respondent's competitors. It cannot reasonably be inferred from the evidence of record that these instances of off-list pricing have the adverse competitive effect proscribed by the statute. In addition, the evidence does not sustain an inference of predatory intent on the part of respondent in its sales at less than list price, as urged by counsel supporting the complaint. Moreover, with respect to evidence of general price concessions by respondent, we agree with the examiner's holding that "the mere fact of price concessions obviously is meaningless unless such concessions are related to specific transactions" and that such evidence is lacking in this record.

In our review of this record, we have noted that the evidence relates to sales made by respondent between the years 1955 and 1958, principally in 1955 and 1956. Under these circumstances, the Commission is of the opinion that remand of this proceeding for reception of additional evidence is not warranted.

It is, therefore, ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

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

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

Commissioner MacIntyre not concurring and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

PONCA WHOLESALE MERCANTILE COMPANY

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

Docket 7864. Complaint, Apr. 18, 1960—Decision, Feb. 24, 1964

Order dismissing—for the reason that respondent wholesaler's challenged cigarette sales in the Roswell and Albuquerque, N. Mex., markets were within the "meeting competition" sanction of Sec. 2(b) of the Clayton Act—complaint charging discrimination in price among competing retailer purchasers, in violation of Sec. 2(a) of the Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A.

Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Ponca Wholesale Mercantile Company, sometimes hereinafter referred to as Ponca, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas.

PAR. 2. Ponca is a wholesale house which sells and distributes a line of cigarettes, cigars, tobacco, candy, school supplies and sundry items to various types of retail business concerns. In 1958 its total sales amounted to approximately $30,000,000.

PAR. 3. During the period from January 1, 1958, to the present, respondent, from its main office located in Amarillo, Texas, directed and controlled the operations of its approximately 30 wholesale branches located in various cities in the western part of the State of Texas and in the States of New Mexico, Colorado and Arizona. In the course of its business, as aforesaid, Ponca purchased products from sellers located throughout the United States and resold such products to its customers. After purchasing products from various sellers, respondent caused such products to be transported from the places of business of said sellers to respondent's own various places of business, or to the places of business of respondent's customers, which were located in States other than the States in which the shipments of such products originated. In many instances where deliveries of such products were made to respondent's own places of business, respondent, from its main office in Amarillo, Texas, sold, or caused such products to be sold, to customers located in the States of Texas, New Mexico, Colorado, and Arizona. In many additional instances where deliveries of such shipments were made to respondent's own places of business, respondent sold and transported such products, or caused such products, when sold, to be transported from its places of business located in various States to the places of business of its customers located in various other States of the United States. In the aforesaid manner and method, respondent is now, and has been at all times referred to herein, engaged in a constant stream of trade and commerce, as "commerce" is defined in the amended Clayton Act, in said products between and among the various States of the United States.

Such products are, and have been, sold by Ponca to its customers, including chain grocery stores, independent grocery stores and drug stores, for use or resale in the various States of the United States.

PAR. 4. Ponca, in the course and conduct of its business, is now, and has been at all times referred to herein, in substantial competition with other wholesalers engaged in the sale and distribution of products of like grade and quality.

PAR. 5. In the course and conduct of its business, since January 1, 1958, and continuing to the present, Ponca has discriminated in price between different purchasers of its products of like grade and quality by selling such products to some of its customers at higher prices than to other of its customers.

A typical example of such discriminations occurred during the month of March 1958. During that month, Ponca sold cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

Cigarette type	*Invoice price (per carton)*
Regular size—non-filter	$2.26
Large size—non-filter	2.35
Large size—filter	2.37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice prices, plus tax:

Cigarette type	*Invoice price (per carton)*
Regular size—non-filter	$2.19
Large size—non-filter	2.29
Large size—filter	2.31

PAR. 6. The effect of such discriminations in price, as alleged in paragraph Five herein, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which Ponca and its wholesale competitors are engaged, or in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices.

PAR. 7. The foregoing alleged discriminations in price by respondent Ponca Wholesale Mercantile Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Ross D. Young and *Mr. Ernest D. Oakland*, supporting the complaint.

Mr. W. M. Sutton and *Mr. H. A. Berry* of *Underwood, Wilson, Sutton, Heare & Berry*, Amarillo, Tex., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

MARCH 29, 1963

Introductory Statement

Ponca Wholesale Mercantile Company, a corporation, hereinafter called Ponca or respondent, as the case may be, is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, (U.S.C.A. Title 15, Sec. 13) as amended by the Robinson-Patman Act, by discriminating in price between different purchasers of products sold by it.

Respondent filed an answer, including a plea to the jurisdiction of the Commission, denying that the acts and practices complained of were "in commerce", as required by the Act, and denied generally the material allegations of the complaint. In the alternative, respondent pleaded that, should it be found that respondent unlawfully discriminated in price, as alleged, that the lower prices charged by respondent to any of its customers were made in good faith to meet an equally low price of a competitor as provided by subsection (b) of Section 2 of said Act.

At the close of the Commission's case-in-chief, respondent renewed its motion to dismiss on the grounds of lack of jurisdiction of the Commission. The motion was denied. Respondent then offered evidence in its own behalf and, following the close of all of the evidence, renewed its motion to dismiss on the grounds that the proof affirmatively showed lack of jurisdiction of the Federal Trade Commission. Specifically, respondent says that, since the proof offered by Commission counsel to support the allegations of the complaint was limited to sales and delivery of merchandise by Ponca to customers solely within the State of New Mexico, no jurisdiction of the Commission has been shown; that, under the Act, one or more sales at the alleged discriminatory prices must be made in interstate commerce before there can be a violation of the Clayton Act, as amended by the Robinson-Patman Act, regardless of whether respondent might otherwise be engaged in interstate commerce.

Counsel have filed proposed findings of fact, conclusions of law, order, briefs, and oral argument had thereon. Subsequently, the record was reopened to receive into the record certain material evidence which occurred since the original closing of the record herein. By stipulation, this new evidence was in affidavit form and the record again closed. The matter is now before the hearing examiner for Initial Decision. All proposed findings of fact and conclusions of law not found or concluded herein are rejected. Upon the basis of the

entire record, the hearing examiner makes the following findings of fact and conclusions of law and issues the order hereinafter set forth:

FINDINGS OF FACT

1. Ponca Wholesale Mercantile Company,[1] respondent herein, is a corporation, incorporated under the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas. Ponca is now and for several years previous to the issuance of the complaint herein has been engaged in the sale and distribution, at the wholesale level, of cigarettes, cigars, tobacco, candy, school supplies and sundry items to retail business concerns, including individually owned and operated retail stores, such as the corner grocery or drug store, as well as large chain retail grocery and drug stores. In addition to its main office and warehouse in Amarillo, Ponca also maintains separate branch warehouses in various cities in west Texas and New Mexico from which it sells and distributes merchandise at wholesale, including cigarettes and candy, to retail stores in the cities and towns where such branch warehouses of Ponca are located and to other retail stores and establishments within an approximate 50-mile radius of the particular branch warehouse. In New Mexico, Ponca maintains branch warehouses in the following ten cities and towns: Alamogordo, Albuquerque, Carlsbad, Clovis, Farmington, Gallup, Hobbs, Las Cruces, Roswell and Tucumcari.

2. The principal books and records of Ponca are maintained in its main office in Amarillo, Texas. Inventory records of the various branch warehouses of Ponca are sent from such branches to the main office in Amarillo at regular intervals. The branch warehouses mail to the principal office in Amarillo daily reports showing the sales receipts and the amount of money that is deposited by the branch warehouse in the local bank. A list of accounts receivable are mailed regularly by the branch warehouses to the main office in Amarillo.

3. Ponca's over-all total sales for 1960 exceeded $41,000,000. Sales in 1959 were approximately $37,000,000, and in 1958, approximately $32,000,000. Thus, Ponca's total sales are substantial.

4. The complaint alleges, among other things, that, a typical example of Ponca's price discriminations occurred during the month of March, 1958. During that month, the complaint alleges, Ponca sold

[1] Ponca Wholesale Mercantile Company of Arizona and Ponca Wholesale Mercantile Company of Colorado are separate corporations, 100 per cent owned by Ponca, each maintaining its own separate warehouses and branches in Arizona and Colorado, respectively. Each sells cigarettes, cigars, tobacco, and other merchandise to retail stores within the trade area of their respective warehouses, but neither is involved in this proceeding.

cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

Cigarette type	*Invoice price (per carton)*
Regular size—non-filter	$2.26
Large size—non-filter	2.35
Large size—filter	2.37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice price, plus tax:

Cigarette type	*Invoice price (per carton)*
Regular size—non-filter	$2.19
Large size—non-filter	2.29
Large size—filter	2.31

The complaint further alleged that: "the effect of such discriminations in price * * * may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices."

5. The testimony offered by counsel supporting the complaint with respect to the prices charged by Ponca for any product sold by it to different customers was limited solely to cigarettes and five-cent candy bars. These were sales by Ponca within the State of New Mexico. The evidence with respect to differentials in price on candy bars was further limited to sales to customers located in the City of Albuquerque and immediately adjacent thereto. Thus, all of the evidence offered to substantiate alleged discriminatory prices related to sales of cigarettes and candy to Ponca customers within the State of New Mexico.

6. The record contains many statements and references by various witnesses to "direct" buyers of cigarettes and candy. A "direct" buyer of cigarettes or candy is one who purchases cigarettes or candy direct from the manufacturer as opposed to one who purchases from a source other than the manufacturer, such as from a wholesale distributor or jobber. According to the evidence, the principal customers of cigarette manufacturers are wholesale tobacco distributors, wholesale grocers, cooperatives, retail grocery chains, retail drug chains and Government accounts. The cigarette manufacturers do not sell to the individually owned and operated corner drugstore or grocery store. These stores generally obtain their stock of cigarettes from a wholesale tobacco distributor, such as Ponca. Each cigarette manufacturer sells its particular brand or brands of cigarettes at a uniform price to both the wholesale tobacco distributor and the retail chain purchaser. This means that the wholesale tobacco distrib-

utor and the "direct" retail chain purchaser pay the same price for cigarettes from the manufacturer. Ponca purchases cigarettes and candy direct from the manufacturer. All cigarettes and candy involved in this proceeeding were shipped by the manufacturer in case lot and larger quantities to Ponca's various warehouses located in the State of New Mexico, where they were stored pending their sale. Later, they were removed from the warehouse and placed in Ponca trucks in which they were delivered and sold to Ponca's customers in the State of New Mexico, by Ponca route salesmen or delivery men. Neither cigarettes nor candy were shipped direct from the manufacturer to any Ponca customer in the State of New Mexico. All sales and deliveries of cigarettes and candy by Ponca to customers in New Mexico involved in this proceeding were made from stocks on hand in the local Ponca warehouse in the State of New Mexico. Neither cigarettes nor candy were transported from Ponca warehouses in states other than the State of New Mexico to its warehouses in the State of New Mexico.

7. At the time of hearings, Ponca employed approximately 150 salesmen, of which approximately 140 were salesmen who loaded merchandise, including cigarettes and candy, on trucks and delivered it to customers on their respective routes within the trade territory of the particular warehouse which normally includes an area of approximately 50 miles from the city or town in which the warehouse is located. Merchandise is sold and delivered off the trucks by these route salesmen for cash or on credit to customers who have established a credit rating. No cash discounts were allowed for cash payment or for payment within a specified period of time. The remaining 10 salesmen solicited orders in cities or metropolitan areas where the traffic is heavy. In such case, the merchandise is delivered in Ponca trucks from the Ponca warehouse in such city to the customer.

Jurisdiction

8. Before proceeding to a discussion of the alleged price discriminations, respondent's motion to dismiss on jurisdictional grounds will first be disposed of. Respondent's motion to dismiss raises some interesting questions, more especially since the evidence shows that each of the transactions involving the discriminations in price complained about were sales made by Ponca in the State of New Mexico to customers in the State of New Mexico. Respondent claims that, under such circumstances, the sales complained about were intrastate and the Federal Trade Commission is without jurisdiction as to these transactions. In determining jurisdiction of the Commission

under Section 2(a) [2] of the Clayton Act, should these particular transactions be isolated and considered alone and separate, for jurisdictional purposes, from Ponca's other general business activities, which unquestionably are in interstate commerce?

9. In order to limit the length of this decision, all of the cases on this question will not be discussed. One of the leading cases where the jurisdiction of the Commission under Section 2(a) of the Clayton Act was involved is *Standard Oil Company* v. *Federal Trade Commission*, 340, U. S. 231, decided January 8, 1951. In that case, Standard was charged with selling gasoline to four large jobber customers in Detroit at a lesser price per gallon than it sold like gasoline to many comparatively small service station customers in the same area, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The defenses interposed in that case were identical with those here. With respect to the defense as to jurisdiction, that the sales here involved were not in interstate commerce as required by Section 2(a) of the Act, the pertinent facts in the *Standard* case were as follows: The gasoline was refined at Standard's refinery at Whiting, Indiana, from crude oil obtained from fields in Texas, Oklahoma, Kansas and Wyoming. Standard distributed its products in fourteen Middle Western states, including Michigan. The gasoline was transported from the refinery at Whiting in tankers via the Great Lakes from Indiana to Standard's marine terminal at River Rouge, Michigan. The gasoline remained for varying periods at the terminal or in nearby bulk storage stations until it was delivered to Standard's customers in the Detroit area. The Court held that the gasoline delivered to customers in Detroit, upon individual orders for it, was taken from the gasoline at the terminal in interstate commerce enroute for delivery in that area. The Court further stated: "Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the gasoline as

[2] Section 2(a) reads in part as follows: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them * * *."

occurs within the Detroit area does not deprive the gasoline of its interstate character." *Stafford* v. *Wallace*, 258 U. S. 495. Compare *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570, U. S. 257, 268.

10. Applying the doctrine announced in the *Standard Oil* case to the matter here under consideration, it is seen that in many of its business activities, Ponca is engaged in "commerce", as prescribed by the Clayton Act, 15 U.S.C. Section 12. Ponca operates and does business in several States of the United States. It has offices and warehouses in several states. Ponca purchases products, including cigarettes and candy, from various manufacturers located in different parts of the United States, and these products are transported to Ponca's warehouses located in other states for later resale to Ponca's customers. Unquestionably, these business activities in which Ponca is engaged are in "commerce". The circumstance that the cigarettes and candy after purchase, delivery and receipt from the manufacturer at Ponca's warehouses are removed from the case or container in which the cigarettes or candy were shipped and then left in the warehouse until loaded into Ponca's trucks for sale and delivery to a purchaser in the State of New Mexico does not cause the cigarettes or candy to lose their interstate character. During the last few decades, the Courts have broadened their views as to what constitutes interstate commerce. The observation of the Supreme Court in the *Standard Oil* case that "Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character" may be applied here with respect to Ponca's cigarettes and candy transactions. Such temporary storage of the cigarettes and candy as occurs in Ponca's warehouses within the State of New Mexico before delivery and sale to Ponca's customers in New Mexico does not deprive the cigarettes and candy of their interstate character. Accordingly, respondent's motion to dismiss on jurisdictional grounds is denied.

Price Discriminations

11. Ponca carries a complete line of cigarettes and candy. It purchases cigarettes direct from the following manufacturers, among others, American Tobacco Company, Philip Morris, Incorporated, Liggett & Myers Tobacco Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, and Brown & Williamson Tobacco Company.

12. For some period of time prior to June or July of 1957, the above-named manufacturers of cigarettes sold and delivered popular

priced cigarettes to the various Ponca warehouses in New Mexico and elsewhere at the following prices:

Regular cigarettes, $8.10 per thousand or $1.62 per carton; Long unfiltered cigarettes (King size), $8.55 per thousand or $1.71 per carton; Filter cigarettes, $9.00 per thousand or $1.80 per carton.

In June of 1957, the manufacturers increased their prices of regular and long unfiltered cigarettes, and after such date sold and delivered popular priced cigarettes to the various establishments of Ponca in New Mexico and elsewhere, at the following prices:

Regular cigarettes, $8.45 per thousand or $1.65 per carton; Long unfiltered cigarettes (King size), $8.90 per thousand or $1.78 per carton; Filter cigarettes, $9.00 per thousand or $1.80 per carton.

Each manufacturer allowed to Ponca the usual and customary 2% discount on the amount of the invoice if paid within the time specified by the manufacturer. Ponca took advantage of such discount as well as the discount on stamps purchased by it from the State of New Mexico.

13. During all of the time material herein, there was in effect within the State of New Mexico a so-called cigarette "fair trade" law entitled New Mexico Cigarette Fair Trade Practices Act (Sections 49–2–1 through 49–3–13 New Mexico Statutes Annotated, 1953 compilation) and the Cigarette and Tobacco Tax statutes (Article 14, Sections 72–14–1 through 72–14–17, New Mexico Statutes Annotated, 1953 compilation),[3] which, among other things, fixed a minimum price at which a wholesale distributor of cigarettes, such as Ponca, should sell cigarettes to retail establishments. However, these statutes do not prescribe any minimum price at which a manufacturer may sell cigarettes to a wholesale distributor or retail store. The minimum price at which a wholesale distributor, such as Ponca, may sell cigarettes to a retailer is the cost to such wholesaler, as defined by the statute, plus 2% of such cost, and ¾ of 1% of the basic cost for cartage charges, where delivered.

14. For a number of years prior to July 1, 1961, the New Mexico Cigarette and Tobacco Tax statutes, above referred to (Sec. 72–14–2), required a five-cent tax stamp to be affixed to each package of cigarettes, aggregating fifty cents per carton. Effective July 1, 1961, the New Mexico cigarette stamp tax was increased to eight cents per package or eighty cents per carton, by amendment to such statute. Section 72–14–6 of the New Mexico statutes, 1953 compilation, placed the duty of affixing the cigarette stamps upon the distributor and direct retail purchaser of cigarettes. The statute also required that

[3] Pursuant to the request of counsel, the hearing examiner takes judicial notice of these statutes of the State of New Mexico.

the cigarette stamps were to be sold by the Director of the Luxury Tax Division of the Bureau of Revenue to licensed cigarette distributors and direct buying retailers at the face amount thereof less a discount of 4%. This 4% discount was only allowable on stamp purchases of $1,000 or more. As a licensed distributor of cigarettes in the State of New Mexico, Ponca was authorized to purchase and did purchase cigarette stamps in amounts of $1,000 or more, and was qualified to receive and did receive the 4% discount and did affix the required stamps in the State of New Mexico to all cigarettes sold and distributed by Ponca in the State of New Mexico. During all of the times material herein, all cigarettes sold by Ponca to retail stores in the State of New Mexico were at the so-called "fair trade" minimum wholesale price as prescribed by the New Mexico Cigarette Fair Trade Practices Act, except to Safeway Stores, Inc., Food Mart, Inc., Furr's, Inc., and Skaggs Drug Stores, all in the State of New Mexico. Ponca does not deny that it sold cigarettes to these chain stores at lower prices than it charged to other retail stores in the State of New Mexico, but says that it lowered its prices to these four retail chain stores in good faith to meet an equally low price of its competitors as authorized by Sec. 2(b) of the Clayton Act, as amended by the Robinson-Patman Act.

15. Safeway Stores, Inc., is a national retail grocery chain operating more than 2200 stores in approximately 28 or 29 States. Safeway operates 27 retail stores in the State of New Mexico from its El Paso, Texas, division. These 27 New Mexico stores, together with 23 stores in west Texas, are served by a warehouse of Safeway Stores maintained in its El Paso Division headquarters. Merchandise is transported by Safeway trucks from Safeway's warehouse in El Paso to Safeway Stores in New Mexico and also to its stores in west Texas served by the El Paso warehouse. Ponca sold and delivered cigarettes in the State of New Mexico to Safeway stores located in the following towns in New Mexico: Roswell, Albuquerque, Taos, Santa Fe, Las Vegas, Las Alamos, Belen, Cocorro, Carlsbad, Artesia, Deming, Silver City, Las Cruces, Alamogordo and Hobbs.

