IN THE MATTER OF

THE DRIVE-X COMPANY, INC. TRADING AS THE ELMO COMPANY ET AL.

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

Docket 8615. Complaint, Feb. 14, 1964—Decision, Dec. 1, 1965

Order dismissing the complaint against an Iowa concern dealing in drugs and medical devices and vacating the initial decision of the hearing examiner issued February 4, 1965, for the reason that the Commission determined it was no longer in the public interest to continue the proceeding.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Drive-X Company, Inc., a corporation trading as The Elmo Company, and Craig Sandahl and Richard Johann, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Drive-X Company, Inc., trading as The Elmo Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business at Second and Main Streets, in the city of Madrid, State of Iowa.

Respondents Craig Sandahl and Richard Johann are individuals and are officers of said corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of certain preparations containing drugs and devices as the terms "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the devices is referred to by respondents as the "Elmo Palliative Home Treatment."

The designations used by respondents for their said preparations, the formulae and directions for use thereof and the designations, descriptions and directions for use of their said devices are as follows:

Designation: Preparation No. 1—Ear Oil

Formula:	Gal.	Pts.	Ozs.
Alcohol		1	4
Methyl Salicylate U.S.P. (oil of wintergreen—synthetic)			2½
Oil Eucalyptus			2½
Chloroform (Technical)		1	14
White Mineral Oil	2½		
Capsicum			1¾

Total—2 gallons, 7 pints, 13 ounces

Directions for Use: Do not drop in ears—use the medicine dropper and put 2 or 3 drops—no more—on a piece of clean, sterile, absorbent cotton about ½ the size of a nickel. You can get this cotton at any drug store. Insert this cotton into the ear canal but not so deep that it cannot be easily removed with the fingers. Leave cotton in ears for about 10 minutes, while using the rest of the treatment. Then REMOVE THE COTTON AND THROW IT AWAY. Use Ear Oil once a day for one week. After one week use twice daily.

IMPORTANT—NOTE: If there is infection present in the ear canal do not use No. 1 Ear Oil for use may have the tendency to spread the infection to the deeper parts of the ear. Infection in the ear canal should be healed promptly by a competent physician for the spread of such infection could cause injury to the ear.

DO NOT USE THE MEDICINE DROPPER WITH ANY OTHER MEDICINE.

Designation: Preparation No. 2—Nasal Cleanser

Formula:

Each 200 lbs. combines the following:

Sodium Chloride	95 lbs. 5 ozs.
Pwd. Sodium Borate	100 lbs.
Oil of Eucalyptus	3 pts.
Methyl Salicylate	2 pts.
Menthol Approx.	8 oz.
Aniline Pink #7264	1 gr. to each 1 lb.
Potassium Iodide	6 lbs. 2 oz. 350 gr.
Sodium Salicylate	2 lbs. 1 oz. 146 gr.
Sodium Benzoate	2 lbs. 1 oz. 146 gr.
Sugar of milk	20 lbs. to each 200 lbs.

Directions for Use: Fill No. 7 Nasal Douche about ¾ full with No. 2 Nasal Cleanser liquid from the bottle. Insert bulb end of the douche into one nostril, close the other nostril with finger pressure, and—while bending your head forward and downward—GENTLY snuff the medicine up into your nose. Refill No. 7 Nasal Douche and use in the same way in the other nostril.

Hold the liquid in both nostrils, for about a minute, to let the cleanser soak into the tissue and aid in cleansing catarrhal mucus from the nose. Use No. 2 Nasal Cleanser twice a day.

If you snuff too hard, some of the nasal cleanser may pass into your throat. Spit it out if you can. If you swallow it will do no harm.

Designation: Preparation No. 3—Throat Gargle

Formula:

Each ounce of Special Formula Powder #3 contains the following:

Salicylate Acid	2-1/5 gr.
Carbolic Acid	9/20 gr.
Eucalyptol U.S.P.	9/20 gr.
Menthol U.S.P.	9/20 gr.
Thymol U.S.P.	9/20 gr.
Zinc Sulphate	55 gr.
Boric Acid	378-1/2 gr.

Directions for Use: Use the gargle to help remove the catarrhal secretions, or mucus, from the throat. Use twice a day—use only 1 teaspoonful from your pint bottle each time.

Designation: Preparation No. 4—Vapor Inhaler

Formula:	Gals.	Pts.	Ozs.
Oil Peppermint		3	2
Oil Eucalyptus		5	
Oil Mustard (Synthetic)			2
White Mustard Oil	½	½	3

Directions for Use: First, see that the nose and throat are CLEAN of liquid and mucus. Then remove the corks from each end of the Vapor Inhaler. Insert the tapered end into one nostril, close the other with finger pressure at the side, and GENTLY draw a deep breath. Then hold it, remove the Vapor Inhaler from your nose and pinch BOTH nostrils shut using the thumb and finger. Then, close your mouth and try to blow through your nose. While doing this—try to swallow once or twice.

Repeat this operation in the other nostril. Do this 2 or 3 times each day. KEEP CORKED WHEN NOT IN USE.

Designation: Preparation No. 5—Massage Ointment

Formula:

Cream White Petrolatum	10 lbs.
Oil of Capsicum	1½ ozs.

Directions for Use: Apply just a very little ointment behind and in front of the external ear and rub downward to the angle of the jaw—about 15 or 20 strokes—or until the skin feels slightly warm. Then remove the ointment left on the skin.

Next, stand erect and hold your head straight—throw your shoulders back and move your head from side to side, towards each shoulder, 8 or 10 times. Then move it from the front to the back, 8 or 10 times. Do this mildly at first. Use No. 5 Massage Ointment and do this exercise twice a day.

Designation: Preparation No. 6—Nasal Ointment

Formula:

Cream White Petrolatum	15 lbs.

32 oz. Oil Eucalyptus 20½ oz. Oil Wintergreen 16½ oz. Oil Peppermint	No. 6 Oil	30 ozs.
Oil of Pine Needles		1½ ozs.
Oil of Sassafras		1½ ozs.

Directions for Use: Place a small amount on your little finger and spread well over the mucous membrane in each nostril. Do this twice a day.

Designation: Elmo No. 7 Nasal Douche

Elmo No. 7 Nasal Douche is a glass U-Shaped tube with openings at both ends, and one end tapered.

Directions for Use: Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head WELL FORWARD and DOWN. Snuff up contents of douche. Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

Designation: Elmo No. 8 Ear Vibrator

Elmo No. 8 Ear Vibrator is a glass tube device with a plunger or piston at one end and a bulb containing a small opening at the other end.

Directions for Use: Place glass bulb into hole in ear, holding so air cannot escape around bulb. Then draw piston SLOWLY in and out ten or twelve times. USE ONCE A DAY. When ear becomes accustomed to Ear Vibrator, use morning and night. For indicated ear conditions only. Read direction sheet before using.

IMPORTANT—NOTE: If there is infection present in the ear canal, do not use No. 8 Ear Vibrator for use may have the tendency to spread it. Read accompanying Directions before using.

Designation: Preparation No. 9—Re-Charge Liquid

Formula:

This preparation is the liquid used in the No. 4 Vapor Inhaler and the formula is the same as set out there. It is used to recharge the Inhaler.

