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

(b) All parts of the required information were not set forth in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, in violation of Rule 42(a) of the aforesaid Rules and Regulations.

(c) Non-required information and representations used in advertising textile fiber products were false, deceptive, and misleading as to the fiber content of the textile fiber product and were set forth and used so as to interfere with, minimize and detract from the required

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information, in violation of Rule 42(b) of the aforesaid Rules and Regulations.

Among such products, but not limited thereto, were textile fiber products, namely upholstery fabrics, advertised as "Silkora" thus representing, directly or by implication, that the said products contained silk, when such was not the case.

PAR. 8. After certain textile fiber products were shipped in commerce respondents have removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to such products prior to the time such textile fiber products were sold and delivered to the ultimate consumer, in violation of Section 5(a) of said Act.

PAR. 9. Respondents have furnished their customers with false guaranties that certain of the textile fiber products were not misbranded or falsely invoiced by falsely representing in writing that respondents had a continuing guaranty under the Textile Fiber Products Identification Act on file with the Federal Trade Commission, in violation of Rule 38(d) of the Rules and Regulations under said Act and Section 10(b) of such Act.

PAR. 10. The acts and practices of respondents as set forth here were in violation of the Textile Fiber Products Identification Act and the Rules and Regulations thereunder and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

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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 Textile Fiber Products Identification 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 American Textile Company of New England, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1330 Centre Street, Newton Centre, Massachusetts, formerly doing business at 36 Canal Street, in the City of Boston, Commonwealth of Massachusetts.

Respondents Benjamin Weissman, Esther Weissman, and Allen Weissman 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 American Textile Company of New England, Inc., a corporation, and its officers and Benjamin Weissman, Esther Weissman and Allen Weissman, 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, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

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

2. Stamping, labeling, invoicing, advertising or otherwise identifying such products by representing, either directly

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or by implication through the use of such terms as "Nylock" and "Silkora" or any other terms, that such products contain any fibers which are not present therein.

3. Failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

4. Using a generic name or fiber trademark on any label whether required or non-required, without making a full and complete fiber content disclosure in accordance with the Act and Regulations the first time such generic name or fiber trademark appears on such label.

5. Using fiber trademarks or generic names on labels affixed to textile fiber products in such a manner as to be false, deceptive or misleading as to fiber content or so as to indicate directly or indirectly that any such textile fiber product is composed of wholly or in part of a particular fiber when such is not the case.

6. Using words, symbols, or depictions on labels attached to textile fiber products which constitute or imply the name or designation of a fiber when such fiber is not present in the aforesaid product.

7. Failing to affix labels showing the respective fiber content and other required information to samples, swatches and specimens of textile fiber products subject to the aforesaid Act which are used to promote or effect sales of such textile fiber products.

B. Falsely and deceptively advertising textile fiber products by:

1. Making any representations by disclosure or by implication of the fiber contents of any textile fiber product in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the gen-

eric name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

3. Failing to set forth all parts of the required information in advertisements of textile fiber products in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence.

4. Using non-required information and representations in any advertisement of any textile fiber product in such a manner as to be false, deceptive or misleading as to the fiber content of the textile fiber product or so as to interfere with, minimize or detract from required information.

C. Furnishing false guaranties that textile fiber products are not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That respondents American Textile Company of New England, Inc., a corporation, and its officers and Benjamin Weissman, Esther Weissman, and Allen Weissman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be on or affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product has been sold and delivered to the ultimate consumer.

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

THE PRAGER COMPANY TRADING AS
PRAGER BRUSH COMPANY ET AL.

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

Docket C-637. Complaint, Dec. 27, 1963—Decision, Dec. 27, 1963

Consent order requiring Atlanta, Ga., manufacturers of paint and varnish brushes and other products, to cease selling brushes with no disclosure of the fact that they were composed of bristles which had been previously used; stamping the handles of certain brushes with the words "Contains

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CHINA 100% Pure Bristle", when the brushing part was made in substantial part of bristle from other sources; and selling brushes without revealing that the brushing part of some of them contained other material simulating bristle along with the bristle.

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 Prager Company, a corporation trading and doing business as Prager Brush Company, and Hans E. Prager, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Prager 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 355 Marietta Street N.W., in the City of Atlanta, State of Georgia. Said corporation trades and does business under the name Prager Brush Company.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, advertising, offering for sale, sale and distribution of paint and varnish brushes and other products to distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Georgia 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 misrepresented the materials of which certain of

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their brushes are made or composed by the following methods and means:

(1) The brushing part of certain of respondents' brushes is composed in whole or in part of hog or swine bristle (hereinafter referred to as bristle) which has been previously used and no disclosure of that fact is made in advertising and on invoices or on said brushes. By failing to make such disclosure, respondents represent, directly or by implication, that the brushing part of such brushes is made or composed wholly of new bristle. In truth and in fact, the brushing part of respondents' said brushes is made or composed in whole or in part of previously used bristle. Such bristle has the appearance of new bristle and, in the absence of any disclosure to the contrary, respondents' said brushes are readily accepted by members of the purchasing public as having brushing parts made wholly of new bristle, a fact of which the Commission takes official notice. There is a preference among the purchasing public for paint brushes having a brushing part made wholly of new bristle as contrasted with paint brushes having a brushing part made in whole or in part of previously used bristle, a fact of which the Commission takes official notice.