16. Food Mart, Inc., operates a chain of retail grocery stores in west Texas from El Paso east to Dallas and Fort Worth and also in the following towns in New Mexico: Roswell, Alamogordo, Carrizzo, Truth or Consequences, Silver City, Carlsbad and Las Cruces. Food Mart operates approximately 74 retail grocery stores in Texas and New Mexico. Food Mart maintains a warehouse in El Paso, Texas, and its stores in New Mexico and a portion of its stores in west Texas are supplied with merchandise from its El Paso, warehouse.

17. Prior to 1955, Safeway and Food Mart were purchasing cigarettes for use in all of their stores "direct" from the manufacturer. This included stores operated by them in both Texas and New Mexico. With respect to those cigarettes offered for sale in their New Mexico stores, they were affixing the required New Mexico tax stamps to each package of cigarettes at their respective warehouse in El Paso, Texas, and then transporting the stamped cigarettes in their own trucks to their respective stores in New Mexico as they were doing for their Texas stores served by their respective El Paso warehouse. (Furr's has never affixed New Mexico cigarette tax stamps to cigarettes sold by its retail stores in New Mexico, but has obtained its supply of cigarettes from wholesale cigarette distributors in the State of New Mexico.) However, in 1955, Sec. 72–14–6 of the New Mexico statutes, 1953 compilation, was amended effective in 1956, which required that all cigarette stamps for cigarettes sold in the State of New Mexico should be affixed to the packages within the boundaries of the State of New Mexico. This law made it impossible for Safeway and Food Mart to continue affixing New Mexico tax stamps to cigarettes in their respective El Paso warehouse for later sale in their New Mexico stores and still comply with this New Mexico cigarette tax statute. So, between the time of the amendment to this statute and its effective date, Safeway and Food Mart began making plans to affix the New Mexico tax stamps to cigarettes within the boundaries of New Mexico on cigarettes to be sold in their New Mexico stores, as required by the amendment to the law.

18. Before Safeway and Food Mart completed their respective plans and arrangements for affixing the New Mexico Tax Stamps on cigarettes within the boundaries of the State of New Mexico, representatives of Ponca offered to sell and deliver to the New Mexico stores of such companies,[4] respectively, cigarettes at a discount of six cents per carton below the New Mexico so-called "fair trade" minimum wholesale price. This price for cigarettes offered by Ponca was slightly higher than the price at which such stores could buy the same cigarettes direct from the respective manufacturer, but by buying from Ponca, Safeway and Food Mart would be relieved of setting up facilities and personnel for affixing the stamps to the cigarettes and also avoid large monetary investments in stocks of cigarettes and stamps. Accordingly, Safeway and Food Mart, respectively, accepted the offers. These pricing arrangements between Ponca and Safeway and Food Mart, respectively, were negotiated and

[4] No representative of a cigarette wholesaler other than Ponca made such an offer to Safeway, but a representative of a competing cigarette wholesaler, Carter Wholesale Tobacco Company, made a similar offer to Food Mart. However, Food Mart chose to deal with Ponca.

arranged separately and began on cigarette sales in early 1956, when the amendment to the New Mexico law became effective, and were continued until there was an increase in the manufacturers' prices for regular and long unfiltered cigarettes. Safeway and Food Mart continued to buy cigarettes direct from the manufacturer for their Texas stores.

19. In June, 1957, the cigarette manufacturers increased the prices of regular and long unfiltered cigarettes. The price of filtered cigarettes was not increased. This increase in price by the manufacturer automatically increased the so-called New Mexico "fair trade" minimum wholesale price of regular and king-size unfiltered cigarettes. These prices remained in effect for approximately four years, July 1, 1957, to July 1, 1961. It was during this period that most of the sales complained about were made by Ponca. The minimum wholesale "fair trade" price for cigarettes in the State of New Mexico during this four-year period was $2.26 per carton for regular cigarettes, $2.35 for king-size or long unfiltered cigarettes, and $2.37 for filtered cigarettes. These prices include a New Mexico State cigarette stamp tax of fifty cents per carton. Prior to the manufacturers' increase in prices of cigarettes in 1957, the discount on cigarettes allowed by Ponca to Safeway and Food Mart was six cents per carton below the so-called New Mexico "fair trade" minimum wholesale price. When the manufacturers increased their prices, Ponca revised the discount on regulars to seven cents per carton. These prices were not less than the prices at which Safeway and Food Mart could have bought the same cigarettes direct from the manufacturer. Thereafter, on July 1, 1961, the cigarette tax in New Mexico was increased from five cents per package or fifty cents per carton to eight cents per package or eighty cents per carton. This operated to increase the New Mexico "fair trade" minimum wholesale price of cigarettes in proportion to the amount of increase in tax and a like increase in prices charged by Ponca to Safeway and Food Mart for stamped cigarettes, delivered to the New Mexico stores for such companies. After this increase in the cigarette tax, Ponca's discount to Safeway and Food Mart remained the same, seven cents per carton below the New Mexico so-called "fair trade" price for regular cigarettes and six cents below the "fair trade" price for long unfiltered and filtered cigarettes. The long unfiltered cigarettes are commonly referred to as "king" size.

20. The sale of "king" size and filtered cigarettes constitutes the largest part of Ponca's cigarette sales, volumewise. Ponca makes a profit of approximately six cents per carton on cigarettes even after granting an allowance or discount of six cents per carton. However,

out of the six cents left, Ponca must pay the cost of affixing the tax stamps to the cigarettes and their delivery. The cost of affixing tax stamps to cigarettes by hand is approximately ½ cent per carton and considerably less if done by machine.

21. Furr's, Inc., is a retail grocery chain with approximately 60 retail grocery stores in Texas, New Mexico, and Colorado. Its headquarters are located in Lubbock, Texas. It maintains a warehouse in Lubbock from which it supplies its stores in Texas and New Mexico. Furr's stores in New Mexico are located at Albuquerque, Clovis, Hobbs, and Roswell. Furr's is a direct buyer of cigarettes from the manufacturer for all of its retail stores in Texas. Furr's opened its first retail store (No. 24) in the State of New Mexico at Albuquerque in 1952 or 1953. Furr's began purchasing cigarettes for this store from Ponca at the so-called New Mexico cigarette "fair trade" price. In 1954, Furr's opened a second store in Albuquerque, No. 25, and Ponca began to supply this store with cigarettes, in addition to No. 24, at the so-called New Mexico "fair trade" price. In June, 1956, Furr's decided to split its cigarette buying. It discontinued buying cigarettes from Ponca for its store No. 24 and began buying cigarettes from Rocky Mountain Wholesale Co., an Albuquerque, New Mexico, tobacco wholesaler, for its store No. 24 in Albuquerque, at the same price it had been paying Ponca. (The New Mexico so-called "fair trade" price.) Furr's continued to purchase cigarettes from Ponca for its Albuquerque store No. 25, at the so-called New Mexico "fair trade" price.

22. In the summer of 1956, Furr's began seriously considering the purchase of cigarettes direct from the manufacturer for their two stores in Albuquerque and a third which they were preparing to open in September, 1956. In such an event, Furr's would affix the state cigarette tax stamps to the cigarettes within the State of New Mexico. At this time, Mr. Hill, Division Manager for Ponca in Albuquerque, learned that Furr's was considering purchasing cigarettes direct from the manufacturer and stamping the cigarettes in New Mexico. Mr. Hill called at Furr's headquarters in Lubbock and inquired if Furr's would be interested in purchasing cigarettes from Ponca for their Albuquerque stores at a discount of 2 percent below the New Mexico so-called "fair trade" price. This would relieve Furr's of setting up facilities for stamping cigarettes in New Mexico and investing in stocks of cigarettes and stamps. Mr. Sparks, at that time Supervisor in the General Merchandise Department of Furr's Lubbock headquarters, told Hill that Furr's might be interested and would consider it. After considering the offer, Furr's decided to accept the 2 percent discount offered by Ponca and not buy their cigarettes "direct" and stamp them in New Mexico even though

it might cost Furr's less money to buy direct and stamp the cigarettes in New Mexico. Furr's accepted the offer and Ponca began serving two of its stores in Albuquerque in September, 1956. For a while, until June, 1957, Furr's continued to purchase cigarettes for its No. 24 store in Albuquerque from Rocky Mountain Wholesale Co. At that time, June, 1957, Furr's stopped buying cigarettes for its store No. 24 in Albuquerque from Rocky Mountain Wholesale and began buying from Ponca. Mr. Sparks testified that Furr's did this for two reasons: First, because of the 2 percent discount; and second, Ponca gave Furr's a little better service than Rocky Mountain. In April, 1959, Ponca voluntarily increased the discount to Furr's from 2 percent to 7 cents per carton on regular cigarettes and 6 cents per carton on king size non-filter and filter cigarettes. This was to equalize the discount to that which Ponca was granting Safeway and Food Mart. Of course, this price was above the price the manufacturer was then charging for cigarettes. Mr. Sparks further testified, and it is found, that if Furr's should not be able to continue purchasing cigarettes from Ponca at the discount price and have to begin paying the so-called New Mexico "fair trade" price from a New Mexico cigarette distributor, Furr's would begin buying cigarettes direct from the manufacturer and stamping them in New Mexico for its New Mexico stores.

23. Skaggs Drug Stores, Inc., is a retail drug chain, which operates 29 retail drug stores in Utah, Montana, Idaho, Nevada, Arizona, Colorado, New Mexico, and Texas. Its headquarters are in Salt Lake City, Utah. Its store managers do the buying and operate each store as an individual unit. Skaggs opened its store No. 15 in Albuquerque in August, 1953. The Skaggs stores buy candy direct from the manufacturer. However, the Skaggs store No. 15 in Albuquerque began buying cigarettes from Ponca when it was opened in 1953 at a discount of six cents per carton below the New Mexico so-called "fair trade" price. Mr. E. L. Elwell, Merchandise Manager for Skaggs, among other things, testified that Skaggs has considered buying cigarettes direct from the manufacturer from time to time; if Skaggs could not purchase cigarettes from Ponca or some other distributor at the same discount they are now receiving from Ponca, they will begin buying cigarettes direct from the manufacturer for their Albuquerque store. They have discussed with the representatives of several cigarette manufacturers the purchase of cigarettes direct.

24. The Skaggs store No. 15 in Albuquerque buys some candy direct from the manufacturer, such as Mars and Hershey 24-count boxes of five-cent candy bars, for eighty cents per box, less a 2%

discount if paid in 10 days. They can buy some candy at seventy-five cents per box. Skaggs also purchases some candy from Ponca for its store No. 15 in Albuquerque at eighty cents per box, plus 2%. Ponca receives a 2% discount from the manufacturer if paid within 10 days. If Skaggs bought the same candy direct from the manufacturer, the price would be eighty cents, less 2%. If Skaggs could not buy candy from Ponca at eighty cents per box less 2%, it would buy direct from the manufacturer at eighty cents per box, less a 2% discount if paid in 10 days.

25. Counsel supporting the complaint has also offered evidence showing sales of cigarettes by Ponca at prices below the so-called New Mexico "fair trade" price to H. O. Wooten Grocery Company, a wholesale grocery company, Odessa, Texas, but delivered to Cashway Supermarket, Inc., Hobbs, New Mexico, and to Ace Wholesale Mercantile Company, a wholesale grocery, operated by Bromberg's Inc., Albuquerque, New Mexico, which counsel contends are also in violation of Section 2(a) of the Act. The sales to these two wholesalers will be discussed separately. Cashway Supermarket, Inc., Hobbs, New Mexico, operates six grocery stores of the supermarket type, three in Hobbs, one in Lovington, one in Clovis, and one store in Carlsbad, New Mexico. Mr. Thomas B. Schnaubert, the owner and General Manager of Cashway, was called as a witness by counsel supporting the complaint. Mr. Schnaubert testified, among other things, the following: In 1957, Cashway discontinued buying groceries from Kimball Wholesale Grocery Company of Albuquerque, and began to buy from H. O. Wooten Grocery Company of Odessa, Texas, at a net price, including both groceries and cigarettes. Cashway had been buying its cigarettes from Rocky Mountain Wholesale Co., Inc., a wholesale tobacco distributor, of Albuquerque, New Mexico, with branches in Hobbs, Roswell, Santa Fe, and Farmington, New Mexico. After it switched to Wooten Grocery Company, it developed, however, that Wooten could not ship cigarettes from Texas into the State of New Mexico due to the requirements of the New Mexico Cigarette tax law that the tax stamps should be affixed to the packages of cigarettes within the boundaries of the State of New Mexico. Wooten Grocery Company then made an arrangement with Ponca to purchase cigarettes from Ponca for delivery to Cashway. Under the arrangement, Ponca delivered cigarettes direct to Cashway and billed H. O. Wooten Grocery Company for the cigarettes at the minimum New Mexico "fair trade" wholesale price and, in turn, Cashway paid Wooten for the cigarettes. Cashway was supposed to receive a three cents per carton discount from the so-called

New Mexico "fair trade" price from H. O. Wooten Grocery Company in cooperative advertising. This arrangement lasted for six or seven months. Mr. Schnaubert was unable to say whether Cashway actually received the three cents per carton discount on cigarettes because the checks received from H. O. Wooten Grocery Company for cooperative advertising were in lump-sum amounts and included a lot of items in the retail grocery business other than cigarettes.

26. Counsel supporting the complaint takes the position that the cigarette sales were from Ponca to Cashway and the interposition of Wooten Grocery Company was a subterfuge to hide the three cents per carton discount which Cashway was supposed to receive. Counsel urges that CX 99 is proof of this contention. CX 99 purports to be a letter from Mr. Schnaubert, the owner and General Manager of Cashway, to Rocky Mountain Wholesale Co. Mr. Schnaubert states in this letter that H. O. Wooten Grocery Company and Ponca had reached an agreement, the details of which Mr. Schnaubert was not familiar with, whereby Cashway would receive a three cents per carton discount from Wooten for advertising. Counsel supporting the complaint suggests that Mr. Schnaubert's testimony was "reluctant" and that Wooten Grocery Company was nothing but a "straw". To make such a finding, it would be necessary to disregard the testimony of Mr. Schnaubert. Mr. Schnaubert was called as a witness for the Commission, under supoena, and, from his observation of the witness and his demeanor while testifying, this hearing examiner is of the opinion that Mr. Schnaubert was forthright and truthful in his testimony. Accordingly, this hearing examiner finds that the arrangement between Wooten Grocery Company and Ponca was, as testified to by Mr. Schnaubert. The discount, if any, was granted by H. O. Wooten Grocery Company. Cashway buys five-cent bar candy from the manufacturer at eighty cents per box, such as Hershey and Mars, and has bought the same candy from Ponca at the same price.

27. Ace Wholesale Mercantile Company is a wholesale grocery in Albuquerque. It is owned and operated by Bromberg's, Inc., Albuquerque, New Mexico. Bromberg's Inc., also operates a retail grocery under the name of El Cambio. The two stores are operated at the same address. Prior to the incorporation of Bromberg's Inc., in 1959, they were operated as a partnership by the same family for more than twenty-five years. Ace Wholesale's volume of business in recent years is not as large as formerly. At the time of the hearing, Ace had only about three wholesale customers for cigarettes. However, the circumstance that Ace's wholesale business has fallen off

in recent years does not destroy its identity as a wholesaler. Ace Wholesale Mercantile Company holds a wholesale tobacco license under the New Mexico cigarette and tobacco laws, and for this reason, is authorized to buy cigarettes at the wholesale or jobber's price under the New Mexico so-called "fair trade" cigarette laws. Ace Wholesale does not buy cigarettes direct from the manufacturer but buys cigarettes from Ponca at the wholesale or jobber's price, as it is authorized to do under the New Mexico laws, above stated. Ace has been buying cigarettes from Ponca for the past 13 years. Ace Wholesale buys most of its candy direct from the manufacturer, including Hershey and Mars five-cent candy bars, at eighty cents per box, less a 2% discount if paid within 10 days.

28. Although not urged in their proposed findings of fact, Commission counsel offered in evidence an invoice, CX 10G, which ostensibly represents a sale of cigarettes by Ponca to one Bruck at the New Mexico wholesale price, purportedly to support the charge of price discrimination in the sale of cigarettes. Testimony later offered by respondent (TR. 950–952) established the fact that Mr. Bruck was a sales representative for Liggett & Myers Tobacco Company, a cigarette manufacturer. Liggett & Myers holds a New Mexico State Wholesale Tobacco Dealers Permit and, as such, was entitled to purchase cigarettes from Ponca at the wholesale price. Representatives of tobacco manufacturers call on retail merchants and, if the retailer is in short supply of cigarettes of that manufacturer, the representative will purchase a few cartons from a local wholesale tobacco dealer as a fill-in for that retailer until the wholesale distributor makes his next call on that retailer. The sale represented by invoice CX 10G was a sale of cigarettes by Ponca to Liggett & Myers Tobacco Company at the New Mexico wholesale price and was not an unlawful discrimination in price.

29. Subsequent to the closing of hearings in this proceeding, Ponca discontinued granting the 6 cents and 7 cents per carton discount on cigarettes sold to Safeway, Food Mart and Furr's for delivery and subsequent resale in their New Mexico stores and raised its cigarette prices to Safeway, Food Mart and Furr's to the higher New Mexico "fair trade" cigarette prices. Thereafter, these stores ceased buying cigarettes from Ponca for sale in their New Mexico stores and began buying cigarettes direct from the manufacturer at the lesser prices charged by the manufacturer as they were then doing for their Texas stores.[5] The requirement of the New Mexico cigarette tax law

[5] Effective April 14, 1962, April 16, 1962, and December 3, 1962, respectively, Safeway, Food Mart, and Furr's discontinued the purchase of cigarettes from Ponca for delivery to their respective retail stores in New Mexico and began buying cigarettes direct from the manufacturer for later resale in these stores.

that, for cigarettes sold in retail stores in the State of New Mexico, the New Mexico cigarette tax stamps must be affixed to each package of cigarettes within the boundaries of the State of New Mexico was waived by the New Mexico cigarette tax authorities, and Safeway, Food Mart and Furr's were then enabled to affix the New Mexico cigarette stamps to the packages of cigarettes in their Texas warehouses and then transport the stamped cigarettes to their New Mexico stores. Since discontinuing their purchase of cigarettes from Ponca, Safeway, Food Mart and Furr's have been supplying their retail stores in New Mexico with cigarettes purchased directly from the manufacturer after same have been stamped by Safeway, Food Mart and Furr's in their Texas warehouses with the New Mexico cigarette tax stamps of 8 cents per package or 80 cents per carton. This evidence was in affidavit form and received into the record by stipulation.

30. Under such circumstances, no prescribed injury could or may have resulted to competition at any level from the sale by Ponca to Safeway, Food Mart and Furr's at prices higher than the same cigarettes were available to these stores from the manufacturer. If any injury to competition would or may result from the facts established by the record herein, such injury or possible injury, if any, resulted or would have resulted from the fact that these stores could buy cigarettes and did buy cigarettes from the manufacturer, both before and after Ponca supplied them, at prices less than the prices charged by Ponca, and not from Ponca's acts, but from conditions and circumstances over which Ponca has no control, and with which it could not be charged with responsibility for causing.