PAR. 3. Respondents cause their said preparations and devices, when sold, to be transported from their place of business in the State of Iowa to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said preparations and devices by the United States mails and by various means in commerce, as "com-

merce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and by means of circulars and other advertising media, for the purchase of inducing and which were likely to induce, directly or indirectly, the purpose of said preparations and devices; and have disseminated, and caused the dissemination of, advertisements concerning said preparations and devices, by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

EAR NOISES

relieved!

* * * thousands reported.

Wonderful relief from years of suffering from miserable ear noises and poor hearing caused by catarrhal (excess fluid mucus) conditions of the head! That's what these folks (many past 70) reported after using our simple Elmo Palliative HOME TREATMENT during the past 23 years. This may be the answer to your prayer. NOTHING TO WEAR. Here are SOME of the symptoms that may likely go with your catarrhal deafness and ear noises: Mucus dropping in throat. Head feels stopped up by mucus. Mucus in nose and throat every day. Hear—but don't understand words. Hear better on clear days—worse on bad days, or with a cold. Ear noises like crickets, bells, whistles, clicking or escaping steam or others. You, too, may enjoy wonderful relief if your poor hearing or ear noises are caused by catarrhal conditions of the head and when treatment is used as needed. Write TODAY for PROOF OF RELIEF and 30 DAY TRIAL OFFER.

The Elmo Palliative Home Treatment is a "time-tested" treatment used by thousands during the past 25 years. PROOF OF RELIEF is to be found in the great many letters I have received from people after using it as directed and as needed. * * *

Our treatment is designed for catarrhal (excess fluid mucus) conditions of the head and for poor hearing and ear noises caused by such conditions. * * *

This method of treatment is probably different than anything else you have tried before. DIFFERENT because it is based upon * * *.

* * * Medicines "time-tested" through more than 25 years of use, as its name indicated, our treatment is not intended nor recommended to take the place of professional attention but consists of proprietary medicines designed for palliative relief of catarrhal conditions of the head and for poor hearing and ear noises caused by such conditions.

My catarrhal condition is very much better. My hearing is now very good and seems back where it used to be. My ear noises are relieved. * * *

Have not had any head noises since using your treatment. I can lay in bed now and hear my alarm clock tick and before I could not. * * *

PAR. 6. Through the use of said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication, that the use of its said preparations and devices, in combination, as directed, will cure or constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head.

PAR. 7. In truth and in fact, the use of respondents' preparations and devices, in combination as directed, or otherwise, will not cure nor have any beneficial effect on hearing loss or ear noises or head noises or catarrhal conditions of the head, including the nose, ear and air passages.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respect and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Francis J. Charlton supporting the complaint.

Steadman, Leonard & Hennessey, by *Mr. Geo. Stephen Leonard* of Wash., D.C., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

FEBRUARY 4, 1965

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on February 14, 1964, charging them with engaging in unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, by the dissemination of false advertisements concerning certain preparations, containing drugs and devices, sold and distributed by them. After being served with said complaint, respondents appeared by counsel and thereafter filed their answer denying in substance, having engaged in the illegal practices charged.

Pursuant to notice duly given, a pre-hearing conference was convened on May 5, 1964, before the undersigned, theretofore duly designated to act as hearing examiner in this proceeding. An order

was issued by the undersigned on May 13, 1964, embodying the stipulations, admissions and agreements made at said pre-hearing conference, and controlling the conduct of this proceeding. In accordance with the understandings reached at the aforesaid pre-hearing conference, respondents filed separate motions for discovery of certain medical reports in the files of the Commission, and to dismiss the complaint on the ground that the institution of the present proceeding is in contravention of the Federal Trade Commission Act and of the Commission's Rules of Practice. By separate orders issued May 15, 1964, the undersigned (a) granted in part and denied in part the aforesaid motion for discovery, and (b) denied the motion to dismiss. Application by respondents for permission to file an interlocutory appeal from the examiner's order denying their motion to dismiss was denied by the Commission on June 9, 1964.

Hearings on the charges were thereafter held between August 17, 1964 and September 10, 1964, in Washington, D.C. and Philadelphia, Pennsylvania, in accordance with the prior order of the Commission granting leave to hold hearings in more than one place. At said hearings, testimony and other evidence were received in support of and in opposition to the allegations of the complaint, said evidence being duly recorded and filed in the Office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order were filed by the parties on October 26, 1964, and a reply to the proposed findings of complaint counsel was filed by respondents on November 5, 1964, complaint counsel electing to file any reply to respondents' proposed findings.

After having carefully reviewed the evidence in this proceeding, and the proposed findings and conclusions, the undersigned finds that this proceeding is in the interest of the public and, based on the entire record and from his observation of the witnesses, makes the following: [1]

[1] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to the proposed findings are made with the abbreviations, "CPF" for the findings of complaint counsel, "RPF" for the findings of respondents and "RR" for respondents' reply. References to the transcript in connection with the examiner's findings are made with the abbreviated symbol "Tr." References to exhibits introduced by complaint counsel or respondents are made with the respective abbreviated symbols "CX" or "RX." All such citations are intended to refer to the principal portions of the record relied upon by the undersigned, in connection with particular findings, but do not purport to be an exhaustive compendium of the portions of the record reviewed and relied upon by him.

FINDINGS OF FACT

Identity of Respondents

1. Respondent The Drive-X Company, Inc., trading as The Elmo Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business at Second and Main Streets, in the city of Madrid, State of Iowa. Respondent Craig Sandahl is the president and chief executive officer of the corporate respondent, and owns approximately 90 percent of its stock. Respondent Richard Johann is vice-president and assistant treasurer of the corporate respondent and owns approximately 10 percent of its stock. Respondent Johann is also the general manager of the corporate respondent and handles the placing of its advertising and related functions. The business address of the individual respondents is the same as that of the corporate respondent. It is concluded and found that the individual respondents formulate, direct and control the acts and practices of the corporate respondent.[2]

The Drugs and Devices

2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of certain preparations containing drugs and devices, as the terms "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the devices is referred to by respondents as the "Elmo Palliative Home Treatment."

The designations used by respondents for their said preparations, the formulae and directions for use thereof and the designations, descriptions and directions for use of their said devices are as follows:

Designation: Preparation No. 1—Ear Oil

Formula:	Gal.	Pts.	Ozs.
Alcohol		1	4
Methyl Salicylate U.S.P. (oil of wintergreen—synthetic)			2½

[2] The above findings are based on the substantially admitted allegations of the complaint, as amplified by the testimony with respect to the stock ownership and positions occupied by the individual respondents (Tr. 497, 548). In addition to admitting the allegations of the complaint respondents allege in their answer that the corporate respondent is the legal successor of The Elmo Company, Inc., respondent in Docket No. 5959. The examiner considers this fact immaterial to the disposition of the issues in this proceeding. However, to the extent such fact may be considered material, the uncontradicted evidence in the record supports the claim of respondents that the corporate respondent herein is the legal successor of The Elmo Company under the laws of the State of Iowa (RX 1; Tr. 498-502).