(2) The handles or ferrules of certain of respondents' brushes are marked or stamped with the words "Contains CHINA 100% Pure Bristle". Respondents thereby represent, directly or by implication, that the brushing part of said brushes is composed entirely of bristle imported from China. In truth and in fact, the brushing part of respondents' said brushes is made in substantial part of bristle obtained from other sources.

(3) Certain of respondents' said brushes have a brushing part consisting of bristle and some other material which simulates the appearance of bristle. Respondents thereby represent, directly or by implication, that the brushing part of such brushes is made wholly of bristle. In truth and in fact, the brushing part of respondents' said brushes is made of a mixture or combination of bristle and other materials. In the absence of any disclosure to the contrary, respondents' said brushes are readily accepted by members of the purchasing public as have brushing parts made wholly of bristle, a fact of which the Commission takes official notice. There is a preference among members of the purchasing public for brushes having a brushing part made wholly of bristle as contrasted with brushes having a brushing part made of a mixture or combination of bristle and other materials, a fact of which the Commission takes official notice.

Therefore, the aforesaid statements and representations were and are false, misleading and deceptive.

PAR. 5. By the aforesaid practices, respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead the public as to the quality and composition of said brushes and as to the country of origin of the bristle of which the brushing part of said brushes is made.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged 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 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,

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

1. Respondent The Prager Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 355 Marietta Street, NW., in the city of Atlanta, State of Georgia. Said corporation trades and does business under the name of Prager Brush Company.

Respondent Hans E. Prager is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents The Prager Company, a corporation, trading and doing business as Prager Brush Company, or under any other name or names, and Hans E. Prager, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of paint and varnish brushes or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Offering for sale or selling brushes having a brushing part composed in whole or in part of bristle of the hog or swine or any other material which has been previously used without clearly disclosing such fact in advertising and sales promotional material and on invoices and other sales memoranda and by means of a legible marking or stamping on the handle or ferrule of such brushes of such size, conspicuousness and degree of permanency, as to be noticeable and readable upon casual inspection when the brush is offered for sale to consumer purchasers.

(2) Using the word "China" or any other word or words of similar import or meaning, either alone or in conjunction with other words, to designate or describe or refer to bristle of the hog or swine which is not imported from China, or otherwise misrepresenting the origin of the bristle of which the brushing part of respondents' brushes is made or composed.

(3) Offering for sale or selling brushes having a brushing part composed in part of bristle of the hog or swine and in part of

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material other than such bristle but which has the appearance of bristle without truthfully describing, in the order of their predominance, all constituent materials by means of a legible marking or stamping on the handle or ferrule of the brush of such size, conspicuousness and degree of permanency as to be noticeable and readable upon casual inspection when the brush is offered for sale to consumer purchasers.

(4) Placing in the hands of others the means or instrumentalities whereby they may mislead the public as to any of the matters or things prohibited in Paragraphs 1, 2, and 3 hereof.

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

IN THE MATTER OF

HARRY HUTT TRADING AS HARRY HUTT FUR CO.

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

Docket C-638. Complaint, Dec. 27, 1963—Decision, Dec. 27, 1963

Consent order requiring manufacturing furriers in New York City, to cease violating the Fur Products Labeling Act by failing to show, on labels and invoices, the true animal name of furs; to disclose, on labels, when fur was artificially colored and to identify the manufacturer, etc.; to show, on invoices, when fur products contained used fur and the country of origin of imported furs; to set forth the terms "Persian Lamb", on labels and invoices, and "Dyed Broadtail-processed Lamb", on invoices; invoicing dyed rabbit as "Coney" and "Sealine"; and failing to comply in other respects with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harry Hutt, an individual trading as Harry Hutt Fur Co., hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public in-

terest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Harry Hutt is an individual trading as Harry Hutt Fur Co. Said respondent is a retail furrier with his office and principal place of business located at 307 Seventh Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the 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 has manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or 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 without labels and 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.
3. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce introduced it into commerce, sold it in commerce, or transported or distributed it in commerce.

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

1. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.
2. The term "Persian Lamb" was not set forth on labels in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

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3. 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.

4. 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.

5. 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 show that the fur product contained or was composed of used fur, 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 "Coney" and "Sealine", respectively, when, in fact, the fur contained in such products was dyed rabbit.

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:

1. 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.

2. 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.

3. 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.

4. The disclosure "second-hand" where required was not set forth on invoices, in violation of Rule 23 of said Rules and Regulations.

5. 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.

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

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Harry Hutt is an individual trading as Harry Hutt Fur Co. and has his office and principal place of business at 307 Seventh Avenue, New York, 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 Harry Hutt, an individual, trading as Harry Hutt Fur Co., or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, 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:

1. Misbranding fur products by:

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

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

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

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

E. 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.

F. Failing to set forth on labels the item number or marks assigned to a fur product.

2. Falsely or deceptively invoicing fur products by:
- A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
 - B. Setting forth on invoices pertaining to fur products any false and deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.
 - C. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.
 - D. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".
 - E. 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".
 - F. Failing to disclose that fur products contain or are composed of second-hand used fur.
 - G. Failing to set forth separately information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.
 - H. Failing to set forth on invoices the item number or mark assigned to fur products.

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

IN THE MATTER OF

ADELE FASHIONS, INC., ET AL.

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

*Docket C-639-C-671. Complaint, Dec. 27, 1963—Decision, Dec. 27, 1963**

Consent orders requiring 33 wearing apparel manufacturers to cease discriminating in price among their customers in violation of Sec. 2(d) of the

* These orders were made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.