31. Representatives of each of the cigarette manufacturers testified that there was no reason, from the standpoint of the cigarette manufacturers, why Safeway, Food Mart, Furr's and Skaggs Drug Stores could not have purchased cigarettes directly from the manufacturers for delivery and distribution in the State of New Mexico during all of the years 1958 through 1961, involved in this proceeding, had such companies desired to do so. It is not denied that the cigarette manufacturers would have sold and shipped cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Store to places designated by them in the State of New Mexico during 1958 through 1961, at the same prices charged by the cigarette manufacturers to Safeway, Food Mart, and Furr's for delivery at their warehouses in El Paso and Lubbock, Texas, and at the same prices charged to Ponca. Although Skaggs Drug Stores, Inc., was not actually buying cigarettes directly from the manufacturer at the time of hearings herein, the evidence shows that Skaggs could have bought direct if

it had desired to do so. Skaggs was qualified to buy direct and had made formal application to P. Lorillard Company to buy direct and had received the favorable recommendation of the field representatives of Lorillard, but no final action had been taken at the request of Skaggs because Skaggs was not then ready to receive shipments of cigarettes direct. Unquestionably, Skaggs could have bought cigarettes direct from the manufacturer instead of Ponca, had it desired to do so.

32. The evidence shows that if Safeway, Food Mart, Furr's and Skaggs had not been able to make the arrangements with Ponca for the purchase of cigarettes at the prices agreed upon, which were lower than the New Mexico "fair trade" price, these companies would have purchased cigarettes directly from the manufacturer and stamped the cigarettes in the State of New Mexico, and would have supplied their New Mexico stores with cigarettes so purchased and stamped, at lessser prices than they purchased stamped cigarettes from Ponca. The testimony of the witnesses to this effect is corroborated by actual events which have transpired since hearings herein were completed. These events were the following: (1) Subsequent to the close of hearings herein, Ponca discontinued granting the 6 cents and 7 cents discount on cigarettes sold to Safeway, Food Mart and Furr's and raised its price to the New Mexico "fair trade" price; (2) After Ponca raised its price, these stores ceased buying cigarettes from Ponca and began buying cigarettes direct from the manufacturer for use in their New Mexico stores. So, the evidence is conclusive that if Ponca had not sold the cigarettes to these stores at the prices which it negotiated with these stores, they would have bought the cigarettes for their New Mexico stores direct from the manufacturer.

33. All sales of cigarettes by Ponca to retail establishments in the State of New Mexico, other than to Safeway, Food Mart, Furr's and Skaggs, were at uniform prices without any discounts or allowances and in accordance with the prices established by the New Mexico cigarette "fair trade" law. There is no evidence of sales at other prices than to those four retail establishments above named. Furthermore, there is no evidence in the record that Safeway, Food Mart, Furr's or Skaggs have ever sold cigarettes in their New Mexico stores at less than the minimum prices established by the New Mexico so-called "fair trade" law. No injury to competition or to any competitor of Ponca or lessening of competition or creation of a monopoly resulted from the sale by Ponca to Safeway Stores, Inc., Food Mart, Inc., Furr's, Inc., and Skaggs Drug Stores of cigarettes at the prices same were sold since like cigarettes were available

to such stores from the cigarette manufacturers at the same or lower prices. As a wholesale distributor of cigarettes, Ponca is in direct competition with the cigarette manufacturers in selling cigarettes to chain stores and large volume buyers who buy or who can qualify to buy cigarettes direct from the manufacturers at the same price that Ponca can purchase cigarettes from the same cigarette manufacturer. In making the sales of cigarettes complained about to Safeway, Food Mart, Furr's, and Skaggs at prices less than the prices established by the New Mexico cigarette so-called " fair trade" law, but not less than the cigarette manufacturer's prices, Ponca was acting in good faith to meet an equally low or lower price of a competitor, namely, the cigarette manufacturer. The cigarette manufacturer's price was a then existing, available price, and was the same to all purchasers from the manufacturer.

34. Under the evidence of record, the cigarette manufacturers are competitors of Ponca in selling cigarettes to retail chain grocery and drug stores at the same prices at which the manufacturers sell the identical cigarettes to Ponca. Ponca did not reduce its price of cigarettes to Safeway, Food Mart, Furr's or Skaggs Drug Stores as part of a general pricing scheme, but did so on an individual and separately negotiated basis to meet the competition of the cigarette manufacturers. Contemporaneously with the time that Ponca was selling cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Stores at the discount prices complained about, like cigarettes were available to such chain stores from the cigarette manufacturers at lower prices than they were available to retail establishments who were not direct buyers of cigarettes from the cigarette manufacturers. The prices at which the cigarette manufacturers sold or offered to sell cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Stores in New Mexico and the prices at which cigarettes were available to the New Mexico stores of such companies from the cigarette manufacturers were not unlawful. Under the circumstances, a reasonably prudent person would believe that the lower prices of the cigarette manufacturers which Ponca was meeting in lowering its prices of cigarettes to the New Mexico stores of Safeway, Food Mart, Furr's and Skaggs Drug Stores were lawful prices.

35. With respect to the cigarette sales by Ponca to Ace Wholesale Company, H. O. Wooten Grocery Company, and Liggett & Myers Tobacco Company, it should be noted that these companies perform different economic functions than retail establishments in the sale and distribution of cigarettes. Ace, Wooten and Liggett & Myers do not compete with retail stores in the sale of cigarettes directly to the ultimate consumer. Contemporaneously with the times that Ace,

Wooten, and Liggett & Myers purchased cigarettes from Ponca, like cigarettes were available to Ace, Wooten and Liggett & Myers from other wholesale distributors of cigarettes under the so-called New Mexico "fair trade" law at prices less than the prices to be charged under said "fair trade" law to retail stores who were not direct buying retailers. In lowering the price for cigarettes charged by Ponca to Ace, Wooten and Liggett & Myers below that charged by Ponca to retail stores who were not direct buying retailers, Ponca was meeting but not beating an equally low price charged by other wholesale distributors or manufacturers of cigarettes and which they were entitled to charge under the so-called New Mexico "fair trade" price law. In lowering the prices charged to Ace, Wooten, and Liggett & Myers below those charged by Ponca to retailers who were not direct buyers, Ponca acted in good faith to meet an equally low price of a competitor, namely, other wholesale tobacco distributors. The prices at which cigarettes were available to Ace, Wooten and Liggett & Myers from other wholesale distributors were not unlawful. Under the facts and circumstances then existing, a reasonably prudent person would believe that the lower prices which Ponca was meeting by lowering its prices to Ace, Wooten, and Liggett & Myers for cigarettes were lawful prices.

36. In addition to Ponca's alleged price discriminations in the sale of cigarettes hereinabove discussed, Commission counsel also offered evidence purporting to show discriminations in price by Ponca in sales of 24-count boxes of five-cent candy bars. During hearings held in Roswell and Albuquerque, New Mexico, for the presentation of evidence by Commission counsel to support its case-in-chief Commission counsel offered evidence as to prices charged by Ponca to different customers in those towns for 24-count boxes of five-cent candy as well as for cigarettes. However, at a subsequent hearing held in Roswell, during the presentation of evidence on behalf of respondent, after Commission counsel had concluded their case-in-chief, and while respondent's counsel was offering evidence and testimony to support its good faith meeting of competition defense under Section 2(b) of the Clayton Act with respect to sales of 24-count boxes of five-cent bar candy in the Roswell, New Mexico, area, Commission counsel objected to said testimony on the grounds that the evidence offered by Commission counsel at previous hearings did not prove any price discrimination in candy sales by Ponca in Roswell. Commission counsel stated that the only evidence in the record to support the allegation of discrimination in price of candy sales by Ponca were candy sales by Ponca to retail stores in Albuquerque, New Mexico (Tr. 724–725). The hearing examiner concurs

with Commission counsel's evaluation of the testimony in this respect. The evidence shows that Ponca's candy sales in the Roswell area were at a uniform, non-discriminatory price of 85 cents per box for 24-count five-cent bar candy. The Roswell trade area is a separate and different trade territory than Albuquerque, New Mexico. The City of Roswell is approximately 225 miles from Albuquerque. Therefore, only those sales by Ponca of 24-count boxes of five-cent candy bars to its customers in Albuquerque will be considered in determining whether Ponca discriminated in price as to five-cent candy bars, and if so, were the sales at the lower price made in good faith to meet an equally low price of a competitor, as recognized by subsection (b) of Section 2 of the Clayton Act, as amended.

37. Ponca buys 24-count boxes of five-cent bar candies direct from the manufacturer, including Hershey Chocolate Corporation, Mars, Inc., Sweets Company of America, Hollywood Brands, Inc., Planters Nut and Chocolate Company, James O. Welsh Sales Corp., and others, at prices ranging from 72 to 80 cents per box. The manufacturer generally allows a 2 percent discount from these prices if the account is paid within a certain period of time, ranging from 10 days to 30 days. These prices were in effect at the time of hearings in 1961. Each of the alleged discriminatory candy sales involved in this proceeding was sold and delivered by Ponca from Ponca's warehouse in Albuquerque or Roswell after the candy had been received from the manufacturer and stored in Ponca's Albuquerque or Roswell warehouse. The candy manufacturers last increased their prices approximately 10 years ago. Prior to that increase, Ponca attempted to sell its 24-count five-cent bar candy at 85 cents per box. To meet competition in some accounts, Ponca reduced the price accordingly. After the price increase by the manufacturers, Ponca, on the whole, has attempted to sell its 24-count five-cent bar candy in the Albuquerque trade area at 90 cents per box. However, with respect to numerous retail stores in Albuquerque, including Walgreen and Skaggs Drug Stores, Ponca has reduced its price of 24-count five-cent bar candy to these stores below the 90 cent price which it has charged other retail customers in order to meet a lower price of the candy manufacturer or a competitor wholesale candy distributor. Some of these sales will now be discussed.

38. The evidence shows that the sales of the popular brands of 24-count five-cent bar candy to retail stores in the Albuquerque area is highly competitive between candy wholesalers. Their prices to retail stores vary. In the Albuquerque area, the following wholesale grocery companies and wholesale candy distributors are competitors of Ponca in selling 24-count five-cent candy bars to retail stores:

Kimbell Albuquerque Company, Charles Ilfeld Company, Associated Grocers, Rocky Mountain Wholesale Company, Inc., Valley Distributing Company, Allen Candy Company, and Gholson Brothers. These companies also purchase their candy direct from the manufacturer at the same price that Ponca pays and with the same 2 percent discount for prompt payment. These prices range from 72 cents per box for boxes of 24 bars to 80 cents per box for the more popular brands such as Hershey, Tootsie Roll, Milky Way, Snicker, 3 Muskateers, Butterfinger, and Baby Ruth.

39. Kimbell Albuquerque Company is a Wholesale grocery company, carrying a full line of groceries and candies. It maintains a warehouse in Albuquerque. Its customers are retail grocery stores, but it sells to other types of retail stores as well. In October, 1959, Kimbell purchased the Charles Ilfeld Company, a wholesale grocery company then doing business in New Mexico. After Kimbell purchased the Charles Ilfeld Company in October, 1959, it merged the Ilfeld Company into its own business. Kimbell Albuquerque Company had been operating in Albuquerque prior to its purchase of the Charles Ilfeld Company. During its operation, the Charles Ilfeld Company made it a practice to distribute weekly price lists to its customers. These price lists were printed on its regular order forms. On this price list, all items of merchandise offered for sale, including candy, were listed at the "cost" price to Ilfeld before allowance of the 2 per cent discount allowed by the manufacturer for prompt payment. This "cost" price was the price charged by the manufacturer to Ilfeld for the candy or other merchandise before discount for prompt payment. When Kimbell Albuquerque Company purchased the business of Charles Ilfeld Company in 1959, Kimbell continued this pricing practice and same was in effect at the time of hearings herein. The "cost" price shown on the price list and order form, plus an up-charge or mark-up added by Kimbell is the amount or price charged by Kimbell Albuquerque Company to its retail customers for candy and other merchandise sold to them. This price list is distributed weekly by Kimbell to its customer retail stores and lists the cost of 24-count boxes of five-cent candy bars at prices ranging from 72 cents to 80 cents per box for the more popular brands. These prices are the same prices charged by the manufacturer to Ponca for the same brands and types of bar candies. To such amount (72 cents to 80 cents per box of bar candy) and the cost of other merchandise, are added the up-charge, as listed on Kimbell's weekly price list (RX 3-3B), ranging from 3 percent on weekly purchases of $1500 or less, down to 1½ percent on

all weekly purchases above $2,500. These prices are f.o.b. Kimbell's warehouse. If Kimbell delivers the merchandise, an additional charge of ½ of 1 percent is made.

40. Associated Grocers of New Mexico is owned by a number of retail merchants in New Mexico and operated on a cooperative basis. It sells dry groceries and other merchandise, including candy, to its members. It prices merchandise to its customer members on the basis of cost, plus an up-charge of 4 percent and an additional charge of ½ of 1 percent for delivery in the city of Albuquerque. Associated Grocers' cost is the price to Associated by the manufacturer before allowance of the 2 percent discount for prompt payment. The manufacturer's prices for candy bars to Associated are the same as those charged by the same manufacturer to Ponca. Prior to the 4 percent mark-up charged by Associated, the mark-up had been 3 percent. The price list and the order form of Associated Grocers lists the cost price of 24-count boxes of five-cent candy bars at prices ranging from 75 cents to 80 cents per box. This is the cost to Associated Grocers for the candy and is the same as the manufacturer's price to Ponca for the same candy. The candy is then sold by Associated to its customer members at such cost plus an up-charge that has ranged from 3 percent to 4 percent, plus a ½ of 1 percent delivery charge if delivered in the city of Albuquerque. Any earnings to Associated are distributed to its members, based upon the volume of business done by such member with the Association.

41. Rocky Mountain Wholesale Company, Inc., is a wholesale distributor of tobacco and candy in New Mexico. It has headquarters and a warehouse in Albuquerque, with branches in Hobbs, Roswell, Santa Fe, and Farmington, New Mexico. Rocky Mountain purchases candy and cigarettes direct from the manufacturer at the same prices paid by Ponca. Rocky Mountain sells 24-count boxes of five-cent bar candy to its retail customers in Albuquerque at different prices ranging from 84 cents to 90 cents per box.

42. Gholson Brothers Candy Company is a tobacco and candy wholesale distributor in Albuquerque, New Mexico. The evidence shows that it sells 24-count five-cent bar candy to some customers at 90 cents per box and at a lesser price when the order for the candy is phoned in to its office in Albuquerque. It also sells what is sometimes called "vend packed" bar candy of the popular brands of bar candy which it repacks in boxes containing 24 bars at 84 cents per box. Gholson purchases this candy in bulk from the manufacturer and then places the candy in boxes, each box containing 24 bars.

43. Allen Candy Company is a wholesale distributor of candy in Albuquerque. It purchases candy direct from the manufacturer at the same price paid by Ponca for the same candy. Allen Candy Company sells 24-count boxes of five-cent bar candy to its retail customers at 85 cents per box.

44. Walgreen Drug Store in Albuquerque is a member of a national chain of retail drug stores. The Walgreen Drug Store in Albuquerque is privileged to buy and actually buys candy, including 24-count boxes of five-cent bar candy, direct from the manufacturer at the same price that Ponca pays the manufacturer for the same candy. These prices range from 72 cents to 80 cents per box, depending on the brand of candy, less a discount of 2 percent if paid for within the period of time fixed by the manufacturer. The Walgreen Drug Store in Albuquerque purchases its day-to-day supplies of candy from Ponca, but on some occasions, such as for Thanksgiving or Christmas, Walgreen may purchase candy direct from the manufacturer. Ponca sells and delivers to the Walgreen store in Albuquerque all brands of five-cent candy bars, regardless of the manufacturers' price, ranging from 72 cents to 80 cents per box, to Ponca, at a flat price of 80 cents per box, plus a 2 percent mark-up. This price averages 81.6 cents per box for all brands of five-cent candy bars (80 cents, plus 2 percent equals 81.6 cents). Walgreen could, if it desired, purchase the same candy direct from the manufacturer at prices ranging from 72 cents to 80 cents per box, less a 2 percent discount for prompt payment. This price of the manufacturer is less than Ponca's price to Walgreen for the same candy. In effect, Ponca gave Walgreen the benefit of the 2 percent discount allowed by the manufacturer for prompt payment. It is found, therefore, that Ponca reduced its price for 24-count five-cent bar candy to Walgreen to meet the price of the candy manufacturer, Ponca's competitor, with respect to Walgreen, a direct purchaser.

45. The Skaggs Drug Store in Albuquerque is store No. 15 of a retail drug chain which is also privileged to purchase and does purchase some of its candy, including 24-count bar candy, directly from the manufacturer. Skaggs can purchase 24-count boxes of five-cent candy bars of the popular brands, such as Hershey and Mars, direct from the manufacturer at 80 cents per box, less the 2 percent discount for prompt payment to the manufacturer. It can buy other brands of candy direct from the manufacturer at prices ranging from 72 cents to 80 cents per box, less the usual discount of 2 percent for prompt payment. These prices to Skaggs from the manufacturer are the same prices for the same candies purchased by Ponca from the same manufacturer. At the time of hearings, the Skaggs

Drug Store in Albuquerque was purchasing 24-count boxes of five-cent candy bars from Ponca at the same price Ponca was selling Walgreen Drug Store, 80 cents per box, plus 2 percent of such amount, for all brands of candy bars regardless of the manufacturers' price to Ponca, which ranged from 72 cents to 80 cents per box. This price charged by Ponca to Skaggs, similar to Ponca's price to Walgreen, averages 81.6 cents per 24-count box of five-cent candy bars, regardless of the brand and manufacturers' price to Ponca. The representative of Skaggs testified, among other things, that if Skaggs could not continue to purchase candy from Ponca at the price of 80 cents per box plus the 2 percent markup, Skaggs would buy all of its candy directly from the manufacturer at 80 cents or less per box, depending on the brand of candy, less the 2 percent discount allowed by the manufacturer for prompt payment. It is found, therefore, that Ponca reduced its price of 24-count five-cent bar candy to Skaggs Drug Store to meet the lower price offered by the candy manufacturer, Ponca's competitor.

46. In addition to Walgreen and Skaggs Drug Store, who are direct purchasers of candy from the manufacturer, Ponca has also sold 24-count five-cent bar candy to other retail stores in Albuquerque at less than 90 cents per box who are not direct purchasers of candy from the manufacturer. These stores cannot buy candy direct from the manufacturer and must obtain their supplies of candy from a wholesale distributor, such as Ponca or one of its competitors. Ponca's sales of 24-count five-cent bar candy to these retail stores will now be discussed.

47. The evidence shows that Ponca has, from time to time, sold all brands of 24-count five-cent candy bars, regardless of the manufacturers' price, to Nob Hill Grocery Company, a retail grocer in Albuquerque, New Mexico, at a flat price of 85 cents per box. Nob Hill Grocery, sometimes referred to as Nob Hill Super Value Grocery, purchased most of its groceries and candy from the Kimbell Albuquerque Company, a wholesale grocer in Albuquerque , at 83.2 cents per box. Ponca reduced its price on boxes of 24-count bar candies to Nob Hill in order to obtain some of Nob Hill's candy business and to meet the competition of Kimbell's Albuquerque Company. Nob Hill was able to purchase the same candy from Kimbell at 83.2 cents per box.