Formula:—Con't	Gal.	Pts.	Ozs.
Oil Eucalyptus			2½
Chloroform (Technical)		1	14
White Mineral Oil	2½		
Capsicum			1¾

Total—2 gallons, 7 pints, 13 ounces

Directions for Use: Do not drop in ears—use the medicine dropper and put 2 or 3 drops—no more—on a piece of clean, sterile, absorbent cotton about ½ the size of a nickel. You can get this cotton at any drug store. Insert this cotton into the ear canal but not so deep that it cannot be easily removed with the fingers. Leave cotton in ears for about 10 minutes, while using the rest of the treatment. Then REMOVE THE COTTON AND THROW IT AWAY. Use Ear Oil once a day for one week. After one week use twice daily.

IMPORTANT—NOTE: If there is infection present in the ear canal do not use No. 1 Ear Oil for use may have the tendency to spread the infection to the deeper parts of the ear. Infection in the ear canal should be healed promptly by a competent physician for the spread of such infection could cause injury to the ear.

DO NOT USE THE MEDICINE DROPPER WITH ANY OTHER MEDICINE.

Designation: Preparation No. 2—Nasal Cleanser

Formula:

Each 200 lbs. combines the following:

Sodium Chloride	95 lbs. 5 ozs.
Pwd. Sodium Borate	100 lbs.
Oil of Eucalyptus	3 pts.
Methyl Salicylate	2 pts.
Menthol Approx.	8 oz.
Aniline Pink #7264	1 gr. to each 1 lb.
Potassium Iodide	6 lbs. 2 oz. 350 gr.
Sodium Salicylate	2 lbs. 1 oz. 146 gr.
Sodium Benzoate	2 lbs. 1 oz. 146 gr.
Sugar of milk	20 lbs. to each 200 lbs.

Directions for Use: Fill No. 7 Nasal Douche about ¾ full with No. 2 Nasal Cleanser liquid from the bottle. Insert bulb end of the douche into one nostril, close the other nostril with finger pressure, and—while bending your head forward and downward—GENTLY snuff the medicine up into your nose. Refill No. 7 Nasal Douche and use in the same way in the other nostril.

Hold the liquid in both nostrils, for about a minute, to let the cleanser soak into the tissue and aid in cleansing catarrhal mucus from the nose. Use No. 2 Nasal Cleanser twice a day.

If you snuff too hard, some of the nasal cleanser may pass into your throat. Spit it out if you can. If you swallow it will do no harm.

Designation: Preparation No. 3—Throat Gargle

Formula:

Each ounce of Special Formula Powder #3 contains the following:

Salicylic Acid	2-1/5 gr.
Carbolic Acid	9/20 gr.
Eucalyptol U.S.P.	9/20 gr.
Menthol U.S.P.	9/20 gr.
Thymol U.S.P.	9/20 gr.
Zinc Sulphate	55 gr.
Boric Acid	378-1/2 gr.

Directions for Use: Use the gargle to help remove the catarrhal secretions, or mucus, from the throat. Use twice a day—use only 1 teaspoonful from your pint bottle each time.

Designation: Preparation No. 4—Vapor Inhaler

Formula:	Gals.	Pts.	Ozs.
Oil Peppermint		3	2
Oil Eucalyptus		5	
Oil Mustard (Synthetic)			2
White Mustard Oil	½	½	3

Directions for Use: First, see that the nose and throat are CLEAN of liquid and mucus. Then remove the corks from each end of the Vapor Inhaler. Insert the tapered end into one nostril, close the other with finger pressure at the side, and GENTLY draw a deep breath. Then hold it, remove the Vapor Inhaler from your nose and pinch BOTH nostrils shut using the thumb and finger. Then, close your mouth and try to blow through your nose. While doing this—try to swallow once or twice.

Repeat this operation in the other nostril. Do this 2 or 3 times each day. KEEP CORKED WHEN NOT IN USE.

Designation: Preparation No. 5—Massage Ointment

Formula:

Cream White Petrolatum	10 lbs.
Oil of Capsicum	1½ ozs.

Directions for Use: Apply just a very little ointment behind and in front of the external ear and rub downward to the angle of the jaw—about 15 or 20 strokes—or until the skin feels slightly warm. Then remove the ointment left on the skin.

Next, stand erect and hold your head straight—throw your shoulders back and move your head from side to side, towards each shoulder, 8 or 10 times. Then move it from the front to the back, 8 or 10 times. Do this mildly at first. Use No. 5 Massage Ointment and do this exercise twice a day.

Designation: Preparation No. 6—Nasal Ointment

Formula:

Cream White Petrolatum		15 lbs.
32 oz. Oil Eucalyptus 20½ oz. Oil Wintergreen 16½ oz. Oil Peppermint	No. 6 Oil	30 ozs.

Oil of Pine Needles.....1½ ozs.
Oil of Sassafras .....1½ ozs.

Directions for Use: Place a small amount on your little finger and spread well over the mucous membrane in each nostril. Do this twice a day.

Designation: Elmo No. 7 Nasal Douche

Elmo No. 7 Nasal Douche is a glass U-Shaped tube with openings at both ends, and one end tapered.

Directions for Use: Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head WELL FORWARD and DOWN. Snuff up contents of douche.

Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

Designation: Elmo No. 8 Ear Vibrator

Elmo No. 8 Ear Vibrator is a glass tube device with a plunger or piston at one end and a bulb containing a small opening at the other end.

Directions for Use: Place glass bulb into hole in ear, holding so air cannot escape around bulb. Then draw piston SLOWLY in and out ten or twelve times. USE ONCE A DAY. When ear becomes accustomed to Ear Vibrator, use morning and night. For indicated ear conditions only. Read direction sheet before using.

IMPORTANT—NOTE: If there is infection present in the ear canal, do not use No. 8 Ear Vibrator for use may have the tendency to spread it. Read accompanying Directions before using.

Designation: Preparation No. 9—Re-Charge Liquid

Formula:
This preparation is the liquid used in the No. 4 Vapor Inhaler and the formula is the same as set out there. It is used to recharge the Inhaler.[3]

Sale and Dissemination in Commerce

3. Respondents cause their said preparations and devices, when sold, to be transported from their place of business in the State of Iowa to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act. The

[3] The findings above made with reference to respondents' various preparations, including the designation, formula and directions for use thereof, are based on the allegations of the complaint which were substantially admitted in respondents' answer. Although respondents raised some question at the pre-hearing conference whether the allegations of the complaint properly reflected the directions for use or combination of use of their preparations (see Pre-Hearing Order of May 13, 1964, Paragraph 2), they conceded at the hearings that the allegations of the complaint are accurate with respect to the formula of their preparations and the directions for use (Tr. 117).

volume of business in such commerce has been and is substantial.[4]

4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said preparations and devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and by means of circulars and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations and devices; and have disseminated, and caused the dissemination of, advertisements concerning said preparations and devices, by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.[5]

The Advertising

5. Respondents' initial contact with prospective purchasers of their preparations is made through advertisements inserted in various newspapers and magazines. Among the newspapers in which respondents' advertisements have appeared are: San Diego Tribune, Philadelphia News, Los Angeles Herald Examiner, and Lancaster (Pennsylvania) New Era-Intelligencer Journal. Among the magazines in which their advertisements have appeared are: New England Homestead, Our Sunday Visitor-Register Unit, St. Anthony's Messenger, and T.V. Guide. Typical of the advertisements inserted by respondents in such newspapers and magazines is the following (Tr. 105; CX 1-2):

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[4] The above findings as to commerce are based on the allegations of the complaint, which were admitted in respondents' answer except as to the substantiality of such commerce. However, such qualification in respondents' answer was later withdrawn and it was admitted that the volume of their sales in commerce was substantial (Tr. 493).

[5] The above findings are based on the allegations of Paragraph 4 of the complaint and the advertisements. Respondents admitted in their answer the placing of advertisements in the media referred to in the complaint "for the purpose of informing potential users of the nature of respondents' medications and seek[ing] thereby to interest such persons in the purchase thereof." Respondents contend that there is no basis for finding that their advertisements were "for the purpose of inducing * * * the purchase of said preparations" since readers of the advertisements were invited merely to send for applications for respondents' preparations (RR, p. 2). It is clear from the statements, made in respondents' advertisements, which will be hereinafter more fully described, that the purpose of respondents' advertising was for the purpose of inducing the purchase of its said preparations and not merely the inviting of applications.

EAR NOISES
relieved!
* * * thousands reported.
Wonderful relief from years of suffering from miserable ear noises and poor hearing caused by catarrhal (excess fluid mucus) conditions of the head! That's what these folks *(many past 70)* reported after using our simple Elmo Palliative HOME TREATMENT during the past 23 years. This may be the answer to your prayer. NOTHING TO WEAR. Here are SOME of the symptoms that may likely go with your catarrhal deafness and ear noises: Mucus dropping in throat. Head feels stopped up by mucus. Mucus in nose and throat every day. Hear—but don't understand words. Hear better on clear days—worse on bad days, or with a cold. Ear noises like crickets, bells, whistles, clicking or escaping steam or others. You, too, may enjoy wonderful relief if your poor hearing or ear noises are caused by catarrhal conditions of the head and when treatment is used as needed. Write TODAY for PROOF OF RELIEF and 30 DAY TRIAL OFFER.

6. Persons responding to one of these advertisements receive a form letter in which respondents offer to sell the "30 Day Elmo Palliative Home Treatment" on a "trial" basis, *i.e.*, the purchaser will not have to pay the purchase price ($10) for 30 days, at the end of which period payment will be expected if the user determines that the treatment has helped him (CX 3 C-D). The form letter, which is signed by L. A. Johann, contains the following statements with respect to respondents' preparations:

The Elmo Palliative Home Treatment is a "time-tested" treatment used by thousands during the past 26 years. PROOF OF RELIEF is to be found in the great many letters I have received from people after using it as directed and as needed. I am enclosing a pamphlet in which I have printed the substance of a few of their letters. These are taken from actual case records on file from folks, MANY PAST 70, who once may have suffered just like you! * * *

Our treatment is designed for catarrhal (excess fluid mucus) conditions of the head and for poor hearing and ear noises caused by such conditions. * * *

This method of treatment is probably different than anything else you have tried before. DIFFERENT because it is based upon * * *.

* * * Medicines "time-tested" through more than 27 years of use. As its name indicates, our treatment is not intended nor recommended to take the place of professional attention but consists of proprietary medicines designed for palliative relief of catarrhal conditions of the head and for poor hearing and ear noises caused by such conditions.

7. The pamphlet referred to in the above letter contains excerpts from letters which are stated to have been received from actual users of the Elmo Treatment, and the prospective purchaser is urged to: "Take the Word of Others" (CX 3 E-H). In most instances, the users purport to have been afflicted for a number of years with

deafness or other forms of hearing difficulty, and with ear noises, and report that they were benefited by the Elmo Treatment. Concerning ear noises, the testimonial extracts contain statements that the ear noises "have stopped," or "are relieved," or "are cleared up now," and other statements to similar effect. Concerning difficulty in hearing or deafness, the extracts contain such statements as the following: "I can hear good again." "My hearing is so much better." "My hearing seems extra good." "My hearing has been improved to the point it seems nearly perfect."

8. Accompanying the form letter is an application for the Elmo Treatment, in which the prospective user is invited to "accept your generous offer to send me your REGULAR 30 DAY TREATMENT on Trial, postage prepaid" (CX 3-A). The application form requests the prospective user to answer the following three questions:

1. Do you have symptoms of CATARRHAL CONDITIONS OF THE HEAD?

2. Do you want Treatment for HARD-OF-HEARING due to Catarrhal Conditions of the HEAD?

3. Do you want Treatment for EAR NOISES due to Catarrhal Conditions of the Head?

The reverse side of the application form contains an explanation of these three conditions, and includes the following admonition: "If your poor hearing or ear noises are caused by accidents, auditory nerve trouble, any of the destructive fevers or running or discharging ears, this treatment is NOT indicated NOR recommended."

9. Of those responding to the invitation to send for the Elmo Home Treatment on a "trial" basis, respondents decline about one-third of the orders on the basis of answers to the questionnaire in the application form which indicate that the individuals may have an ear infection, traumatic injury or a disease for which the treatment would be ineffective (Tr. 106). Of the remaining two-thirds who receive the treatment, approximately 60% pay for it at the end of the 30-day trial period. Two follow-up letters are sent to the 40% who did not pay for the treatment at the end of the trial period to ascertain whether they have used the preparations and secured relief (Tr. 542). There is no indication in the record as to the reason these persons have not paid for the preparations.

10. Where persons responding to respondents' contact advertising do not reply to respondents' initial form letter inviting them to apply for respondents' home treatment on a 30-day trial basis, respondents send them a second form letter inviting them to apply for the treatment (Tr. 106; CX 4 A-B). The second letter suggests

that the individual may not have responded because of his uncertainty as to "how a catarrhal condition in my nose and throat can affect my ears." The letter attempts to briefly explain how "catarrhal conditions of the nose or throat can easily affect the Middle Ear and cause ear noises as well as be dangerous to your hearing." Enclosed with the letter is a pamphlet containing a much more detailed explanation of the physiology of the ear and how respondents' preparations have "helped so many people with this kind of poor hearing and ear noises" (CX 4E-F). Also enclosed is a further series of extracts from testimonial letters purporting to have been received from users, similar in content to those previously described (CX 4G-J). Persons who do not respond to the second form letter receive a third letter offering them the home treatment at a reduced rate of $7.35, instead of the $10 price offered in the original letter (Tr. 106; CX 5A-B). Attached to this letter is a further group of extracts from testimonial letters (CX 5E-H).