48. The evidence also shows that Ponca sold 24-count boxes of five-cent bar candy to Conniff Food and Appliance Company, a retail grocery in Albuquerque, at a price of 84 cents per box, regardless of the brand or the manufacturers' price for the candy to Ponca, ranging from 72 cents to 80 cents per box. At the time of hearings, Conniff was purchasing most of its groceries and candy from Kimbell

Albuquerque Company, but purchased some candy and other merchandise from Ponca, Rocky Mountain Wholesale Company and Gholson Brothers. Conniff paid Kimbell 80 cents per box for the more popular brands of 24-count boxes of five-cent bar candy plus a mark-up of 4 percent, and a delivery charge of ½ of 1 percent, making a total of 83.2 cents per box. Conniff also bought lower-priced candies from Kimbell with a similar mark-up at prices less than those charged by Ponca to Conniff. Ponca sold the candy to Conniff at a flat price of 85 cents per box for all brands of five-cent bar candy in order to obtain some of Conniff's candy business and to meet the competition of Kimbell which was selling and offering to sell Conniff like candy at prices less than Ponca's price to Conniff.

49. The evidence also shows that Ponca has sold 24-count boxes of five-cent bar candies to Bel Air Drug, a retail drug store in Albuquerque owned by one Pat Birmingham, and to Pat-Y-Ken Drug in the same city, and in which Mr. Birmingham owns an interest, at 85 cents per box, regardless of brand or the manufacturer's price, to Ponca, ranging from 72 cents to 80 cents per box. Charles Ilfeld Company was selling five-cent bar candies at its cost plus 3½ percent, which was less than Ponca's price for the same candy. Rocky Mountain Wholesale Company also reduced its price to meet Ilfeld's price and sold like candy to Bel Air Drug Store at the same price, 85 cents per box. Ponca made a flat price of 85 cents per box to Bel Air and Pat-Y-Ken to meet the competition of Ilfeld, which is now Kimbell Albuquerque Company, and Rocky Mountain Wholesale Company, which had offered to sell these stores candy at 85 cents per box or less.

50. The evidence shows that Ponca has sold five-cent candy bars to Martin's Market, a retail grocery in Albuquerque, sometimes called Martin's Food Store, at 85 cents per box, regardless of brand and manufacturer's price, ranging from 72 cents to 80 cents per box. The evidence further shows that Martin's was able to purchase and did purchase candy from Kimbell Albuquerque Company at less than 85 cents per box. To meet this competition, Ponca reduced its price to a flat 85 cents per box to Martin's for all 24-count five-cent bar candy, regardless of the cost to Ponca from the manufacturer.

51. The evidence shows that Ponca sold 24-count five-cent candy bars to NuWay Food Market, a retail grocery store in Albuquerque, at a flat price of 85 cents per box, regardless of the manufacturer's cost to Ponca, which ranged from 72 cents to 80 cents per box. Prior to the time that Ponca reduced its price to NuWay, NuWay Food Market was purchasing its grocery supplies and candy from the Kimbell Albuquerque Company, a wholesale grocer. Kimbell's charge to NuWay for candy was the cost of the candy to Kimbell plus a 5

percent mark-up, which included delivery of the candy to NuWay, and was one cent to two cents less per box than Ponca's charge to NuWay for the more popular brands of candy and more than two cents per box less than Ponca's reduced price to NuWay on the cheaper brands of candy. Mr. Thomas of NuWay testified that Ponca's price to NuWay averaged about two cents per box higher than Kimbell's. Ponca reduced its price to NuWay to meet the competition of Kimbell Albuquerque Company which offered the same candy to NuWay at a price lower than Ponca's price to NuWay for all brands of candy.

52. Ponca sold 24-count boxes of five-cent bar candy to Rhodes Food Market, a retail grocery in Albuquerque, at a flat price of 85 cents per box for all brands of bar candy, regardless of the manufacturer's price, which ranged from 72 cents to 80 cents per box. Ponca reduced its price for the candy to Rhodes Food Market to meet the competition of Kimbell Albuquerque Company. Even so, Mr. Rhodes testified that Ponca's price of 85 cents per box for all bar candies was about two cents per box higher than Kimbell's. Kimbell Albuquerque Company was selling and offered to sell to Rhodes Food Market the same brands of candy at approximately 83 cents per box, and Ponca reduced its price to meet Kimbell's price.

53. The evidence shows that Ponca sold 24-count boxes of five-cent bar candy to Miller's Meat Market, Keith Drug Store, D & J Grocery Store and Avis Rent-A-Car, in Albuquerque, at 85 cents per box for all brands of five-cent bar candy, regardless of the manufacturers' price to Ponca, which ranged from 72 cents to 80 cents per box. Kimbell Albuquerque Company was selling and offering this same candy to these places of business in Albuquerque at approximately 83 cents per box. Ponca reduced its price to these places of business in order to meet the competition of Kimbell Albuquerque Company.

54. Ponca also sold 24-count boxes of five-cent bar candy to Hart's Market, a grocery store in Albuquerque, at a flat price of 85 cents per box, regardless of the manufacturers' cost to Ponca, which ranged from 72 cents to 80 cents per box. Hart's Market was purchasing its groceries and some of its candy from Kimbell Albuquerque Company at Kimbell's cost from the manufacturer, plus a mark-up of 5 percent which included delivery charges. These prices from Kimbell to Hart's ranged from approximately 75 cents or 76 cents per box to 84 cents per box for the highest-priced candy. In order to meet this competition, Ponca reduced the price of bar candy to Hart's to a flat price of 84 cents per box.

55. Ponca reduced its price of 24-count boxes of five-cent bar candy to Sun Drug Store, Albuquerque, New Mexico, from 90 cents to 88 cents per box for the reason that Kimbell Albuquerque Company

and its predecessor Charles Ilfeld Company offered to sell and did sell like candy to Sun Drug at approximately 83 cents per box. Ponca reduced its price to 88 cents per box in order to meet this competition.

56. The evidence shows that Ponca has sold 24-count five-cent bar candy to Palms Food Market, a retail grocery in Albuquerque, New Mexico, at a flat price of 85 cents per box, regardless of the manufacturer's cost to Ponca, which ranged from 72 cents to 80 cents per box. Palms Food Market purchased its groceries and some candy from Kimbell Albuquerque Company at Kimbell's cost, plus its customary mark-up. Kimbell's price to Palms Food Market for the most popular and highest-priced brands of five-cent bar candy was approximately 83 cents per box, and a lesser amount for the cheaper candies. Ponca reduced its price from 90 cents to 85 cents per box for all brands of five-cent bar candy in order to meet the competition of Kimbell Albuquerque Company.

57. Quick and Handy, Inc., Albuquerque, New Mexico, operates a chain of drive-in grocery stores known as 7-11 stores. Quick and Handy, Inc., was purchasing most of its merchandise, including candy, from Associated Grocers Cooperative, of which Quick and Handy was a member, at the manufacturers' price to Associated Grocers, plus a markup of what was originally 3 percent, and at the time of the hearing was 4½ percent. The cost of 24-count five-cent bar candy purchased by Quick and Handy from Associated Grocers ranged from 72 cents to 80 cents per box plus the 4½ percent mark-up. In order to meet this competition and obtain some of the candy business of Quick and Handy, Inc., Ponca reduced its price to a flat 83 cents per box to Quick and Handy for all brands of five-cent bar candy, regardless of the cost to Ponca.

58. Speedway Food Stores, Inc., also operates a chain of drive-in grocery stores in Albuquerque. Speedway purchased its groceries and some candies from Kimbell Albuquerque Company at the Manufacturers' price to Kimbell, plus a markup of 4½ percent. Kimbell's charge to Speedway for 24-count boxes of five-cent bar candy ranged from 72 cents to 80 cents per box, plus the mark-up of 4½ percent. In order to meet the competition of Kimbell Albuquerque Company, Ponca reduced the price on 24-count boxes of five-cent bar candy sold to Speedway to a flat price of 84 cents per box, regardless of the cost to Ponca, which ranged from 72 cents to 80 cents per box. In spite of this price reduction, Ponca began losing some of its candy sales to Speedway Food Stores. The reason for the drop in candy sales from Ponca to Speedway was that Speedway began buying more of its candy needs from Kimbell Albuquerque Company, who was offering a lower price. Kimbell's price was its cost, plus a

mark-up of 41½ percent. Ponca then negotiated an arrangement with Speedway whereby Ponca agreed to reduce its price to Speedway to a flat 82 cents per box and Ponca's route men would not call at Speedway drive-ins for the solicitation of candy sales. Speedway would place their orders for candy with Ponca by telephone. Ponca reduced its price on five-cent candy bars to Speedway in order to meet the competition of Kimbell Albuquerque Company. Ponca's final reduced price to Speedway was not lower than the average price of 24-count five-cent bar candy offered by Kimbell Albuquerque Company to Speedway.

59. No injury to competition or any competitor of Ponca or lessening of competition, or creation of a monopoly resulted from the sale by Ponca of 24-count boxes of five-cent candy bars to different customers in the Albuquerque, New Mexico, area, at different prices to meet the competition of the candy manufacturers and wholesale distributors in the Albuquerque area since Ponca's reduced prices were no lower, and in every instance higher than the price at which like candy bars were purchased by or available to such customers from either the manufacturer of such candy bars or wholesale candy distributors in the Albuquerque area. 24-count boxes of five-cent candy bars of the same brand sold by Ponca were available from the candy manufacturers and the wholesale distributors in competition with Ponca during the period in question to retail stores in the Albuquerque area to whom Ponca reduced its prices from 90 cents, at the same or lower prices than the reduced prices charged by Ponca.

60. With respect to Ponca's candy sales to the Walgreen Drug Store and Skaggs Drug Store in Albuquerque, Ponca reduced its prices to these stores to meet the competition of the candy manufacturer. Each of these stores was able to purchase the same brand of candy direct from the manufacturer at prices less than the prices charged to these stores by Ponca. With respect to Ponca's sales of candy to the other retail stores at the prices below 90 cents per box, other wholesale candy distributors in Albuquerque were competitors of Ponca in the sale of 24-count five-cent candy bars, and Ponca's reduced prices to some purchasers in the Albuquerque area were no lower than the prices at which such purchasers could or did purchase like candy from a competitor of Ponca. The candy sales by Ponca shown by this record were not part of a general pricing scheme but were offered on an individual basis to meet an equally low or lower price of a competitor. Ponca acted in good faith in reducing its prices to meet the lower prices offered by its competitors. Insofar as the record shows, the prices at which the manufacturers sold or offered to sell 24-count boxes of five-cent candy bars were not unlawful, and

it was reasonable for respondent to believe that the lower prices of the candy manufacturer which it was meeting in lowering its price of five-cent candy bars to Walgreen and Skaggs were lawful prices. Also, the prices at which wholesale distributors who were competing with Ponca sold or offered to sell 24-count boxes of five-cent candy bars to retail stores in the Albuquerque area, and the prices at which such candy was available to such purchasers from the wholesale distributors are not unlawful. A reasonably prudent person would believe that the price or prices of wholesale distributors competing with Ponca in Albuquerque and which Ponca was meeting in lowering its price of 24-count boxes of five-cent candy bars to retail stores in Albuquerque were lawful prices.

61. The evidence shows that, of Ponca's sales of five-cent bar candy in Albuquerque at less than 90 cents per box, excluding those sales to the two direct buying retailers, Walgreen and Skaggs drug stores, Ponca's prices ranged from 88 cents per box to one customer, 84 cents per box to two customers, sales to one customer at 83 cents per box, sales to one customer at 82 cents per box, and the remaining sales at 85 cents per box. The sales at 85 cents per box constituted the largest number of sales at prices less than 90 cents per box. These individual and separate reductions in price below 90 cents per box were made to meet the prices of Ponca's competitors, especially Charles Ilfeld Company, Kimbell Albuquerque Company, and Associated Grocers. These purchasers from Ponca could have purchased the same candy from Kimbell or Associated at an equal or lower price. No instance is shown in the record where Ponca reduced its price below the price of at least one of its competitors. With respect to Ponca's candy sales to Walgreen and Skaggs drug stores, Ponca's price (a flat 80 cents per box, plus 2 percent mark-up, or a total of 81.6 cents per box) was higher than the manufacturer's price for any brand of candy. Walgreen and Skaggs were direct buyers of candy from the manufacturer. In its sales to Walgreen and Skaggs, Ponca was meeting the competition of the candy manufacturers.

62. Ponca is not to be blamed for the difficulties, if any, of some of the locally and individually owned corner drug and grocery stores in competing with the direct buying chain stores by reason of Ponca's actions in selling cigarettes or candy to the direct buying chain stores at higher prices than the chain stores could or were buying cigarettes or candy from the manufacturer. Some of the individually owned independent stores compete among themselves and with the direct buying chain stores in different ways. Some of the so-called "independents" specialize in service, such as longer open hours, charge accounts, delivery service, etc., rather than low prices. Although their

prices on merchandise may not be the same as the direct buying chain stores, they have an appeal to a certain segment of the purchasing public, nevertheless. The circumstance that some may not run full-page newspaper advertisements as some of the direct buying chain stores, does not necessarily indicate that they are not competing with the direct buying chain stores or are not making a success of their business. Several witnesses who were called at the instance of counsel supporting the complaint testified to having built their businesses in New Mexico from scratch to an annual volume of approximately $400,000 to $1 million per year within approximately the past seven to twelve years' time. The chain stores can and were buying merchandise direct from the manufacturer at the same prices that Ponca, a wholesale distributor, was paying for the same merchandise. The success or failure of the independent stores cannot be attributed to the fact that Ponca has sold cigarettes and five-cent candy bars at lower prices to some stores to meet its competition in New Mexico. In addition to the candy manufacturers who sell directly to retail stores in Albuquerque, other wholesalers, especially Gimbell Albuquerque Company and Associated Grocers were selling and offering to sell candy to all stores, including Ponca's customers, at prices below Ponca's prices.

63. Ponca's lowering of its prices on cigarettes to the direct buying retail chain stores and its lowering of prices of five-cent candy bars to direct buying retail stores and others to meet the competition of other wholesalers did not have any adverse effect upon competition at the wholesaler's level. Direct buying chain stores, to whom Ponca sold cigarettes at lower prices, could purchase the same cigarettes from the manufacturer at lower prices than those charged by Ponca. Some of the retailers purchased and supplied their New Mexico stores and Texas stores with cigarettes purchased directly from the manufacturer. Their representatives testified that if they had not been able to purchase cigarettes from Ponca or another distributor at like prices, they would purchase their cigarettes for their New Mexico stores from the manufacturer. After Ponca discontinued granting the discount to Safeway, Food Mart, and Furr's, these stores ceased buying from Ponca and began supplying their New Mexico stores with cigarettes purchased direct from the manufacturer at lower prices than those they had been paying Ponca. No more cigarettes would have been purchased by the direct buying retailers from other wholesalers competing with Ponca even if Ponca had not granted the lower prices to such direct buying retailers. Under such circumstances, no injury to competition or to competitors of Ponca could arise.

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64. What has been said also applies to retail stores buying candy direct from the manufacturer. Neither Ponca nor any of its wholesale competitors in Albuquerque sell five-cent candy bars to Safeway, Food Mart or Furr's. They buy their five-cent candy bars direct from the manufacturer. With respect to the so-called "independent" retail stores in Albuquerque that do not buy candy direct from the manufacturer, five-cent bar candy was also being offered for sale and sold to these stores by Kimbell Albuquerque Company and Associated Grocers, Ponca's competitors, at lower prices than Ponca's reduced prices, and lower than the reduced prices of some of Ponca's other competitors, including Rocky Mountain Wholesale Company and Gholson Brothers. Counsel supporting the complaint contends that Rocky Mountain, Gholson Brothers, and Ballew Brothers, wholesale competitors of Ponca, have or may have been put at a competitive disadvantage by Ponca's action.

65. Counsel's argument with respect to Rocky Mountain is based upon findings of fact made in another proceeding, not in evidence in this proceeding, and rejected by the hearing examiner. CX 96A–D are findings of fact made by a court in New Mexico and based upon a record of facts made in that proceeding. Also, counsel supporting the complaint suggests that Rocky Mountain lost the Piggly Wiggly (owned by Shop Rite Corporation) account in Albuquerque by reason of Ponca granting discriminatory prices to Piggly Wiggly. This is not so. Mr. Beaty, President of Rocky Mountain Wholesale Company, a competitor of Ponca, called as a Commission witness and relied upon by complaint counsel to support this contention, testified, among other things, that Piggly Wiggly, a former customer of Rocky Mountain, began buying cigarettes direct from the manufacturer. So, Rocky Mountain did not lose Piggly Wiggly as a customer because of any price discrimination by Ponca but because Piggly Wiggly began buying cigarettes direct from the manufacturer. With respect to Mr. Beaty's other charges, the record is clear that Ponca did not at any time grant a discount on cigarettes to Walgreen Drug Store in Albuquerque, and it has heretofore been found that Ponca did not grant any discount on cigarettes to Cashway Supermarkets or made any rebate to said stores. With respect to the Furr's No. 24 store in Albuquerque, Ponca cannot legally be charged with Rocky Mountain's loss of this store as a cigarette customer because Rocky Mountain would have lost this store anyway because Furr's would have bought its cigarettes direct from the manufacturer if Ponca had not reduced its price. With respect to Gholson Brothers Candy Company, Gholson Brothers is not a competitor of Ponca with re-

spect to the direct buying chain stores. Mr. Phillips, Manager of Gholson Brothers, testified, among other things, that Gholson Brothers did not sell to the major chains for the reason that Gholson Brothers was not big enough to handle the volume of business that the chains require. He stated that he had not solicited the business of the direct buying chain stores.

66. The sale of cigarettes by Ponca to Safeway and Food Mart in competition with the manufacturer and the sale of cigarettes by Ponca to Furr's in Albuquerque in competition with the manufacturer, could have no possible effect upon competition insofar as Ballew Brothers Wholesale Company of Roswell is concerned, because the cigarette manufacturers were the competitors. Ballew Brothers had never sold cigarettes to Safeway and Food Mart even before Ponca reduced its prices to these stores for the reason that Safeway and Food Mart were buying cigarettes direct from the manufacturer and transporting the cigarettes, together with other merchandise, from their El Paso warehouse to their Roswell stores, and had been doing so for a number of years prior to the time that Ponca began granting them the discounts. Mr. Ballew testified, among other things, that he originally solicited the accounts of Safeway and Food Mart for cigarettes from their respective managers in Roswell but was advised that the purchasing for these companies was done in their Texas offices in El Paso. Ballew Brothers sold cigarettes to the Furr's store in Roswell at the so-called New Mexico "fair trade" price. There is no evidence that Ponca sold or offered to sell cigarettes to Furr's in Roswell at less than the so-called "fair trade" price or in any other city, where, according to the testimony of Mr. Boverie of Furr's, it did not pay Furr's to go to the expense of setting up facilities to affix the New Mexico cigarette stamps to cigarettes within the boundaries of New Mexico because the volume of its cigarette sales in Roswell did not justify it. Although counsel supporting the complaint stated that no proof had been made of discrimination in prices of candy bars sold by Ponca in Roswell, it is significant that Mr. Ballew had solicited the candy business of Safeway, Food Mart, and Furr's in Roswell, but did not obtain any of their candy business because they were buying their candy direct from the manufacturer. It is obvious that the reduced prices on cigarettes which Ponca granted to Safeway and Food Mart in Roswell could not have any possible effect upon competition insofar as Ballew Brothers is concerned, because Safeway and Food Mart could and did buy cigarettes direct from the manufacturer at the same price that Ballew bought the same cigarettes.

This is also true with respect to five-cent bar candy purchased by Safeway, Food Mart and Furr's from the manufacturer at the same prices that Ballew Brothers bought like candy from the manufacturer.