The Nature of the Representations Made

11. The complaint alleges that through the above and similar statements made by them in newspaper and magazine advertisements, and in the circular and other literature sent to prospective customers, respondents have represented and are now representing, directly and by implication, that the use of their preparations and devices "will cure or constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head." In their answer respondents deny that their advertisements are subject to such a broad interpretation and allege that the only statements and representations which they have made with respect to their products is that "they will temporarily relieve a catarrh caused deafness or impaired hearing and ear or head noises by the softening of the dried exudates." Respondents' position, in essence, is that their advertising claims with respect to the therapeutic value of their preparations are limited to (a) "temporary relief," rather than "cure" or "effective treatment," and (b) "symptoms only," rather than the "underlying disorders" responsible for these symptoms (Tr. 380; RR p. 3). In support of their position concerning the limited character of the representations made by them respondents cite the fact that their advertising literature, (a) uses the word "relief," and nowhere refers to their preparations as a "cure," (b) uses the word "palliative" in connection with the name of their preparations (the dictionary definition

of which is, "to mitigate" or "to ease without curing"), and (c) uses the words "symptoms" and "catarrhal conditions" in referring to what they offer relief for, rather than "an ailment or a disease" (RR, pp. 3-4). While recognizing that their advertising literature does not use the word "temporary" in connection with the word "relief," respondents contend that the former word is superfluous since "the word 'temporary' is assumed in the word 'relief,' " when used in connection with symptoms rather than a basic disorder. They also contend that the words "as needed" in connection with their treatment "necessarily negate any concept of permanent relief" (RR, p. 5).

12. It is the opinion and finding of the examiner that through the statements made in their advertising literature, portions of which have been cited above, respondents have represented and are now representing, directly and by implication, that the use of their preparations and devices, in combination, as directed, will cure or constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head, and that their claims of therapeutic value for said preparations and devices are not limited to mere "temporary relief." While it is true that respondents nowhere expressly use the word "cure," the over-all impression created in their newspaper and magazine advertising, and in the circulars thereafter sent to propective users, is that the use of their preparations is likely to bring about a cure or, at the very least, an extended cessation of the poor hearing or ear noises caused by catarrhal conditions of the head. The references made in advertisements to "[w]onderful relief from years of suffering from miserable ear noises and poor hearing," and the excerpts from the testimonial letters referring to ear noises as being "stopped" or "cleared up" after the use of the preparations, and to hearing being "good again" or "extra good" or "nearly perfect," after many years of suffering from these infirmities, would hardly suggest to readers and potential users of the preparations that all that was being offered to them was the possibility of achieving "temporary relief" from these conditions.[6]

13. Whether or not respondents' advertising literature can be interpreted as representing that their preparations will "cure" the indicated conditions, there is no question but that they constitute a representation that the preparations and devices are an effective method of treatment for these conditions, and that users can

[6] Although many of the testimonial letters speak of the writers' having received "relief," at least one of them refers to the individual's having received "a complete cure" (CX 3-E).

reasonably expect to receive some type of extended therapeutic benefits from the use thereof. Respondents' contact advertising expressly refers to the preparations as a "treatment" for ear noises and poor hearing caused by catarrhal conditions of the head (CX 1-2). The initial form letter sent to persons who respond to respondents' advertising states that: "Our treatment is designed for catarrhal * * * conditions of the head and for poor hearing and ear noises caused by such conditions" (CX 3-C). The application form refers to the preparation as a "30 Day Treatment" and the recipient is asked whether he wants "Treatment for Hard-of-Hearing" and "Treatment for Ear Noises" (CX 3-A). From the attestations of users (with which the prospective customer is deluged, and whose "word" he is urged to "take") of a complete cessation of or material improvement in auditory difficulties of long standing, the average reader would hardly infer that the "treatment" he is being offered will afford him temporary surcease from these afflictions.

14. Respondents' argument, that their use of such words as "relief," "palliative," "symptoms," and "as needed" can only be interpreted as implying temporary relief from symptoms, and not a cure for the basic disorders responsible for such symptoms, is one which might find a responsive chord in the rarefied disputations of medieval scholastic philosophers, but would hardly be appreciated by the generality of readers of respondents' advertising literature. As the court of appeals said in *Positive Products* v. *FTC*, 132 F. 2d 165, 167 (CA 7), where a similar argument was made:

> The weakness of this position * * * lies in the fact that such representations are made to the public, who, we assume, are not, as a whole, experts in grammatical construction. Their education in parsing a sentence has either been neglected or forgotten.

As previously indicated, there is nothing about the word "relief," in the context of its use, to imply that the therapeutic benefits being offered are merely "temporary" in nature. While it may be that one of the dictionary definitions of "palliative" is "to ease without curing," the examiner doubts that one in a hundred readers would be aware of this fact or would take the trouble to read the dictionary. Furthermore, even if some readers would understand that the preparations were being offered to "ease," rather than to "cure," their condition, they would, at the very least, have every reason to infer from the advertising literature as a whole that the remedy offered would bring about an extended easing of their ear difficulties. The fact that the advertisements refer to "symptoms" does not, in the context of the use of this word, imply that any

lesser degree of relief is being offered. In the first place, the "symptoms" referred to in the advertising are "mucus dropping in the throat," etc., whereas the "catarrhal deafness and ear noises" are referred to as if they were basic maladies.[7] More importantly, however, whether the latter are mere symptoms or are a basic disorder, respondents' advertising literature clearly implies that its preparations will cure or effectively treat them.

15. It is now well settled that to offer a preparation "for" some medical condition or as "treatment for" the condition, as respondents admittedly do here, "is equivalent to labeling it 'as a cure or remedy.' *Hall* v. *U.S.*, 267 Fed. 795, 798 (CCA 5)." *Aronberg (Positive Products)* v. *FTC, supra* at 168; *Rhodes Pharmacal Co.* v. *FTC,* 208 F. 2d 382 (CA 7). The fact that the word "relief" is used in this connection does not imply that any lesser degree of therapeutic effectiveness is being offered. *Positive Products* v. *FTC, supra.* Respondents seek to distinguish the *Positive Products* case on the ground that the product there was offered as relief for some "underlying disorder," whereas here it is offered only to relieve "symptoms." This agreement is substantially similar to that made in *Positive Products,* where respondent contended that its product was being offered merely to relieve a "functional" disturbance, rather than to remove the "organic" causes of the disturbance, to which the court responded that: "The term 'relief' * * * in a common sense * * * connotes permanent removal of organic or functional disturbance, as distinguished from alleviation of discomfort." Similarly here, whether catarrhal deafness and ear noises are symptoms, basic disorders, disturbances or conditions, respondents' claims that their preparations will afford relief from them and that they are a treatment for them clearly imply, in the context in which these claims are made, that the preparations are a cure or an effective treatment for catarrhal deafness and ear noises.

16. Respondents seek to further distinguish *Positive Products* on the ground that under the later holding in *Rhodes Pharmacal Co.* v. *FTC, supra,* the word "relief" necessarily implies the "temporary" character of the therapy being offered (RR, p. 5). This argument is wholly lacking in merit. The court in *Rhodes Pharmacal*

[7] The examiner is not unaware that in the instructions accompanying the preparations respondents make the statement that: "Catarrhal conditions of the head are a condition rather than an ailment or disease" (RX 2-C). This revelation, after the customer has ordered the preparations, has no exculpatory effect since the law is violated "if the first contact * * * is secured by deception." *FTC* v. *Carter Products Co.*, 186 F. 2d 821, 824 (CA 7). Furthermore, it is immaterial, since the prospective customer is interested in knowing whether the preparation will help his condition, not whether its medical classification is that of a symptom, a condition or an ailment. Calling it a "condition" does not imply that the preparation offers him a lesser degree of relief.

actually cited, with approval, the holding in *Positive Products (Aronberg)*, that offering a preparation as relief "for" a disease or condition "is equivalent to labeling it a cure or remedy for such disease," unless the advertising makes it clear that the claimed relief is merely for pains or aches associated with the disease (208 F. 2d at 386). While it is true that the court struck the word "temporary" from the Commission's Order, it did not do so because the word "relief" implies "temporary," as respondents suggest, but because the word temporary "carries an uncertain meaning" in the context of its use (208 F. 2d at 388). Futhermore, this modification of the Commission's Order was subsequently set aside by the Supreme Court (348 U.S. 940).

17. Even assuming, arguendo, that respondents' advertising literature can be interpreted as offering the prospective user only temporary relief from his catarrhal caused deafness and ear noises, it is the opinion and finding of the examiner that, at the very least, they constitute a representation that the prospective user may expect a cessation of his catarrhal deafness and ear noises for some period of time that is of more than merely momentary or fleeting duration. The very words cited by respondents as suggesting that a permanent cure is not being offered, *viz*, that the preparation should be "used as needed," carry the implication that when the treatment has been used as needed it will achieve a cessation or remission of ear noises and hearing for some period of time sufficient to make the effort and expenditure worthwhile. Respondents' characterization of its preparation as "Our Regular 30-day Treatment," and the reference in numerous testimonial excerpts to the users' ear problems having been terminated or materially improved within 30 days or less, would certainly convey, to a prospective user, the minimum expectation that he could reasonably expect some extended period of relief from the ear problems referred to, whether they be considered a basic disorder or a symptom thereof.

The Truth or Falsity of the Representations

18. The complaint alleges that respondents' advertising literature is false and misleading since the use of respondents' preparations and devices, in combination as directed, or otherwise, will not cure nor have any beneficial effect on hearing losses or ear noises, or head noses or catarrhal conditions of the head, including the nose, ear and air passages. In their answer respondents denied knowledge or information sufficient to form a belief as to the truth or falsity of this allegation of the complaint. The basis of their indirect denial is

respondents' contention that they make no claim that their preparations constitute a cure of the conditions alleged in the complaint or that they will have any beneficial effect on these conditions, except in one limited respect, *viz*, that they will afford temporary relief for "a catarrh caused deafness or impaired hearing and ear or head noises by the softening of dried exudates." (Pre-Hearing Order, Par. 6-7). In essence, therefore, respondent concede, for purposes of this proceeding, that their preparations have no therapeutic efficacy in excess of affording temporary relief from loss of hearing and ear noises when these conditions are caused by a catarrh, and that the temporary relief afforded in such cases arises from the softening of dried exudates (Tr. 380).

19. The position taken by respondents in this proceeding with respect to the limited therapeutic value claimed for their preparations is an outgrowth of an earlier Commission proceeding brought against respondents' predecessor, *The Elmo Co., Inc.*, Docket No. 5959, 48 F.T.C. 1379. The complaint in that proceeding was based on Elmo's advertising claims with respect to preparations and devices identical with those in the instant proceeding. The earlier proceeding was terminated by a consent settlement under which respondents were ordered to cease and desist from claiming, (a) that the use of their preparations "will have any beneficial effect on deafness not caused by a catarrhal condition of nose, ear or air passages," (b) that the beneficial effect of these preparations in the treatment of deafness or head or ear noises by a discharging catarrh is "in excess of affording temporary relief therefrom," and (c) that the effect of the preparations in the treatment of such conditions when due to dry catarrh is "in excess of softening of the dry exudates, or that any benefit can be expected by reason of this action of respondents' preparations in the treatment of conditions caused by dry catarrh of the ear canal unless the softened exudates are removed by other means." In the earlier proceeding the Commission made findings by consent, and without the taking of testimony, (a) that the use of respondents' preparations will have no beneficial value in cases of impaired hearing, "except when caused by catarrh," (b) that the only beneficial effect of the preparations in the latter type of situation is that of "temporarily relieving the catarrhal condition and the resulting deafness or impaired hearing and ear and head noises," and (c) that when these conditions are due to a so-called dry catarrh, the benefits derived from the use of respondents' preparations are "limited to the softening of the dried

exudates." Respondents contend that the claims they now make for their preparations are limited to those permitted under the order and findings in the *Elmo* case (RR, p. 8).[8]

20. While, as previously stated, it is the position of complaint counsel that respondents' advertising is not limited to a claim of mere temporary relief of the indicated conditions, they contend that even if respondents' advertising is deemed to be so limited it is false, since their preparations and devices have no therapeutic value in the treatment of these conditions, either as a cure or effective treatment, or as affording even temporary relief. For this purpose counsel called three prominent otolaryngologists (ear, nose and throat specialists). One of these, Dr. Donald F. Proctor, is Associate Professor of Laryngology and Otology at the Johns Hopkins University Medical School, and is Otolaryngologist in Charge of Baltimore City Hosptials (CX 6-A). The second, Dr. Samuel L. Fox, is Associate Professor of Otolaryngology and a Lecturer in Pharmacology at the University of Maryland Medical School. In addition, Dr. Fox is engaged in private practice specializing in diseases of the eye, ear, nose and throat and is a prominent staff member of a number of hospitals in Baltimore City (CX 7-A; Tr. 290). The third physician, Dr. David Myers, is Professor of Otorhinolaryngology at the University of Pennsylvania Medical School, and Director of the Institute of Otology at Presbyterian Hosptial, Philadelphia. In addition, he is engaged in private practice specializing in diseases of the ear, nose and throat (CX 9-A; Tr. 423). All three physicians are the authors of numerous articles appearing in medical journals dealing with diseases of the ear, nose and throat. It was the burden of their testimony that respondents' preparations and devices have no therapeutic value, either as a cure or treatment, or even as affording temporary relief in cases involving poor hearing or ear noises, whether caused by catarrh or otherwise. The testimony of these witnesses will be hereafter discussed in greater detail.