67. Counsel supporting the complaint argues that Ponca has not established its "good faith" defense with respect to price discriminations in the sale of cigarettes because the classic 2(b) defense is a situation where a seller is threatened with the loss of a customer by reason of a lower lawful price of another seller and must, in order to retain the customer, match the lower competitive price. Counsel urges that the facts in this case are different and do not meet this test. The circumstance which led Ponca to reduce its price on cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Store in New Mexico have already been discussed. Commission counsel urges that, after the amendment of the New Mexico Cigarette Tax Statute in 1955 requiring cigarettes to be stamped in New Mexico for sale in that State, Safeway, Food Mart, and Furr's could have continued to stamp cigarettes in their Texas warehouses and later transport the stamped cigarettes to their New Mexico stores, as they had been doing prior to the amendment of the New Mexico Cigarette Tax Statute. Counsel's challenge is not valid. From the time of the amendment of the New Mexico Cigarette Tax Statute in 1955, until a subsequent amendment in 1957, it was unlawful for a New Mexico retail cigarette dealer to affix the New Mexico tax stamps to packages of cigarettes outside the boundaries of the State of New Mexico. It was this amendment which made it necessary for Safeway, Food Mart, and Furr's to discontinue their former practice of stamping cigarettes in their Texas warehouses for later sale in their New Mexico stores. Rather than undergo the expense and trouble in setting up facilities to stamp cigarettes within the State of New Mexico, these stores began purchasing stamped cigarettes from Ponca at the reduced prices. It was not until 1957 that the New Mexico Cigarette Tax Statute was amended to authorize the Director of Revenue of the State of New Mexico to issue licenses to stamp cigarettes outside the State of New Mexico. However, the evidence further shows that no license was ever issued under this provision of the statute until the year 1961.

68. Counsel also argues that the Commission has never held that a seller's supplier may be his competitor and that the "price" which Ponca is allegedly meeting is one not in existence, but rather one that is allegedly available. Counsel has not cited any authority for the proposition that the cigarette manufacturer was not a competitor

of Ponca with respect to the sale of cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Store, under the facts in this case. Indeed, the courts have recognized that a manufacturer can be a competitor of a wholesale distributor who buys his products from the manufacturer, by selling to the same customers that the wholesale distributor sells to. *Krug* v. *International Telephone and Telegraph Company*, 142 Fed. Supp. 230; *Klein* v. *Lionel Corp.*, 138 F. Supp. 560. The manufacturer's price was an existing, available price, and these direct buying retailers would have begun buying direct from the manufacturer if Ponca had not reduced its prices to an amount which did not undercut the manufacturer's price.

69. In effect, counsel also argues that even though Ponca's reduced prices for cigarettes to Safeway, Food Mart, Furr's and Skaggs were higher than these stores could buy like cigaretes from Ponca's wholesale competitors, Ponca could not legally reduce its price below the price that equals an amount representing the total of the price charged by competitors, plus the purchaser's cost of doing business. There is no provision in the Clayton Act, as amended by the Robinson-Patman Act, which makes such a requirement. The statute authorizes a seller to reduce his price in good faith to meet an equally low price of a competitor. No mention is made in the statute as to the purchaser's cost of doing business, and there is no legal authority to read such a requirement into the statute. Ponca's good faith in lowering its prices on cigarettes is established by the fact that Ponca did not undercut the manufacturers' prices, but as to most types of cigarettes was in excess of the manufacturer's prices before allowance of discounts for prompt payment and allowance of cash discounts on tax stamp purchases and was equal to but not below, the manufacturer's prices, plus the cost of stamps before allowance of either cash discount as to regular cigarettes. Ponca's good faith is also evidenced by the fact that it only reduced its prices on cigarettes to chain stores who could have purchased cigarettes at lower prices direct from the manufacturer.

CONCLUSION

It is concluded that, upon the basis of the evidence herein found, Ponca Wholesale Mercantile Company, respondent herein, in reducing its prices on cigarettes and candy to some customers in the State of New Mexico, did so in good faith to meet an equally low price of a competitor. Accordingly,

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

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner:*

This is a case brought under Section 2(a) of the Clayton Act, as amended, involving the candy and cigarette sales of a Southwestern tobacco wholesaler in the cities of Albuquerque and Roswell, New Mexico.[1] The hearing examiner dismissed the complaint on the ground that the allegedly discriminatory prices had been granted to meet the equally low prices of respondent's competitors and thus were within the sanction conferred by Section 2(b) of the Act. The matter is now before us on complaint counsel's appeal from that decision.

Respondent, the Ponca Wholesale Mercantile Company of Amarillo, Texas (Ponca), distributes its products in the New Mexico and West Texas area. Respondent also has two wholly owned subsidiaries trading in Arizona and Colorado which, however, are not involved in this proceeding. Ponca has a fairly extensive network of branch warehouses in addition to its main warehouse in Amarillo and, in the relevant period, respondent's New Mexico branches were located in ten cities and towns, including the Roswell and Albuquerque areas. Respondent's business is increasing. Its total annual sales have risen from $32,000,000 in 1958 to approximately $41,000,000 in 1960, and its business must be deemed substantial.

Turning first to the cigarette transactions in issue in this proceeding, the record is clear that the major tobacco companies are engaged, to a considerable extent, in direct selling to the more desirable retail accounts. In fact, a representative of one of the larger cigarette manufacturers estimated that 30 percent of his company's total volume represented sales to direct buying retailers.[2] The economic problems arising out of dual distribution have recently been receiving increasing notice, including Congressional attention,[3] and it is apparent that the competitive relationship between Ponca and its suppliers, the cigarette manufacturers, is one of the determinative factors governing the disposition of this proceeding. Cigarette sales constituting 79 percent of its volume are, of course, vital to Ponca.

Ponca's competition with the cigarette companies for sales to certain of the larger chain store organizations must be viewed in the context of the applicable New Mexico tobacco laws. At all times

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[1] The evidence on alleged discrimination in candy sales is limited to the Albuquerque area.

[2] The record reveals that the cigarette companies generally sell at the same prices to direct buying retailers and wholesale distributors.

[3] See, *The Impact Upon Small Business of Dual Distribution and Related Vertical Integration*. Hearings, Subcommittee on Small Business, House of Representatives, 88th Cong., 1st Sess. 1963.

relevant to this proceeding there was in effect the New Mexico Cigarette Fair Trade Practices Act, which fixed the minimum price at which a wholesale distributor of cigarettes might sell cigarettes to retailers. It is noteworthy that the statute does not set a minimum price for sales by cigarette manufacturers to direct buying retailers. Another significant feature of the New Mexico tobacco laws is the requirement that cigarette distributors or retailers affix the mandatory tax stamps to cigarette packages and cartons. Effective 1956, the statute was amended to require that all tax stamps for cigarette sales in New Mexico be affixed within the boundaries of that State. As a result, those chain stores in a position to buy direct from the manufacturer had the choice of either buying direct from the tobacco companies and setting up stamping facilities within New Mexico, at whatever cost that might entail, or purchasing from wholesalers such as Ponca, who would perform the stamping service for them.

Ponca's sales of stamped cigarettes to the chain stores involved in complaint counsel's appeal [4] were at a price slightly higher than the manufacturer's price to direct buying retailers and below the New Mexico fair trade price applicable to competing customers in the relevant trade areas. On the basis of a detailed evaluation of the testimony, the examiner concluded that had these chains not been able to purchase at the lower price from Ponca, they would have turned to the manufacturers for their cigarette supplies at a price lower than those of respondent and stamped the cigarettes themselves. We have reviewed the testimony of Ponca's officials, as well as that of the representatives of the chain stores, and agree that Ponca, at the time of the transaction challenged in this proceeding, had reason to assume in good faith that the prices in question were required to meet the equally low or lower prices of the major tobacco companies if respondent were to enjoy the cigarette business of these chains.[5]

Our finding that Ponca's lower cigarette prices were granted in good faith at the time respondent made such offers in order to meet a competitor's prices and that respondent's defense does not consist

[4] Safeway Stores, Inc., Foodmart, Inc., Furr's, Inc., and Skagg's Drug Stores, Inc.

[5] The other transactions involved in the appeal on the cigarette issue are Ponca's sales to Ace Mercantile Co. The sales to this customer apparently did not have the competitive significance attaching to Ponca's arrangement with Safeway, Furr's, Foodmart, or Skagg's. The defense, according to complaint counsel, must fail in the case of Ace, on the ground that this customer did not qualify for the lower price as a legitimate wholesaler. We are not persuaded that in this instance respondent was required to test the validity of the decision of state authorities granting Ace a wholesale tobacco license under the New Mexico cigarette and tobacco laws. Under the circumstances, irrespective of the extent of Ace's wholesale operations, it was reasonable for Ponca to infer that the lower price was necessary to meet the equally low price of its competitors.

merely of *ex post facto* rationalization, as suggested by complaint counsel,[6] is reinforced by the testimony of the representatives of the major cigarette companies delineating their involvement in sales to direct buying retailers. In view of the significance of the manufacturers' distribution in this area, it is inconceivable that this critical fact was unknown to tobacco wholesalers, such as Ponca, affected thereby.

Significantly, the examiner found that the testimony of the witnesses was corroborated by the actual events transpiring since the hearings, for when Ponca discontinued granting the discounts in question and raised Safeway's, Foodmart's, and Furr's cigarette prices to the New Mexico fair trade price, these stores commenced purchasing cigarettes direct from the manufacturer for use in their New Mexico stores. This, we agree, is convincing evidence that had Ponca not sold the cigarettes to these stores at the lower prices, they would have commenced cigarette purchases from the manufacturers for their operations in New Mexico at that time.

Before turning aside from the issues raised by Ponca's cigarette transactions, we need to refer specifically to only one of complaint counsel's contentions. Among other arguments, he urges strenuously that the meeting of competition defense is inapplicable on the ground that the manufacturers selling direct to the larger retailers were not competitors of Ponca. The argument is made that since manufacturers sell only cigarettes with no tax stamp affixed thereto, as opposed to the stamped cigarettes of Ponca, the cigarette companies and respondent are vending different product lines which are not in competition. This argument flies in the face of economic reality. As a practical business matter, it is obvious that Ponca and its suppliers, the manufacturers, are in competition in the sale of cigarettes to chain stores. Respondent's endeavors in this respect should not be subject to handicaps over and above those inherent in the situation by a strained and hypertechnical definition of competition not consonant with the realities of the market place.

In short, we find that respondent's challenged cigarette prices come within the sanction of Section 2(b) of the Act. That finding, in this instance, is compelled by the evidence as a whole and the minutiae in the record, which if viewed out of context might indicate a different result, cannot significantly detract from this conclusion. We note further the proceeding by the Commission in this instance against Ponca's discriminatory cigarette sales may well be largely academic in view of the injunction relating to these practices issued against respondent under the New Mexico statutes. The

[6] *Cf. Exquisite Form Brassiere, Inc., Docket* No. 6966 (1964) [p. 271 herein].

public interest will be better served by applying the Commission's limited funds and manpower to more current issues.

Ponca's candy sales also present the question of whether the allegedly illegal prices were granted in good faith to meet the equally low prices of its competitors. At the outset, we note complaint counsel concedes that Ponca justifiably lowered its prices in many instances to meet the equally low or lower prices of its competitors. Complaint counsel, however, does challenge the examiner's findings that the allegedly discriminatory sales to the Walgreen Drug Store, Skagg's Drug Stores, and Speedway Food Stores, Inc., as well as to the Arrow Supermarket, were granted to meet the competition of either the manufacturer or other wholesalers. With the exception of the Arrow Supermarket, we find that there is sufficient evidence to sustain the examiner's findings on this point. Since the defense is concededly applicable in so many of the candy transactions under consideration, we are not inclined to disturb in the other instances the examiner's findings, resting on the whole record, on the basis of the more or less isolated facts suggested by complaint counsel. In the case of the Arrow Supermarket, the evidence does seem insufficient to justify the finding. In this connection we note, however, that the Arrow Supermarket is apparently not a strong competitor in the Albuquerque area. In fact, the owner or operator of this concern was put on the stand by complaint counsel to testify with respect to the allegedly adverse effect on smaller competitors stemming from Ponca's cigarette sales. In this instance we are not inclined to infer that the lower candy prices granted to the Arrow Supermarket may be reasonably expected to have the adverse effect on competition required by the statute.

Since Ponca's cigarette and candy sales in the Roswell and Albuquerque markets, with the one exception noted above, are within the sanction conferred by Section 2(b) of the Clayton Act, as amended, the complaint will be dismissed on that basis. To the extent that the hearing examiner's findings are consistent with our disposition of this matter as outlined in this opinion, they are adopted. Those portions of the initial decision which conflict with or which go beyond our decision are vacated. We also note that respondent, although it has not taken a formal appeal from the examiner's initial decision, did take at least informal exception to certain of the findings. Since our decision disposes of this matter in its entirety by affirming the dismissal of the complaint, there is no necessity for a ruling on the questions raised by Ponca's contentions.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

This matter has been heard on complaint counsel's appeal from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that the findings contained in the initial decision should be adopted only to the extent that they are consistent with the Commission's decision. Accordingly,

It is ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with the accompanying opinion.

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

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

HEAVENLY CREATIONS, INC., ET AL.

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

Docket 8448. Amended and Supplemental Complaint, June 13, 1962—Decision Feb. 25, 1964

Order requiring New York City distributors of various articles of merchandise to distributors, jobbers and retailers, to cease advertising and preticketing their goods at inflated prices, misrepresenting by words or pictures that certain of their products are of foreign origin, falsely implying that their merchandise has been extensively advertised or that certain articles have different capacities or sizes than is true, misrepresenting the identity of any guarantors of their products, furnishing retailers with means to deceive the purchasing public; and to cease selling textile fiber products without disclosing the generic name and other information required by the Textile Fiber Products Identification Act.

AMENDED AND SUPPLEMENTAL 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 Heavenly Creations, Inc., a cor-

poration, J. B. Promotions, Inc., a corporation, Americana Star Silver Corp., a corporation, and Sam S. Goldstein and Sylvia Goldstein, individually and as copartners trading as Sun Gold Industries and as officers of each of said corporations, 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 Heavenly Creations, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1220 Broadway in the city of New York, State of New York.

Respondent J. B. Promotions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at the above stated address.

Respondent Americana Star Silver Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at the above stated address.

Respondents Sam S. Goldstein and Sylvia Goldstein are individuals trading as a copartnership under the name of Sun Gold Industries. Said individual respondents are the sole officers and with other members of their family they own substantially all of the stock in each of the aforesaid corporations. They formulate, direct and control the acts and practices of each of the corporate respondents, including the acts and practices hereinafter set forth. Their office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of perfumes, coffeemakers, women's lingerie, tableware, tablecloths, luggage, blankets, office machines, household furniture, and other merchandise to distributors and jobbers, to retailers for resale to the public and to the public.

Respondents function at several different levels in the sale and distribution of the aforesaid goods. In some instances respondents act as distributors and purchase directly from manufacturers for their own account and resell the goods to distributors, jobbers and

retailers. In other instances respondents act as manufacturers' sales representatives and solicit orders which are filled directly by the manufacturers. In yet other instances respondents have their own door-to-door salesmen who sell certain of the aforesaid goods directly to the consuming public.

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

In those instances where respondents act as manufacturers' sales representatives the aforesaid goods may be shipped from the manufacturers' warehouses or factories located in any one of the several states to the purchasers thereof located in various other states of the United States.

PAR. 4. Subsequent to the effective date of the Textile Fiber Products Identification Act of March 3, 1960, respondents have been and are now engaged in the introduction, sale, advertising, and offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the transportation 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 which were made of other textile products so shipped in commerce; as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of their said products, respondents have made certain statements in advertising and in labeling with respect to the public's acceptance, extent of advertising, price, origin, quality, guarantee, manufacturer and other characteristics of said products. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

1. On an advertising flyer or circular which features a picture of the Eiffel Tower appear the words: "Paris Inspired Ellyn Deleith Golden Ensemble Magnificent Blue Flame Fragrance Inspired in France * * * Complete 4 Pc. Set $25 * * * ED Ellyn Deleith, Inc. Eau de Toilette Distributor New York * * *

Nationally advertised since 1940 Vogue, Mademoiselle, Harpers Bazaar * * * ED Ellyn Deleith Parfum".

Substantially similar advertisements are disseminated for respondents' one ounce package of Blue Flame Perfume and respondents' Blue Flame Atomizer except that the price amounts are stated to be $16.50. Said perfumes also carry preticketed price amounts of $16.50.

2. Respondents' dinner cloth and napkins are packaged in a green and white box bearing the words, "Bride O Erin Imported Damask Tablecover with 8 Matching Napkins". The center of the "O" is filled with the picture of a shamrock. Inside the box is a flyer which is also used as a part of respondents' catalog and for other advertising purposes. The said flyer reproduces the exterior of the box and in addition contains the statement, "Imported Damask Dinnercloth and 8 Full Size Dinner Napkins Complete 9-Piece Ensemble $19.95 Bride O Erin (with the shamrock reproduced inside the "O")". Packaged beneath the aforesaid flyer and attached to the said cloth is a shield-shaped paper label which is pasted lightly to the tie strings holding the tablecloth and napkins together inside the box. This label, done in the motif of English heraldry, prominently features 2 lions, a crown and other ornaments strongly suggestive of Great Britain and a harp strongly suggestive of Ireland. Inconspicuously printed on the bottom of said label are the words "Made in Japan".

3. Respondents' advertisement for one of its blankets reads in part as follows, "The Macgregor plaid sportster blanket * * * rayon orlon * * * As Advertised in Life".

Respondents have also used the expression "As Advertised in Life" to describe other kinds and styles of blankets, typewriters, adding machines, women's lingerie, and various other articles of merchandise.

The word "Macgregor" is very prominently displayed. The word "plaid" is comparatively inconspicuous. The letters used in the word "Macgregor" in pattern and configuration are an almost exact copy of the letters used in the word "McGregor" by McGregor-Donninger Inc., 666 Fifth Avenue, New York, New York and duly registered as its trademark in the United States Patent Office. The same type of advertising is used by respondents to describe various other articles of merchandise offered for sale by them.

4. In advertising their tableware for sale respondents' advertising reads in part: "Americana Star Masterpiece Creation of Lifetime Stainless by International Silver Co. 50 pieces complete service for 8 suggested retail $29.95 * * * Lifetime Guarantee. Unconditionally warranted against any defects in materials or workmanship at any time. Made in the U.S.A. by the International Silver Co." Other advertisements for tableware carry the additional representation. "Nationally advertised in House Beautiful, Saturday Evening Post". Certain advertisements substitute "Better Homes and Gardens" for "House Beautiful".

5. In advertising their "Flavoramic Coffeemaker" respondents have stated, "15-cup * * * Perfect for serving at home, lodge, club, church, school, office restaurant, shop, etc."

6. In advertising their "Starlight Blanket" respondents' advertising reads in part, "With the cashmere look and feel * * * 90% rayon 10% nylon DuPont 100% nylon binding * * * Nationally advertised Life, Look, New Yorker".

The words "90% rayon 10% nylon" appear in comparatively small type. The expression "DuPont 100% nylon binding" appears in very large and conspicuous type.

Respondents have used this same type of advertising to describe various other blankets offered for sale by them.

7. In addition to the foregoing price amounts appearing in advertising and in preticketing, respondents have in advertising and in labels affixed to various articles, used the following: "Miss Wonderfit Peignoir Ensemble—$19.95"; "Flavoramic Coffeemaker—$29.95"; "Edgebrook Service Set—$29.95"; "Macgregor Plaid Luggage Set—$29.95" and for other merchandise various price amounts have been used.

PAR. 6. Through the use of the aforesaid statements and others of similar import and meaning not herein specifically set forth, respondents have represented directly or indirectly:

1. That the aforesaid price amounts, whether accompanied or unaccompanied by words or terms such as "suggested retail", were the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale.

2. Through the use of the picture of the Eiffel Tower, the words "Paris Inspired" and "Inspired in France", particularly in the context of advertisements containing fictitiously high price amounts, representations of being nationally advertised, representations that Ellyn Deleith is a distributor and other representations contained in the above-quoted advertisements of respondents' Blue Flame perfume, that said perfume was manufactured or compounded in France.

3. Through the use of the trade name "Bride O Erin" and the picture of a shamrock, particularly against the green background, along with the word "imported" and other representations suggestive of the British Isles, that said tablecloth and napkins were made in Ireland.

4. That the said blankets and other articles of merchandise described with the term "Macgregor", in the manner hereinabove set forth, were the products of McGregor-Donniger, Inc., 666 Fifth Avenue, New York, New York.

5. That said perfume has been frequently and continuously advertised from 1940 to the present time in Vogue, Mademoiselle and Bazaar magazines, that the specific articles hereinabove described have been frequently and continuously advertised in Life, Look or New Yorker magazines and that said tableware has been frequently and continuously advertised in House Beautiful, Saturday Evening Post and Better Homes and Gardens magazines.

6. Through the use of the words "lifetime guarantee" in the above context, that said tableware is unconditionally guaranteed for the life of the purchaser, the life of the product or some other extended, but unspecified period of time by The International Silver Company of Meriden, Connecticut.

7. That said coffeemaker when used as directed has the capacity to make or brew and will in fact so make or brew with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve fifteen cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc.

PAR. 7. In truth and in fact:

1. The aforesaid amounts whether accompanied or unaccompanied by words or terms such as "suggested retail" were not the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale, but said amounts were in excess of the price or prices at which the merchandise was generally sold in said trade areas.

2. Said perfumes were not manufactured or compounded in France.

3. Said tablecloths and napkins were not made in Ireland. Said tablecloths and napkins were made in and imported from Japan.

4. Said blankets and other articles of merchandise designated by the trade name "Macgregor" were not the products of McGregor-Donniger, Inc., 666 Fifth Avenue, New York, New York.

5. Said perfumes have not been frequently and continuously advertised from 1940 to the present time in Vogue, Mademoiselle, or Bazaar magazines. Said blankets and other articles of merchandise have not been frequently and continually advertised in Life, Look or New Yorker magazines. Certain of said products have never been advertised in Life, Look or New Yorker magazines. Others of said products have been the subject only of inconspicuous, infrequent, isolated institutional type advertisements. Said tableware has not been frequently and continuously advertised in House Beautiful, Saturday Evening Post and Better Homes and Gardens magazines. Said products have been the subject only of inconspicuous, infrequent, isolated institutional type advertisements.

6. Said tableware is not unconditionally guaranteed for the life of the purchaser, the life of the product or some other extended, but unspecified period of time by The International Silver Company, Meriden, Connecticut. Such guarantee as may be afforded in connection with said tableware is provided by respondents. Said purported guarantee is, therefore, wholly deficient in that it does not clearly and conspicuously disclose the nature, extent, and duration of the guarantee, the manner in which the guarantor will perform thereunder and the identity of the guarantor.

7. Said coffeemaker when used as directed does not have the capacity to make or brew and will not in fact make or brew with one

filling of the necessary ingredients and at one time sufficient coffee to fill or serve fifteen cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc. The cups of coffee above referred to by respondents are only of four ounces net content. The usual and customary cups of coffee served in homes, lodges, clubs, churches, schools, offices, restaurants, etc. contain substantially more than four ounces net.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 8. The aforesaid expression "Made in Japan" inconspicuously imprinted on the said small sticker, which itself strongly suggests the British Isles, and contained within a box which with its accompanying advertising flyer affirmatively represents that the said tablecloth and napkins were made in Ireland, is wholly and completely inadequate to advise or apprise purchasers that said products are manufactured in Japan.

PAR. 9. There is a preference on the part of a substantial portion of the purchasing public for perfumes, toilet waters and cosmetics manufactured or compounded in France and for tablecloths and napkins manufactured in Ireland. There is also a preference on the part of a substantial portion of the purchasing public for the products of said McGregor-Donniger, Inc., 666 Fifth Avenue, New York, New York, which said products are nationally advertised and widely sold.

PAR. 10. By the aforesaid practices respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead and deceive the public as to the quality, identity, origin and usual and regular selling price of said products.

PAR. 11. 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 the aforesaid products sold by respondents.

PAR. 12. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken beliefs.

PAR. 13. Certain of said textile fiber products were deceptively advertised in violation of the Textile Fiber Products Identification

Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act of certain promotional literature concerning said products, which was not in accordance with the provisions of Section 4(c) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said textile fiber products.

PAR. 14. Among and included in the advertisements as aforesaid, but not limited thereto, was the promotional literature hereinbefore quoted from in Paragraph Five which was disseminated in "commerce" as above described.

By means of said promotional literature and other promotional literature, not specifically referred to herein, respondents falsely and deceptively advertised textile fiber products in that said promotional literature:

1. Failed to disclose the generic name of each manufactured fiber as defined in the Rules and Regulations promulgated under said Act, in violation of Section 4(b)(1) of the Textile Fiber Product Identification Act.

2. Failed to disclose all parts of the required information in immediate conjunction with each other in legible or conspicuous type or lettering of equal size and prominence, in violation of Rule 42(a) of the said Rules and Regulations.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged in the aforesaid paragraphs 13 and 14, are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and along with the other aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Terral A. Jordan for the Commission.

Bader and Bader, New York, N.Y., by *Mr. I. Walton Bader* for respondents.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JANUARY 11, 1963

The Federal Trade Commission on October 31, 1961, issued and subsequently served its complaint against the individual respondents

named in the caption hereof, individually and as copartners. After answer to the complaint was filed, counsel supporting the complaint filed a motion to amend, which was certified to the Commission for its determination.

On June 13, 1962, the Commission issued and subsequently served its amended and supplemental complaint, charging the respondents named in the caption hereof with violations of the Federal Trade Commission Act and the Textile Fiber Products Identification Act and the Rules and Regulatons thereunder, through alleged misrepresentations involving fictitious prices, foreign origin, trade names, extent of national advertising, guarantees, the capacity of coffeemakers, and failure to disclose certain textile information. The respondents admitted some and denied some of the allegations of the amended and supplemental complaint, and asserted several "separate" defenses. The issues were joined and all of the subsequent proceedings herein have been under the amended and supplemental complaint. Any further references herein to the complaint are intended to refer to the amended and supplemental complaint.

A prehearing conference, which was stenographically reported and, by agreement of the parties, made a part of the public record, was held in Washington, D.C., on September 27, 1962. At that conference agreements and stipulations were entered into by counsel for the parties, exhibits were offered and received in evidence, and rulings were made by the hearing examiner with respect to questions of official notice and the relevancy and materiality of certain evidence which counsel proposed to offer. The prehearing conference resulted in substantially narrowing the issues remaining to be tried, and in the presentation of very limited additional evidence. Hearings in support of and in opposition to the complaint were held in New York, New York, on October 22 and 23, 1962, and, at the conclusion of those hearings, both sides rested. The record of evidence, including the prehearing conference, consists of 356 pages of transcript, 34 Commission exhibits, and 4 respondent exhibits. An additional exhibit offered by respondents was rejected.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties, which are not adopted herein either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Heavenly Creations, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1220 Broadway in the City of NewYork, State of New York.

2. Respondent J. B. Promotions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at the above stated address.

3. Respondent Americana Star Silver Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at the above stated address.

4. Respondents Sam S. Goldstein and his wife, Sylvia Goldstein, are individuals trading as a copartnership under the name of Sun Gold Industries. Said individual respondents are the sole officers and with other members of their family they own substantially all of the stock in each of the aforesaid corporations. Their office and principal place of business is located at the above stated address.

5. Respondent Sam S. Goldstein dominates and controls all of the corporate respondents in this proceeding. It is stipulated, in effect, that it is through him that all of their acts and practices are performed, and that differentiation between the acts and practices of the several corporate respondents is of no consequence for the purposes of this proceeding. The answer to the amended and supplemental complaint admits the individual responsibility of respondent Sylvia Goldstein. Each of the respondents is, accordingly, equally involved in and responsible for the acts and practices of any of them, and reference hereinafter to respondents is intended to include all of the respondents, collectively and severally.

6. Respondents are now, and for some time have been, engaged in the advertising, offering for sale, sale and distribution of perfumes, coffeemakers, women's lingerie, tableware, tablecloths, luggage, blankets, office machines, household furniture, and other merchandise to distributors and jobbers, to house-to-house salesmen, and to retailers for resale to the public. They do not sell directly to consumers.

7. Respondents function at several different levels in the sale and distribution of aforesaid goods. In some instances respondents act as distributors and purchase directly from manufacturers for their

own account and resell the goods to distributors, jobbers, retailers, and house-to-house salesmen. In other instances respondents act as manufacturers' sales representatives and solicit orders which are filled directly by the manufacturers.

8. In the course and conduct of their business, respondents now cause, and for some time have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States and 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.

9. In those instances where respondents act as manufacturers' sales representatives, the aforesaid goods may be shipped from the manufacturers' warehouses or factories located in any one of the several States to the purchasers thereof located in various other States of the United States.

10. 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 the aforesaid products sold by respondents.

11. In the course and conduct of their business, and for the purpose of inducing the sale of their said products, respondents have made certain statements in advertising and in labeling which are alleged to be false, misleading and deceptive in various respects. The statements specifically challenged are alleged to be typical and illustrative, but not all inclusive, and the advertising in evidence discloses additional statements of similar character and meaning to most of those specifically challenged. The answer admits that the respondents have disseminated advertising material which contained the challenged statements, but objects to the "characterizing" language used in the complaint. In the following sections, each of the charges of false, misleading and deceptive advertising and labeling will be separately discussed.

Fictitious Prices

12. In advertising various articles of merchandise, and in some instances in labels affixed thereto, respondents have included price amounts, either alone or in connection with "suggested retail" or words of similar import. Typical and illustrative of such advertising labeling are the following:

Ellyn Deleith Perfume * * * $16.50;

Ellyn Deleith Golden Ensemble * * * Blue Flame fragrance * * * Complete 4 pc. set, $25;
Imported Damask Dinner Cloth and 8 Full Size Dinner Napkins, complete 9-pc. Ensemble $19.95;
Americana Star Masterpiece Creation of Lifetime Stainless * * * 50 pieces complete service for 8, suggested retail, $29.95;
Miss Wonderfit * * * 2 pc. Peignoir Ensemble * * * $19.95;
15 Cup Flavoramic Coffeemaker * * * manufacturers suggested retail, $29.95;
Edgewood * * * 52 pieces * * * Complete service for 8 $29.95;
MacGregor Plaid 3 Pc. * * * Luggage Set * * * $29.95.

For other merchandise, various price amounts have been used.

13. Respondents have discontinued the sale of certain of the aforesaid articles of merchandise, and have discontinued advertising price amounts in connection with certain of the other aforesaid articles. They have, however, continued to advertise price amounts in connection with some of the aforesaid articles, and in connection with other articles of merchandise not specifically referred to in the foregoing statements. The foregoing statements are typical and illustrative of respondents' current advertising of price amounts in connection with many of the articles of merchandise which they offer for sale and sell.

14. Through the use of the foregoing statements, and others of similar import, respondents have represented that the price amounts, whether used alone or in connection with words or terms such as "suggested retail", were the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale. No evidence was offered, and none was required in the present record, to establish this meaning. This is the common and ordinary meaning of price amounts when used in advertising, and is the meaning of such advertising as determined by the Commission in many prior proceedings.

15. Respondents contend that sporadic sales of their merchandise were made at the advertised prices by firms employing house-to-house canvassers, and that the advertised price amounts were in accordance with the normal and customary markups utilized by such firms. The evidence discloses that in the house-to-house selling industry, although there is tremendous variation from item to item and firm to firm, the average markup will run between three and four times cost. There is also evidence that respondents sell to firms in this industry, and that the markups represented by the price amounts in their advertising are generally in accord with the average markups in the industry. There is no evidence of specific sales of respondents' merchandise by house-to-house canvassers. From the evidence as a whole, however, it is inferred that, as proposed by respondents,

articles of merchandise purchased from respondents were sold by firms employing house-to-house canvassers at the price amounts advertised by respondents, but such sales were of a sporadic nature.

16. It was stipulated, and it is found, that the foregoing prices of tableware, and other prices of tableware used in respondents' advertising, were not the prices at which the tableware referred to was usually and customarily sold in retail stores in all of the trade areas in which it was offered for sale, but said amounts were in excess of the prices at which the tableware was sold in retail stores in said trade areas. It was also stipulated, and it is found, that except with respect to tableware, the foregoing prices and other prices used in respondents' advertising were not the prices at which the merchandise referred to was usually and customarily sold at retail by any means in all of the trade areas in which it was offered for sale, but said amounts were in excess of the prices at which the merchandise was generally sold in said trade areas.

17. Respondents' advertising of price amounts, either alone or in connection with "suggested retail" or words of similar import, is, therefore, false, misleading and deceptive.

18. Respondents assert that they intend to utilize the term "comparative value" in place of the term "suggested retail" in connection with their price advertising of tableware. The use of the term "comparative value", however, is not in issue in this proceeding. An offer to prove the comparative retail value of articles of merchandise offered for sale and sold by respondents, which offer was made by respondents during the prehearing conference, was denied.

19. It is respondents' position that the basic issue in this proceeding involves the charge of fictitious pricing, and that the proposed order on that charge would be in violation of the constitutional rights of the respondents. They contend that the Commission is aware that the practice of fictitious pricing is in use in the retail sale of automobiles, and that it does not propose to proceed against it; and they urge, in effect, that any action against them for similar practices would deny to respondents equal protection of the laws, and would, therefore, deprive them of due process of law.

20. During the prehearing conference, counsel for respondents proposed to offer evidence that fictitious pricing is in general use in the retail sale of automobiles, and that the Commission is aware of the practice and has taken no action with respect to it. At that time, the hearing examiner ruled, in effect, that such evidence would not be relevant to the issues here involved, and would be rejected if offered.

21. In *The Baltimore Luggage Company, et al* v. *F.T.C.* (296 F. 2d 608, C.A. 4, 1961), the court recognized that the Automobile Information Disclosure Act, adopted July 7, 1958, which requires "a

species of preticketing", was enacted "to remedy a situation peculiar to the automobile industry", but that "There is nothing in this Act to indicate that fictitious or deceptive preticketing has Congressional approval." There is no suggestion that respondents may be competitively affected by practices which may prevail in the retail sale of automobiles, and no consideration has been urged which would bring the use of any practices which may prevail in that industry within the ambit of this proceeding. Whether or not the practice of fictitious pricing is in general use in the retail sale of automobiles, either within or outside the requirements of the Automobile Information Disclosure Act, would constitute no justification for respondents to continue their deceptive price advertising.

22. Respondents also contend that, if they should attempt to control the retail prices of the products which they sell, they would be in violation of another law administered by the Commission. There is nothing in the order proposed by counsel supporting the complaint which would require respondents to control the resale prices of their products. The realities of retail competition make it unlikely that, in seeking to comply with any order which may be entered, they would undertake to maintain artificially high retail prices such as those which they have advertised, or that any effort to do so could succeed. This contention of respondents, accordingly, warrants no further consideration.

French Origin of Perfume

23. Flyers or circulars used by respondents in advertising "Ellyn Deleith Blue Flame" perfume and cologne feature a picture of the Eiffel Tower in connection with the words "Paris Inspired", and in some instances include the words "fragrance inspired in France". These advertisements also contain fictitiously high price amounts, representations of being nationally advertised, and representations that Ellyn Deleith is a distributor.

24. This advertising was used by respondents prior to January 1, 1960, and was discontinued as of that date, and respondents discontinued selling, distributing or promoting the sale of all "Ellyn Deleith" products on or about January 1, 1960. Their 1962 catalog, however, contains a strikingly similar advertisement of "Mona de Lise" perfume. In any event, there is nothing in the record to show that the advertising here challenged has been permanently discontinued and will not be resumed. There is, therefore, a continuing public interest with respect to respondents' use of such advertising.

25. It is alleged that in the context of this advertising respondents represent that the perfume was manufactured or compounded

in France. It was stipulated that the perfume was not manufactured or compounded in France; and with the consent of respondents official notice was taken that there is a preference on the part of a substantial portion of the purchasing public for perfumes, toilet waters, and cosmetics manufactured or compounded in France.

26. No additional evidence was offered as to the meaning of the advertisements, reliance being placed upon the Commission's examination and determination, on the basis of its judgment and experience, as to whether or not the advertising conveys the representation that the perfume was manufactured or compounded in France.

27. It is the view of the hearing examiner that the first impression likely to be created by the advertisements here in question is that the "Paris Inspired" perfume is of a type or fragrance generally associated with French perfumes. The representation seems to be that the fragrance was inspired by French perfume, and that it is being offered as an imitation or simulation of such perfume. This first impression falls substantially short of a representation or reasonable inference of French production. More critical examination of the advertisements discloses in smaller, but clear and not inconspicuous print, the words "Manufacturer Frank P. Becker, Inc., New York, New York". Any residual doubt concerning the origin of the perfume should, accordingly, be readily resolved even by a casual observer.

28. The fictitiously high price amounts, and representations of being nationally advertised, which appear in these advertisements, are deceptive and are dealt with elsewhere in this decision, but in the context of the advertisements as a whole, they contribute little, if anything, to an impression or representation of French origin. Similarly, the representation that Ellyn Deleith is a distributor, which is not otherwise challenged, does not materially contribute to an impression of French origin.

29. In the absence of other evidence concerning the meaning of these advertisements, therefore, it is the opinion of the hearing examiner that the charge that respondents have represented, directly or indirectly, that Ellyn Deleith "Blue Flame" perfume was manufactured or compounded in France has not been sustained.

Irish Origin Of Tablecloths

30. Respondents have sold a dinner cloth and napkins packaged in a green and white box bearing the words "Bride O Erin Imported Damask Table Cover with eight matching napkins". The center of the "O" is filled with the picture of a shamrock. Inside the box

was a flyer which was also used as a part of respondents' catalog and for other advertising purposes. The said flyer reproduces the exterior of the box and, in addition, contains the statement: "Imported Damask Dinner Cloth and 8 Full Size Dinner Napkins * * * Bride O Erin" (with the shamrock reproduced inside the "O"). Also in the box, packaged beneath the aforesaid flyer, were a tablecloth and napkins in a cellophane wrapper. A shield-shaped paper label was pasted lightly to the tie strings holding the tablecloth and napkins together inside the cellophane wrapper. This label contains a design in the motif of English heraldry, prominently featuring a lion, a crown, and other ornaments strongly suggestive of Great Britain. Printed on the bottom of said label in clear, but small, type are the words "Made in Japan". Pasted near the bottom of the outer section of said tablecloth was also a small paper label containing the words "Made By Nichibo In Japan".

31. On or about January 1, 1960, respondents discontinued the practice of marketing the aforesaid tablecloth and napkins under the trade name "Bride O Erin", and said products are currently being marketed under the trade name "Heavenly Damask Dinner Ensemble". Respondents assert that they will not in the future promote, sell or distribute such products of Japanese origin under the trade name "Bride O Erin".

32. Respondents' assertion in an affidavit, which was received in evidence, that they will not in the future promote, sell or distribute the tablecloth and napkins here in question under the challenged trade name does not constitute a showing that similar questionable advertising of these or other products has been permanently discontinued by respondents and will not be resumed. There is, therefore, a continuing public interest with respect to respondents' use of such advertising.