21. In support of their position that their preparations and devices will afford temporary relief for catarrhal caused hearing impairment and ear noises, respondents rely principally on the testimony of three medical witnesses and on extracts from certain

[8] Respondents' motion to dismiss the complaint herein, which has been heretofore referred to, was based on the ground that if its preparations had no therapeutic value, even that of affording temporary relief for the indicated conditions, the Commission should have reopened the earlier proceeding, rather than issuing a new complaint against them. As previously stated, this motion was denied by the undersigned and respondents' application to file an interlocutory appeal from this order was denied by the Commission.

textbooks in the fields of Pharmacology and Otolaryngology.[9] The first of respondents' medical witnesses, Dr. McKeen Cattel, although possessing an M.D. degree, was actually a pharmacologist. While prominent in the field of pharmacology, he made no pretense to being an expert in the field of drugs used in diseases of the ear, nose and throat (Tr. 596). His testimony was limited principally to a pharmacologic properties possessed by the drugs used in respondents' preparations. The second witness, Dr. Benjamin Calesnick, while also possessing a medical degree and engaging in a limited amount of general medical practice, was principally engaged in research in the field of human pharmacology at a medical college in Philadelphia, where he was dealing mainly with the use of drugs in persons not in a state of disease (Tr. 652). Although knowledgeable in the field of drugs used in the treatment of persons with upper respiratory infections, he conceded his lack of expertise in diseases of the ear, nose and throat (Tr. 670). Neither his testimony nor that of Dr. Cattel established that respondents' preparations have any value in the alleviation of ear noises or hearing impairment due to catarrhal conditions of the head. The third medical witness called by respondents, Dr. Harry K. Cherken, is a practicing otolaryngologist, who identified certain textbooks as authoritative and testified concerning his examination of certain users of respondents preparations. He expressed no opinion as to the efficacy of respondents' preparations beyond the fact that there was a "possibility" they might relieve ear noises under certain limited conditions (Tr. 743). In addition to these three professional persons, respondents called two users of respondents' preparations who claimed to have received some relief from their ear difficulties by the use thereof.

22. Before seeking to resolve the issue of whether respondents' preparations and devices will or will not achieve the therapeutic benefits claimed for them, it is necessary to first define more precisely the nature of the conditions for which it is claimed such benefits will be achieved. As previously noted, respondents' claim that their preparations and devices will have a beneficial effect on poor hearing and ear noises is limited to cases where these ear problems are "caused by catarrhal (excess fluid mucus) condi-

[9] The textbooks in question were identified by respondents' medical witnesses as being "authoritative" texts in their field, and were received in evidence by the undersigned over objection of complaint counsel. Although of the opinion that textbooks (even authoritative ones) should not ordinarily be received as direct evidence, lest hearings in medical cases degenerate into "trial by textbook," the examiner was constrained to overrule the objection of complaint counsel, under the authority of the Commission's decision in *Sinkram, Inc.*, Docket No. 8490, February 28, 1964 [64 F.T.C. 1243].

tions of the head." In present day medical parlance there is no such disease or condition as a "catarrh." The word "catarrh" was used in earlier medical practice, when doctors had a poorer understanding of these conditions, as referring to a symptom complex in which there was an inflammation of the mucous membrane of the head or throat, whose origin was uncertain and which was accompanied by an excess secretion of fluid from, and a swelling of, the membrane of the affected areas (Tr. 100, 119, 303, 335, 430, 709). The term "catarrh" is still used and understood by members of the lay public, as involving an excess secretion of fluids in areas of the head and throat, accompanied by a feeling of stuffiness or congestion, and somtimes by a cough. However, very often people think they are suffering from what they refer to as a "catarrh," but they are merely overly conscious of the mucus which is a normal secretion from the membranes (Tr. 100, 225, 462).

23. It is respondents' contention that a catarrhal inflammation of the membrane in the nasopharyngeal tract will tend to spread to and block the eustachian tube, causing a drop in pressure within the tube and the production of a serous fluid within the middle ear (RPF, p. 10). This condition is known as serous otitis media,[10] and is frequently accompanied by an impairment of hearing and tinnitus (ear noises). While it is true that a blockage of the eustachian tube may cause serous otitis media and resultant hearing impairment and tinnitus, as respondents contend, it is not true that such blockage is commonly caused by a catarrhal condition (excess fluid) in the nasopharynx.[11] The greater weight of the persuasive medical evidence in the record is to the effect that only an "insignificant proportion" of cases of poor hearing or ear noises is due to an excess of mucus alone and without infection or other pathological factors being present (Tr. 101, 222, 307, 310, 353). Furthermore, a catarrhal inflammation of the nose and throat does not necessarily spread to the ear canal and thereby affect the eustachian tube (Tr. 129, 452).

24. The commonest cause of eustachian tube blockage is the mechanical blockage of the tube due to enlarged adenoid tissue. Other frequent causes of blockage are discharge from sinus infection and allergic rhinitis (nasal allergy). (Tr. 128, 205). While serous otitis media may be caused by blockage of the eustachian tube,

[10] The medical term of the disease derives from the Latin, serous being the serous fluid given off by the membrane, otitis being "ear" and media being "middle" (Tr. 356).

[11] In their advertising literature respondents state that "Catarrhal conditions of the head are a common cause of poor hearing and ear noises," and that the blocking of the eustachian tube "is a common cause of poor hearing and ear noises" (CX 3-I, 4-E).

it is not uncommon to have serous otitis and resultant ear difficulty without any blockage of the eustachian tube and despite the fact that the tube is wide open (Tr. 355, 406). In any event, whether resulting from blockage of the eustachian tube or not, in the condition known as serous otitis media the middle ear cavity becomes filled with a serous fluid secreted by the membrane. Such fluid, after a period of time, may become hardened. The serous secretion interferes with the conduction of sound and causes varying degrees of hearing impairment. It may also be accompanied by ear noises. This type of middle ear condition involves an inflammation and swelling of the mucous membranes of the middle ear, without any evidence of infection being present. It is sometimes referred to as secretory otitis media or as catarrhal otitis media. Where the condition is brought about by, or involves some form of, infection in the middle ear it is referred to as suppurative otitis media (Tr. 120, 128, 130, 345, 354-356, 394, 398, 431-433).

25. Respondents claim that their preparations and devices will afford relief for hearing difficulties or ear noises is limited to cases where these conditions are of catarrhal, *i.e.*, inflammatory, but not infectious, origin. Such therapeutic value as they may have in relieving deafness and ear noises is conceded to be limited to cases where a catarrhal inflammation in the head has affected the eustachian tube-middle ear complex (CX 3 I-J; CX 4 A, E, F; RX 2 C). Essentially, this means that the only persons who could conceivably receive relief from poor hearing or ear noises, by the use of respondents' preparations, are those persons whose auditory difficulties are due to serous (catarrhal) otitis media which has been brought about by closure of the eustachian tube. No claim is made that persons with suppurative (infectious) otitis media will receive relief from respondents' preparations. On the contrary, respondent advises prospective users that "if there is infection present in the ear canal" the treatment should not be used "since use may have the tendency to spread it [the infection]" (CX 3 B). Nor is it contended that respondents' preparations have any efficacy in cases of hearing impairment or ear noises arising from difficulties in the inner ear.

26. Before considering whether respondents' preparations and devices will or will not afford relief in the narrow class of cases where it is claimed they have utility, it should be noted that respondents' claims presuppose (a) that eustachian tube blockage and resultant hearing difficulties are commonly brought about by

excess mucus secretion in the nasopharynx,[12] and (b) that the average person suffering from hearing impairment or ear noises is able to determine, without a medical examination, that his difficulties are the result of serous otitis media brought about by blockage of the eustachian tube, and are not the result of suppurative otitis media (infection in the middle ear) or of some disease in the inner ear. With respect to the first supposition, it has been previously noted that only an "insignificant proportion" of cases of eustachian tube blockage and hearing impairment is due solely to an excess of mucus in the nasopharyngeal tract. With respect to the second supposition, the evidence in the record establishes that the symptoms contained in respondents' advertising literature are applicable to a number of different diseases of the middle ear and inner ear, and that the average layman cannot determine what is causing his hearing difficulties without a medical examination. Where the condition is of infectious origin, persons using respondents' preparations may delay in seeking necessary medical treatment, with the result that they may sustain a permanent impairment in hearing or suffer more dire consequences (Tr. 107, 143, 150, 152, 306, 310, 361-362, 435-436).