33. No additional evidence was offered as to the meaning of this advertising, reliance being placed upon the Commission's examination and determination, on the basis of its judgment and experience, as to whether or not the advertising conveys the representation that the tablecloth and napkins were made in Ireland.

34. It is officially noticed that the name "Erin" means Ireland; that the shamrock is a plant and an emblem long used by and associated with the Irish; and that the Irish have historically used green as their identifying color. In the combination used by respondents the purpose and meaning of the advertising emerge with compelling clarity. The trade name "Bride O Erin", which included the picture of a shamrock and which was printed on a green background, along with other pictorial representations suggestive of the British Isles,

involves a combination which clearly has the capacity and tendency to convey the impression that the tablecloth and napkins were made in Ireland, and it is self-evident that it was respondents' purpose to convey that impression.

35. It is the opinion of the hearing examiner that through such advertising respondents have represented that the tablecloth and napkins were made in Ireland. The small print on the labels physically attached to the tablecloth and napkins inside the box, disclosing that they were made in Japan, was inadequate to overcome that representation. Even this disclosure was not made on the outside of the box, or on the flyer which was contained inside the box and which was also used as a part of respondents' catalog and for other advertising purposes.

36. It was stipulated, and it is found, that the tablecloth and napkins in question were not made in Ireland, but were made in and imported from Japan; and with the consent of respondents, official notice was taken, and it is found, that there is a preference on the part of a substantial portion of the purchasing public for tablecloths and napkins manufactured in Ireland. Respondents' advertising that "Bride O Erin" tablecloths and napkins were made in Ireland was, therefore, false, misleading and deceptive.

"MacGregor"

37. The complaint charges that respondents have used the word "MacGregor", in connection with certain of the products which they have advertised and offered for sale, in such manner as to represent them as "the products of McGregor-Donniger, Inc., 666 Fifth Avenue, New York, New York". With respect to this charge, counsel supporting the complaint proposed the following finding:

> Respondents, since 1961, have abandoned the use of the word "MacGregor" in connection with their business operations without intent to resume. Said discontinuance was pursuant to an order of the Supreme Court of New York, New York County, so that there appears to be virtually no likelihood of a resumption of the practice. (Proposed findings, p. 14.)

38. The foregoing finding proposed by counsel supporting the complaint is fully supported by the evidence, and it is hereby adopted. This charge of the complaint will, accordingly, be dismissed.

National Advertising

39. Flyers, circulars and other advertising used by respondents have included the following representations: "Nationally Advertised

since 1940-Vogue, Mademoiselle, Harper's Bazaar", in connection with Ellyn Deleith perfume; "Advertised In Life", in connection with The MacGregor Sportster Blanket, and other kinds and styles of blankets, adding machines, women's lingerie, and various other articles of merchandise; "Nationally advertised in House Beautiful, Saturday Evening Post" and "Nationally advertised in Better Homes and Gardens, Saturday Evening Post" in connection with tableware; and "Nationally Advertised Life, Look, New Yorker" in connection with Starlight Blankets and certain other blankets.

40. No additional evidence was offered as to the meaning of these representations. In the context of the advertising as a whole, however, it is clear that, through the use of the aforesaid statements, respondents have represented that said perfume has been frequently and continuously advertised from 1940 until the present time in Vogue, Mademoiselle and Bazaar magazines, that the specific articles hereinabove described have been frequently and continuously advertised in Life, Look and New Yorker magazines, and that said tableware has been frequently and continuously advertised in House Beautiful, Saturday Evening Post, and Better Homes and Gardens magazines.

41. The evidence, consisting of stipulations and exhibits, discloses that said perfume has not been frequently and continuously advertised from 1940 to the present time in Vogue, Mademoiselle or Bazaar magazines; that said blankets and other articles of merchandise have not been frequently and continuously advertised in Life magazine; that certain of said products have never been advertised in Life magazine; that others of said products have been the subject of only inconspicuous, infrequent, isolated institutional type advertisements; that said tableware has not been frequently and continuously advertised in House Beautiful, Saturday Evening Post, or Better Homes and Gardens magazines, but has been the subject only of inconspicuous, infrequent, isolated institutional type advertisements.

42. There is no evidence that said blankets were not advertised in Look and New Yorker magazines, and counsel supporting the complaint has abandoned such allegations with respect to those magazines.

43. Respondents' advertising that certain of their products have been frequently and continuously advertised from 1940 to the present time in Vogue, Mademoiselle, or Bazaar magazines, and that certain of their products have been frequently and continuously advertised in Life, House Beautiful, Saturday Evening Post or Better Homes and Gardens magazines is, therefore, false, misleading and deceptive.

Guarantee

44. In advertising their tableware for sale, respondents' advertising reads, in part: "Lifetime Guarantee. Unconditionally warranted against any defects in materials or workmanship at any time. Made in U.S.A. by The International Silver Co." These statements are set apart from the rest of the advertising by a contrasting color background, and are made in sequence and in apparent continuity. Elsewhere in the advertising, the name of The International Silver Company is prominently featured, and the respondents are not specifically identified.

45. The complaint charges that in the context of this advertising, the tableware is unconditionally guaranteed for the life of the purchaser, the life of the product or some other extended, but unspecified period of time by The International Silver Company of Meriden, Connecticut; that such guarantee as may be afforded is provided by respondents; and that the guarantee is deficient in that it does not disclose the nature, extent and duration of the guarantee, the manner in which the guarantor will perform thereunder, and the identity of the guarantor.

46. There is no evidence that anyone has been confused or deceived by the guarantee advertising, that respondents have failed to satisfy any claims under the guarantee, or that any such claims have been made. There is likewise no evidence concerning the meaning of the guarantee advertising, reliance being placed upon the meaning to be drawn by the Commission from the representations in the context in which they are made. The evidence discloses that the guarantee is not provided by The International Silver Company, but that such guarantee as is afforded in connection with the tableware is provided by respondents.

47. In April of 1960 the Commission adopted and published "Guides Against Deceptive Advertising of Guarantees", which provide, in pertinent part, that any guarantee in advertising shall clearly and conspicuously disclose: the nature and extent of the guarantee; what, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation; the manner in which the guarantor will perform; and the identity of the guarantor. (25 F.R. 3772)

48. The Commission has stated that its "Guides" "are not substantive law in and of themselves", but that they constitute "a codification of the interpretive rules which the Commission and the courts have applied * * *." They are "promulgated after lengthy and detailed study of all pertinent decided cases and are the

end product of continuous official observation of advertising practices and consumer reaction from the founding of the Commission to the date of publication." The Commission has made it clear that the Guides "serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out." (Opinion, Docket No. 7834, *Gimbel Brothers, Inc.*, July 26, 1962 [61 F.T.C. 1051, 1073].) The Guides Against Deceptive Advertising of Guarantees must be applied here on that basis.

49. It is the opinion of the hearing examiner that respondents' advertising clearly and conspicuously discloses the nature, extent and duration of the guarantee. The advertising specifically states that it is an unconditional lifetime guarantee against any defects in materials and workmanship at any time. Since there is nothing in the advertising or evidence to suggest otherwise, this must be interpreted, under Section IV of the "Guides", as relating to the life "of the purchaser or original user." The guarantee which is received with the tableware is consistent with the advertising. It provides that "Every piece is guaranteed against defects in workmanship and material," without providing any limitation as to time.

50. The advertising does not specifically disclose "what, if anything, anyone claiming under the guarantee must do." As used in the Guides, this appears to be a requirement designed to protect the purchaser against undisclosed difficult, burdensome or costly procedures to obtain satisfaction under the guarantee. The guarantee which is received with the tableware includes a card for the name and address of the dealer and of the purchaser, and the date of purchase, together with the statement: "To validate your guarantee this card must be mailed within 10 days." This is a reasonable identification procedure which involves no substantial difficulty or burden. There is nothing in the guarantee or in the evidence to indicate that the product must be returned or that a labor or service charge must be paid. Since there is no evidence of any unsatisfied claims, or claims of any kind under the guarantee, it must be assumed that any sort of notification to respondents of defects in materials or workmanship of the tableware is sufficient to obtain performance of the guarantee. In these circumstances it is the opinion of the hearing examiner that the advertising is not deficient in this respect.

51. Similarly, the advertising does not specifically disclose "the manner in which the guarantor will perform." In the absence of evidence of unsatisfied claims, or any claims under the guarantee, or of any limitation of respondents' obligation to perform thereunder, it

must be assumed that the respondents will perform in a manner satisfactory to the purchaser. Accordingly, it is the opinion of the hearing examiner that the advertising is not deficient in this respect.

52. Finally, the guarantee does not disclose that respondents are the guarantors. On the contrary, the clear meaning of the advertising is that the guarantor is The International Silver Company, and the advertising does not specifically identify respondents even as the sellers. There can be little doubt that a guarantee by a nationally known manufacturer, such as The International Silver Company, is likely to cause a substantial segment of the purchasing public to have greater confidence in the merchandise involved than the same guarantee, however well performed, by these respondents, and to purchase the merchandise on that basis. Such a misrepresentation is unfair both to consumers and to competitors. Since the only guarantee of the tableware in question is provided by respondents, the advertising is false, misleading and deceptive because it does not disclose the identity of the guarantor.

Coffeemaker Capacity

53. In advertising their "Flavoramic Coffeemaker", respondents have stated: "15-Cup * * * Perfect for Serving at Home-Lodge-Club-Church-School-Office-Restaurant-Shop-Catered Affairs-Etc." In effect, it is charged that through such advertising respondents have overstated the capacity of their coffeemaker. This is the only charge upon which the testimony of witnesses was offered in support of the complaint.

54. It was stipulated that the coffeemaker here in question will hold a maximum of sixty ounces of cold water in such a way that coffee may then be properly brewed in it.

55. A buyer for the fifth or sixth largest retail department store in New York City testified that in the course of his duties he buys coffeemakers from various manufacturers, and that those manufacturers designate the size of their coffeemakers by the number of cups they will hold. It is his understanding that such designations are based upon cups which will hold five ounces or more of coffee.

56. Four witnesses who were qualified as experts testified in support of the complaint concerning industry practice and consumer understanding with respect to the capacity of coffeemakers and coffee cups, and concerning the brewing of coffee. No witnesses were offered in opposition to this testimony. The testimony of these witnesses was based upon their experience and upon tests which were conducted by them or under their supervision. While the emphasis

of their testimony varied in some particulars, they were substantially in agreement on all essential points. Their testimony provides a solid basis for factual findings on the questions with respect to which they testified.

57. The recipe for making coffee which has long been generally recognized by the coffee industry and by cook books is the use of six ounces of cold water and two level tablespoons of coffee grounds to brew a cup of coffee. Measuring equipment for coffee grounds and water ordinarily used in the kitchen by the housewife are standardized to these capacities. As a result of absorption and evaporation in the brewing cycle, six ounces of cold water and two level tablespoons of coffee grounds properly brewed will yield 5.2 to 5.5 ounces of coffee five minutes after the brewing has been completed. Ordinarily manufacturers state the capacity of their coffeemakers in terms of the number of cups based on five-ounce or larger servings of delivered brew.

58. Cups ordinarily used in the home, in restaurants and elsewhere in serving coffee (except for special types of coffee or service) have a brimful capacity of seven ounces or more. For example, it was stipulated that the brimful capacity of the cups in respondents' Edgebrook dinnerware sets is eight ounces. The brimful capacity of such cups provides a comfortable serving capacity of five to five and a half ounces of coffee. Respondents' advertising is addressed to housewives, restaurants and comparable categories of buyers, and must be judged on the basis of the type of coffee and size of servings to which they are accustomed.

59. On the evidence as a whole it is found: (1) that respondents' advertising represents that their Flavoramic Coffeemaker has the capacity to brew fifteen cups of coffee of the type and in the quantity ordinarily served in homes, restaurants, clubs and similar places; and (2) that each such cup of coffee ordinarily contains five ounces or more. The meaning of the advertising is not altered by the fact that for special types of coffee, such as demi-tasse or expresso, which are brewed by different recipes, the servings are usually smaller; or by the fact that in special types of service, such as on commercial airlines, the servings may frequently be smaller.

60. With a starting capacity of sixty ounces of cold water, respondents' Flavoramic Coffeemaker will yield a maximum of fifty-five ounces of coffee. It has a maximum capacity, therefore, of eleven five-ounce cups of brewed coffee. Accordingly, respondents' "15-cup" advertising substantially overstates the capacity of its coffeemaker and is false, misleading and deceptive.

61. The form of order contained in the "Notice" portion of the complaint, and proposed by counsel supporting the complaint, would require respondents to discontinue representing that their coffeemaker has the capacity to brew any specified number of cups of coffee "without clearly and conspicuously revealing in immediate connection therewith the net contents of each such cup of coffee." The practical effect of this provision would be to require respondents to state the capacity of their coffeemakers not only in terms of cups, but also in terms of ounces per cup.

62. The evidence in this record is that it is the practice of manufacturers generally to designate the capacity of coffeemakers by the number of cups of coffee which they will brew, based upon five-ounce or larger servings per cup. There is no evidence that any disclosure is made, in such designations, of the net contents of the cup which provides the basis for the capacity rating, or that, if made, it would be meaningful to the housewife or other purchasers of coffeemakers.

63. A housewife, for example, is accustomed to the size cups included in her dinnerware, and to the measuring equipment in her kitchen, and it may be presumed that she expects a coffeemaker to yield a quantity of coffee which will provide the designated number of normal servings in the cups to which she is accustomed. There is nothing to indicate that she is aware of the number of ounces which she ordinarily serves in each cup. To inform her in advertising or labeling that the cup capacity of a coffeemaker is designated on the basis of four-ounce or three-ounce servings would undoubtedly fail, in many instances, to tell her that these are smaller than her accustomed servings, and would result in her being confused and misled.

64. A requirement for the disclosure of the ounces per cup on which the capacity of coffeemakers is designated would not be in accord with the practice now generally followed in the industry, and, if broadly applied, would require revision of that practice throughout the industry. It could well result in confusing what has been established by custom as a normal serving of coffee, and may encourage deceptive advertising and labeling by permitting the arbitrary designation of smaller than usual per-cup servings as a basis for representing a large cup capacity for coffeemakers.

65. The proposed order on this charge is not supported by the evidence in the record. It will, accordingly, be modified so as to relate any representation of the cup capacity of respondents' coffeemaker to five-ounce or larger servings of coffee in accord with industry practice and consumer understanding.

Textile Fiber Products Identification Act

66. Subsequent to the effective date of the Textile Fiber Products Identification Act of March 3, 1960, respondents have been and are now engaged in the introduction, sale, advertising, and offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the transportation 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 which were made of other textile products so shipped in commerce. As used in this section, the terms "commerce" and "textile fiber products" have the meanings defined in the Textile Fiber Products Identification Act.

67. It is charged that certain of said textile fiber products were deceptively advertised by respondents in violation of the provisions of Section 4(c) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, because the advertising of said products failed to disclose the generic name of each manufactured fiber contained in said products as required by Section 4(b)(1) of the Act, or failed to disclose all parts of the required information in type of equal size and prominence as required by Rule 42(a) under the Act. The evidence in support of this charge is limited to respondents' advertising, as aforesaid, of certain of their blankets.

68. Respondents' advertising of certain of their blankets has included the words "Rayon and Orlon", without further information or disclosure of fiber content.

69. Section 4(b)(1) of the Textile Fiber Products Identification Act requires, in effect, that textile fiber products shall be labeled to show each constituent fiber by its generic name; and Section 4(c) requires, in effect, that "any disclosure or implication of fiber content" in advertising shall also be by generic names. Pursuant to the provisions of Section 7(c) of the Act, the Commission, in Rule 7 thereunder, established generic names and definitions of manufactured fibers. "Orlon" is not included in the generic names contained in that rule.

70. The words "Rayon and Orlon", which are included in respondents' advertising, purport to refer to the constituent fibers of the blankets so advertised. Since "Orlon" is a manufactured fiber, but

is not a generic name, and since as used in the advertising it constitutes a "disclosure or implication of fiber content", its use in respondents' advertising violates Section 4(c) of the Act.

71. Respondents' advertising of certain of their blankets has also included in clear and conspicuous type the words "90% Rayon and 10% Nylon", and in immediate conjunction therewith, but in type approximately twice as large or larger, the words "100% Nylon Binding".

72. Rule 42(a) of the Rules and Regulations under the Textile Fiber Products Identification Act requires, in pertinent part, that in advertising "all parts of the required information shall be stated in immediate conjunction with each other in large and conspicuous type or lettering *of equal size and prominence*" (emphasis added). The words "100% Nylon Binding" constitute part of the required information, and since they appear in much larger and more conspicuous type than the other required information, "90% Rayon and 10% Nylon", respondents' advertising is in violation of Rule 42(a) and Section 4(c) of the Act.

73. Respondents' advertising of certain of their blankets has also included the words "With the Cashmere Look and Feel", such words being printed in black or dark blue type of equal size, except the word "Cashmere", which is printed in substantially larger and more prominent type, and in some instances in red type.

74. Counsel supporting the complaint contends that respondents have "featured the word 'Cashmere' in such manner as to imply falsely that certain blankets contained cashmere thereby obscuring and confusing the revelation of the true fiber content of the blankets in violation of Rule 42(a) and (b)" (Proposed findings, p. 18).

75. There is no contention, and nothing to indicate, that the blankets so advertised contained any cashmere fiber. Accordingly "cashmere" is not a part of "the required information" within the meaning of Rule 42(a). Since the provisions of Rule 42(a) relate only to the proper disclosure of required information, the reference to cashmere in this advertising does not violate that rule.

76. Rule 42(b) relates to "non-required information" and provides, in pertinent part, that such information "shall not be set forth so as to interfere with, minimize or detract from the required information." It is the opinion of the hearing examiner that, as used in respondents' advertising, the reference to "cashmere" violates Rule 42(b) and Section 4(c).

77. The complaint, however, charges respondents with failure properly to disclose "required information" in violation of Rule 42(a), but does not charge improper use of "non-required informa-

tion" in violation of Rule 42(b). Due to the substantial variance of the pleadings from the evidence, therefore, the contention of counsel supporting the complaint on this point is not allowed (Docket No. 8436, *Sacks Woolen Co., Inc., et al*, Final Order 11/27/62) [61 F.T.C. 1226].

CONCLUSIONS

1. By the statements, representations and practices hereinbefore found to be false, misleading and deceptive, respondents place in the hands of retailers the means and instrumentalities by and through which they may mislead and deceive the public as to the quality, size, origin and usual and regular selling price of the products to which such statements and practices relate.

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

3. The acts and practices of the respondents hereinbefore found to be in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, together with the other acts and practices of respondents hereinbefore found to be false, misleading and deceptive, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

ORDER

1. *It is ordered*, That respondents Heavenly Creations, Inc., a corporation, and its officers, J. B. Promotions, Inc., a corporation, and its officers, Americana Star Silver Corp., a corporation and its officers, and Sam S. Goldstein and Sylvia Goldstein, individually, and as copartners trading and doing business under the name of Sun Gold Industries, or under any other name, and as officers of each of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of coffeemakers, women's lingerie, tableware, tablecloths, luggage, blankets, office machines, household furniture or any other articles of

merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Using the term "suggested retail" or any other words or terms of similar import or meaning as descriptive of any amount which is not the usual and customary retail price of the merchandise so described in each of the trade areas in which the representation is made.

(b) Representing, directly or by implication, that any amount is the usual and customary price of merchandise in each of the trade areas in which the representation is made when it is in excess of the generally prevailing price or prices at which said merchandise is sold in said area or areas.

(c) Using the words "Bride O Erin" or any other words indicating Irish origin or using pictures of the shamrock or any other typically Irish characters or scenes in advertising or labeling to describe merchandise which is not manufactured in Ireland.

(d) Using any words, terms or pictures in advertising or in labeling which represent, directly or indirectly, that merchandise was manufactured or originated in a given country or geographical area unless such is the fact.

(e) Offering for sale or selling products which are, in whole or in substantial part, of foreign origin, without clearly and conspicuously disclosing on such products, and if the products are enclosed in a package or carton, on said package or carton, in such a manner that it will not be hidden or obliterated, the country or origin thereof.

(f) Representing, directly or indirectly, that said products have been frequently and continuously advertised from 1940 to the present time in Vogue, Mademoiselle or Bazaar magazines or that said products have been frequently and continuously advertised in Life, House Beautiful, Saturday Evening Post or Better Homes and Gardens magazines; or that said products have been advertised in any magazine or publication or by any other media or in any manner or to any extent or for any period of time unless such is the fact.

(g) Representing, directly or indirectly, that said products are guaranteed unless the name and address of the guarantor are clearly and conspicuously disclosed.

(h) Representing, directly or indirectly, that said coffeemaker has the capacity to make or brew any specified number of cups of coffee unless it will in fact brew the specified number of cups of coffee so that each cup may contain five ounces or more; or

that any of said products has a capacity, content or size different from what it has in fact.

(i) Furnishing or placing in the hands of retailers or dealers in said merchandise the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

2. *It is further ordered*, That respondents Heavenly Creations, Inc., a corporation, and its officers, J. B. Promotions, Inc., a corporation, and its officers, Americana Star Silver Corp., a corporation, and its officers and Sam S. Goldstein and Sylvia Goldstein, individually, and as copartners trading and doing business under the name of Sun Gold Industries, or under any other name, and as officers of each of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction, manufacture for introduction, 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, selling, offering for sale, advertising, delivering, transporting, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce, and in the sale, offering for sale, advertising, delivering, transporting, and causing to be transported, after shipment in commerce, of textile fiber products, either in their original state or which have been made of other textile fiber products shipped in commerce, as the term "commerce" is defined in the Textile Fiber Products Identification Act, of blankets or other "textile fiber products", as such products are defined in and subject to the Textile Fiber Products Act, do forthwith cease and desist from:

(a) Falsely and deceptively advertising said textile fiber products by failing to set forth the information required by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form required by the Rules and Regulations promulgated thereunder.

3. *It is further ordered*, That the complaint be, and it hereby is, dismissed insofar as it alleges that respondents' advertising and labeling were false, misleading and deceptive or violated the Textile Fiber Products Identification Act because of:

(a) representations that certain of their perfume was manufactured or compounded in France;

(b) the use of the term "MacGregor";

(c) representations that certain articles have been frequently and continuously advertised in Look and New Yorker magazines;

(d) failure of the guarantee advertising to disclose the nature, extent and duration of the guarantee, and the manner in which the guarantor will perform thereunder; and

(e) the use of the words "With the Cashmere Look and Feel".

OPINION OF THE COMMISSION

FEBRUARY 25, 1964

The complaint in this matter charges respondents—a group of closely related firms, and the individuals who control them, engaged in the sale of a variety of merchandise to distributors, jobbers and retailers—with deceptive advertising in violation of Section 5 of the Federal Trade Commission Act and false advertising in violation of Section 3 of the Textile Fiber Products Identification Act and of the Rules and Regulations promulgated under the latter statute. The matter is before the Commission on the cross-appeals of the parties from the initial decision of the hearing examiner, in which he dismissed the complaint in part and upheld it in part, and entered a cease and desist order. Most of the contentions of the parties are adequately dealt with in the initial decision, and require no further discussion. We consider in this opinion only those issues having some general significance.

Fictitious Pricing

The hearing examiner refused respondents' offer to prove that the Commission has deliberately declined to proceed against fictitious pricing in the automobile industry. Respondents' theory is that if, in fact, the Commission has a policy against issuing fictitious-pricing complaints in a particular industry, any fictitious-pricing actions in other industries—including the present action—would contravene the requirements of due process of law, and hence violate the Federal Constitution. Such a theory is untenable.[1] Moreover, it is difficult to see how respondents can be injured or aggrieved in any way by the Commission's alleged failure to take action against firms which are in an entirely different industry and are not competitors of respondents.

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[1] See, e.g., *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411, 413. We note that the Automobile Information Disclosure Act, 15 U.S.C. § § 1231–33, does not preclude the Commission from taking action, where appropriate and in the public interest, against fictitious preticketing or related deceptive practices in the automobile industry. *Baltimore Luggage Co.* v. *F.T.C.*, 296 F. 2d 608 (4th Cir. 1961).

Respondents also contend that paragraphs 1(a) and 1(b) of the cease and desist order contained in the initial decision, which deal with the advertising of fictitious suggested retail or list prices, are vague, and cannot, as a practical matter, be obeyed. Without agreeing with respondents' position, we have decided to modify this part of the order by expressing the prohibition in the terms of the Commission's newly revised Guides Against Deceptive Pricing (January 8, 1964). The standards in these Guides offer guidance to the businessman who desires in good faith to avoid committing the unlawful practices described in them. Guide III deals specifically with the practice—advertising of fictitious suggested retail or list prices—in which respondents have been found to have engaged; and if respondents in the future conform their conduct to the standards set forth in Guide III, they will be in compliance with the fictitious-pricing part of the cease and desist order.[2]

In modifying the order contained in the initial decision, we emphasize that respondents' duties under the order are no different from what they would be if the examiner's order were adopted *in haec verba*. For it is the Commission's policy to interpret all outstanding cease and desist orders against deceptive pricing, whatever the precise form of words employed in the particular order, as if they expressly incorporated the provisions of the newly revised Guides Against Deceptive Pricing.

Other Relief Issues

In addition to modifying the fictitious-pricing part of the examiner's order, we have modified other parts of the order concerned with violations of Section 5. Two changes in the terms of the order in particular should be noted. First, we have deleted the provision that appears as paragraph 1(e) of the examiner's order, which would require respondents affirmatively to disclose the country of origin of their merchandise. The foreign-origin issue in this case, as framed in the complaint and developed at trial, was whether respondents had misrepresented that certain products (for example, perfume and linen) came from foreign countries (for example, France and Ire-

[2] If the Guides do not answer all of the specific questions that may arise as to respondents' obligations under the cease and desist order, the Commission's procedures afford ample opportunity for respondents to obtain definitive advice from the Commission as to the application and interpretation of the order. *Atlantic Products Corp.*, F.T.C. Docket 8513 (Interlocutory Order of December 13, 1963) [63 F.T.C. 2237]; *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963) [62 F.T.C. 1344]; Section 3.26(b), Rules of Practice and Procedure (August 1, 1963); see *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F. 2d 480, 488 (2d Cir. 1962).

land) which are particularly noted for such products. The issue, in other words, was whether respondents had affirmatively misrepresented country of origin, not whether by failing altogether to disclose the true country of origin they were concealing a material fact. Nothing in the record warrants an order directed against the latter, and quite distinct, form of deceptive conduct.

Second, paragraph 1(g) of the order contained in the initial decision would require respondents to cease and desist from "representing, directly or indirectly, that said products are guaranteed unless the name and address of the guarantor are clearly and conspicuously disclosed." However, the deception charged in the complaint and found by the examiner involved, not failure to disclose the guarantor's identity, but falsely stating the guarantor's identity. Hence, the order properly should forbid misrepresenting the identity of the true guarantor.

Generic Names Under the Textile Act

The Textile Fiber Products Identification Act requires that designation of textile fiber content in advertising be by generic name (see Sections 4(b)(1) and 4(c)), and Section 7(c) authorizes the Commission to establish generic names for manufactured fibers. The Commission has done so (see Rule 7, Rules and Regulations Under the Textile Fiber Products Identification Act (March 3, 1960)). Respondents used the term "Orlon" to designate a manufactured fiber in a textile fiber product. The term is not among those listed in Rule 7, and on that ground the examiner held that its use violated the Textile Act. Respondents contend that the examiner erred in rejecting respondents' offer to prove that "Orlon" has become accepted by the consuming public as a generic name for the fiber in question.

Such a contention misconceives the purpose and design of the Textile Act. While both the Federal Trade Commission Act and the Textile Fiber Products Identification Act embody the same basic principle of protecting the consumer from deceptive representations, they do so in different ways: the Federal Trade Commission Act by a general prohibition of "deceptive acts or practices", the Textile Act by requiring explicitly and in detail high and uniform standards in the labeling and advertising of textile fiber products.

The Textile Act uses the term "generic name" in a special sense, namely, as designating those generic names which the Commission is authorized by the Act to establish; the language of Section 7(c), which refers to the "establishment", not ascertainment, of generic

names, requires this interpretation.[3] Respondents are free to use the term "Orlon" in their advertising, but they must also disclose the generic name for the fiber which the Commission has established, pursuant to the Act, in the interest of standardizing disclosure of fiber content.

Commissioner MacIntyre did not concur and Commissioner Reilly did not participate.

Final Order

Upon consideration of the cross-appeals of complaint counsel and respondents from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That:

(1) The initial decision is adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion:

(2) Respondents, Heavenly Creations, Inc., J. B. Promotions, Inc., and Americana Star Silver Corp., all corporations, and their officers, and Sam S. Goldstein and Sylvia Goldstein, individually, and as officers of said corporations, and as copartners doing business under the name of Sun Gold Industries, and respondents' representatives, agents, 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 of any articles of merchandise, in commerce, shall forthwith cease and desist from:

(a) Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area;

(b) Stating or implying, by words or pictures or a combination thereof or otherwise, that any merchandise is manufactured or originates in any foreign country or geographical area, unless such is the fact;

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[3] See also Rules 7 and 8, and the Commission's statement on the Rules and Regulations promulgated under the Act, reported in 2 CCH Trade Reg. Rep. ¶ 8076. The "Orlon" issue was discussed by the Commission in the course of a series of questions and answers furnished for the assistance of persons seeking to comply with the requirements of the Textile Act and the Rules and Regulations promulgated under it:

"Q. 43. Can fiber trademarks such as 'Orlon' and 'Acrilan' be used alone in setting forth the required content information?

A. No. When fiber trademarks are used in setting forth the required information they must be used in immediate conjunction with the generic name of the fiber to which they relate in type or lettering of equal size. The first time a fiber trademark or generic name appears on the label full content disclosure must be made." 2 CCH Trade Reg. Rep. ¶ 8098, p. 13173 (March 10, 1960) (see also question no. 100, p. 13177).

(c) Stating or implying that any product has been frequently and/or continuously advertised in any magazine or other medium of communication, unless such is the fact;

(d) Stating or implying that any product has a capacity, content or size different from what it in fact has;

(e) Misrepresenting the identity of the guarantor of any product;

(f) Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order;

(3) Paragraphs 2 and 3 of the order contained in the initial decision are adopted, and incorporated herein, as the final order of the Commission;

(4) Respondents shall, within sixty (60) days of service of this order upon them, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

Commissioner MacIntyre not concurring and Commissioner Reilly not participating.

IN THE MATTER OF

THEODORE BROGMUS DOING BUSINESS AS NEBRASKA SEED & GRAIN COMPANY

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

Docket 8604. Complaint, Nov. 8, 1963—Decision, Feb. 27, 1964

Order requiring an individual in Norfolk, Nebr., engaged in the sale of seeds and grain to the public, to cease misrepresenting the nature of his seed and grain business, opportunities afforded customers, that prospective customers are specially selected, and that seeds are in limited supply.

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 Theodore Brogmus, an individual trading and doing business as Nebraska Seed & Grain Company, 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, Theodore Brogmus, is an individual trading and doing business as Nebraska Seed & Grain Company, with his principal office and place of business located at 103 North Pine in the City of Norfolk, Nebraska.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of seeds and grain to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said product, when sold, to be shipped from his place of business in the State of Nebraska and other States to purchasers located in various other 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. 4. In the course and conduct of his business, as aforesaid, respondent and respondent's sales agents or representatives call upon prospective purchasers and solicit the purchase of respondent's products. In the course and conduct of such solicitations, respondent and his sales agents or representatives, either directly or by implication, have made certain statements and representations to prospective purchasers of respondent's products, typical, but not all inclusive of which are the following:

1. Respondent is establishing a program of seed grain production in which purchasers of his seed grain can profitably participate.

2. Prospective customers of respondent are specially "selected", "chosen", or "designated".

3. Seed offered for sale by respondent is in limited supply.

4. Respondent is in the business of buying as well as selling seed grain, and he usually and regularly purchases harvested grain from his customers.

5. Respondent will purchase, and under the terms of an instrument labeled "Seed Producers Agreement", or in some cases "Dealership and Seed Producers Agreement", is contractually bound to purchase at premium prices the harvest produced by his customers from seed sold them by respondent subject only to conditions specifying quality.

PAR. 5. In truth and in fact:

1. Respondent does not establish bona fide seed production programs in which his customers can profitably participate.

2. Prospective customers of respondent are not specially "selected", "chosen" or "designated".

3. Seed offered for sale by respondent is not in limited supply.

4. Respondent is not in the business of buying seed from his customers, and he does not usually or regularly purchase harvested seed from his customers.

5. Respondent is not contractually bound by the terms of any instrument or otherwise to purchase his customer's harvest at premium or other prices. Instruments labeled "Seed Producers Agreement" or "Dealership and Seed Producers Agreement", which are furnished by respondent for execution by him and his customers are merely "options" giving respondent the right but not obligating him to purchase said harvest while purporting to bind his customers to sell exclusively to him. Respondent does not purchase the harvest from a substantial number of his customers.

Therefore the statements and representations as set out in Paragraph Four hereof were and are false, misleading and deceptive.

PAR. 6. In the course and conduct of his business as aforesaid, the respondent has been, and, is now, in direct and substantial competition in commerce with other individuals and with various firms and corporations engaged in the sale in commerce of seeds and grain.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now 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. Herbert L. Blume and *Mr. Guy Yelton* for the Commission.
No appearance filed for respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JANUARY 8, 1964

The Federal Trade Commission, on November 8, 1963, issued its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act by misrepresentations in connection with the offering for sale and sale of seeds and

grain to the public. The complaint was duly served upon respondent by registered mail on November 20, 1963, and answer thereto was due on December 20, 1963. No answer to the complaint having been filed, the respondent is now in default, and the hearing examiner has, accordingly, cancelled the hearing scheduled in the complaint. Pursuant to the provisions of Section 3.5(c) of the Commission's Rules of Practice, the hearing examiner enters this initial decision, finding the facts to be as alleged in the complaint, and containing appropriate conclusions and order.

FINDINGS OF FACT

1. Respondent, Theodore Brogmus, is an individual trading and doing business as Nebraska Seed & Grain Company, with his principal office and place of business located at 103 North Pine in the City of Norfolk, Nebraska.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of seeds and grain to the public.

3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said product, when sold, to be shipped from his place of business in the State of Nebraska and other States to purchasers located in various other 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.

4. In the course and conduct of his business, as aforesaid, respondent and respondent's sales agents or representatives call upon prospective purchasers and solicit the purchase of respondent's products. In the course and conduct of such solicitations, respondent and his sales agents or representatives, either directly or by implication, have made certain statements and representations to prospective purchasers of respondent's products, typical, but not all inclusive of which are the following:

(a) Respondent is establishing a program of seed grain production in which purchasers of his seed grain can profitably participate.

(b) Prospective customers of respondent are specially "selected", "chosen", or "designated".

(c) Seed offered for sale by respondent is in limited supply.

(d) Respondent is in the business of buying as well as selling seed grain, and he usually and regularly purchases harvested grain from his customers.

(e) Respondent will purchase, and under the terms of an instrument labeled "Seed Producers Agreement", or in some cases "Dealer-

ship and Seed Producers Agreement", is contractually bound to purchase at premium prices the harvest produced by his customers from seed sold them by respondent subject only to conditions specifying quality.

5. In truth and in fact:

(a) Respondent does not establish bona fide seed production programs in which his customers can profitably participate.

(b) Prospective customers of respondent are not specially "selected", "chosen" or "designated".

(c) Seed offered for sale by respondent is not in limited supply.

(d) Respondent is not in the business of buying seed from his customers, and he does not usually or regularly purchase harvested seed from his customers.

(e) Respondent is not contractually bound by the terms of any instrument or otherwise to purchase his customer's harvest at premium or other prices. Instruments labeled "Seed Producers Agreement" or "Dealership and Seed Producers Agreement", which are furnished by respondent for execution by him and his customers are merely "options" giving respondent the right but not obligating him to purchase said harvest while purporting to bind his customers to sell exclusively to him. Respondent does not purchase the harvest from a substantial number of his customers.

Therefore, the statements and representations as set out in Paragraph 4 hereof were and are false, misleading and deceptive.

6. In the course and conduct of his business as aforesaid, the respondent has been, and, is now, in direct and substantial competition in commerce with other individuals and with various firms and corporations engaged in the sale in commerce of seeds and grain.

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

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, 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.

ORDER

It is ordered, That respondent, Theodore Brogmus, an individual, trading as Nebraska Seed & Grain Company, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of seeds, grain or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Respondent is establishing, sponsoring or maintaining a program for the production or marketing of seed grain or other products for his customers' participation; or misrepresenting in any other manner the nature of respondent's business.

2. Prospective customers are "chosen", "selected", "designated" or otherwise specially selected.

3. Products offered by respondent are in limited supply.

4. Respondent is in the business of buying seed grain or other products from his customers; that he usually or regularly purchases the harvest or increase from such products; or misrepresenting in any manner the opportunities afforded to customers to market their products at premium or other prices.

5. Respondent will purchase or is contractually bound to purchase all or part of the harvest or increase grown or raised by his customers from products sold by respondent; or misrepresenting in any manner the obligations incurred by respondent under his contracts with purchasers.

Decision of the Commission and Order to File Report of Compliance

Pursuant to Section 3.21 of the Commission's Rules of Practice, effective August 1, 1963, the initial decision of the hearing examiner shall on the 27th day of February 1964, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

L'AIGLON APPAREL, INC.

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

*Docket C-717. Complaint, Feb. 27, 1964—Decision, Feb. 27, 1964**

Consent order requiring a corporation engaged in selling wearing apparel products in commerce to cease violating Sec. 2(d) of the Clayton Act by such practices as granting substantial payments for the promoting and advertising of its products to certain department stores and others purchasing for resale while not offering comparable allowances to all competitors of those so favored; and postponing the effective date until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one State to customers located in other States of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional pay-

*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

ments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraph One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

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

1. Respondent L'Aiglon Apparel, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at Fifteenth and Mount Vernon Streets, Philadelphia, Pennsylvania.

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

ORDER

It is ordered, That respondent L'Aiglon Apparel, Inc., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

BENRUS WATCH COMPANY, INC., ET AL.

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

Docket 7352. Complaint, Jan. 8, 1959—Decision, Feb. 28, 1964

Order requiring two New York City associated distributors of watches to wholesalers, retailers and premium users for resale to the public, to cease using—in preticketing their watches, and in price lists, catalogs, newspaper and magazine and other advertising—fictitious amounts as the usual retail prices; setting forth fictitious amounts as retail prices from which reductions were to be made for trade-ins, allowance certificates and other reduction offers, and representing falsely that dealers would make such reductions against the indicated retail price; representing falsely that their watches were guaranteed and "shock proof"; failing to disclose the true metal content of bezels; and placing in the hands of purchasers for resale means for misleading the purchasing public in the above respects.

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 Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, S. Ralph Lazrus, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above corporation, and Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Robert