27. The greater weight of the credible evidence establishes that even in cases of hearing impairment or ear noises brought about by catarrhal conditions of the head, respondents' preparations and devices are of no value, either as a cure or a method of treatment, or as affording any type of effective relief from such hearing impairment or ear noises. The examiner will hereafter separately discuss the purported therapeutic properties of each of respondents' preparations and devices. However, it is sufficient to note at this point that, with one exception, they consist of drugs which are applied to the ear, nose or throat. The essential drugs which are claimed to have any therapeutic value in most instances purport to possess analgesic, anesthetic, antiseptic, astringent or counter-irritant properties, or a combination of such properties. It is the burden of the credible medical evidence in this record that none of these drugs has any value in relieving catarrhal conditions of the head, or hearing impairment or ear or head noises caused by a catarrhal condition of the head or caused by any other condition (Tr. 114-115, 162, 185, 311, 318-319, 441-443). None of the drugs is capable of reaching the areas of the middle ear which are the situs of the hearing impairment or ear noises. While conceivably

[12] See n. 11, *supra*.

some of them might reach the opening of the eustachian tube this would have no substantial beneficial effect since in most instances of serous otitis media with eustachian tube blockage, the entire tube and middle ear cavity are inflamed and swollen. To the extent any of the drugs might conceivably open the tube, the effect would be momentary and fleeting, and the tube would close again unless the underlying cause of the inflammation was removed. In cases of hearing impairment and ear noises due to an inflammation in the middle ear there is no such thing as affording effective relief, short of taking measures to clear up the basic condition which is causing the inflammation. This may involve the prescribing of decongestants or antibiotics by mouth, or the opening of the middle ear cavity surgically. While drugs such as some of those sold by respondents were used in the past by physicians in treating ear conditions, their use was abandoned a great many years ago because they were found to be harmful and ineffective. To the extent drugs are used in the ear cavity or nasal area for hearing difficulties they should be applied by a physician through a nasopharyngoscope or be used under his direction. The only portion of respondents' treatment not involving the use of drugs is the ear vibrator. This method of treatment is not only ineffective, but is dangerous and may force infection into the inner ear (Tr. 207, 230, 235, 261, 237, 349, 372, 391, 396-400, 469, 471, 478, 482, 486, 311, 439).

28. The examiner is not persuaded by the medical evidence offered on behalf of respondents that their preparations and devices will have any material benefit in the cure, treatment or relief of hearing difficulties or ear noises. While Dr. Cattell (the pharmacologist) testified that such preparations would "tend to relieve" catarrhal conditions by "liquefying, moving and washing out the mucus" (Tr. 637), he made no direct claim that they would be effective in relieving hearing impairment or ear noises due to a catarrhal condition of the head. Dr. Cattell admittedly is not an "expert" in the therapeutic effectiveness of drugs used in the field of ear, nose and throat medicine (Tr. 569, 591, 596). While claiming to be familiar with the "pharmacological properties" of "most" of the drugs contained in respondents' preparations, he was frank enough to admit that "we would like to know a lot more about some of them" (Tr. 573-574). Dr. Calesnick, a physician and human pharmacologist (specializing in the action of drugs on nondiseased persons), made no claim to being an expert in the treatment of diseases of the ear. While having some experience in the treatment of colds, coughs and upper respiratory infections, he conceded that

when the inflammation involved the eustachian tube and the patient had catarrhal otitis media, even he would not attempt to treat the patient, but would refer him to "an otolaryngologist" (Tr. 669-670). Dr. Calesnick agreed that there were "101 different causes of tinnitus," and that he would ordinarily refer such patients "to the specialist" (Tr. 661). Dr. Cherken, the only otolaryngologist called by respondents, testified that some of the drugs contained in respondents' preparations had been used in earlier medical practice and had given people "relief" (Tr. 723). The nature of the "relief" afforded was not specified by Dr. Cherken, but from his concurrence with the views expressed in one of the texts offered by respondents, concerning the use of such medications, it seems apparent that he was talking about relief of pain and discomfort, and not relief of hearing difficulties (Tr. 720).[13] The nearest Dr. Cherken came to testifying that respondents' preparations would relieve ear noises was that there was a "possibility" that they would do so (Tr. 743).

29. The examiner does not find the extracts from the medical texts offered by respondents any more persuasive than their medical testimony, on the issue of the efficacy of respondents' preparations in the treatment or relief of catarrhal deafness or ear noises. Some of the texts were of rather ancient vintage and the examiner is not satisfied that they represent current medical opinion.[14] Because of changes which have taken place in scientific knowledge in the field, a great many of the textbooks are out of date and practicing physicians tend to rely more on current medical journals than on texts (Tr. 488). It is noteworthy that the extensive textual material offered by respondents did not include anything from the work by Dr. Francis Lederer, which the doctors on both sides agreed was the outstanding and recognized textbook in the field of otolaryngology (Tr. 338, 722).[15] Aside from whether the textual material offered by respondents is current, it largely fails to support their position concerning the effectiveness of their preparations in the treatment of hearing difficulties and ear noises. Much of the material refers to drugs similar to respondents', as being

[13] See n. 16, *infra*, for further reference to this text, by Dr. Lawrence R. Boies (RX 10).

[14] One of the texts was published in 1928 (RX 14), and another in 1931 (RX 15). Another of the texts, purporting to have been published in 1959 (RX 17), was actually a republication of a text published in the 1930's. One of the otolaryngologists called in support of the complaint, who had written a chapter in the earlier version and was asked to review the 1959 edition before it was republished, advised the editor not to publish the material because at least half of it was out of date. The book was nevertheless republished without change. (Tr. 337, 464).

[15] Respondents' witness, Dr. Cherken, characterized Dr. Lederer's text as a "favorite of mine," and had no recollection of "having seen any mention about those [respondents' drugs] in his book" (Tr. 722).

useful in relieving pain and discomfort, and not for the treatment or relief of hearing impairment or ear noises.[16] In general, the texts agree with the position of the doctors called in support of the complaint that in any middle ear disease treatment should be directed at eliminating the cause.[17] Several of the texts refer to the use of certain mechanical devices and procedures to help inflate the eustachian tube. Aside from the fact that the texts contemplate application thereof by a physician, not a layman, such methods are now regarded as ineffective and dangerous, and have been largely abandoned (Tr. 481-483, 212-214, 317).

30. As heretofore mentioned, respondents offered the testimony of two so-called "user" witnesses, in an effort to establish that their preparations afford relief. Respondents sought to give this lay testimony an aura of scientific validity by having these individuals, along with three other users, examined by Drs. Calesnick and Cherken. Dr. Calesnick did not actually conduct a physical examination of the five individuals, either prior to or subsequent to their use of respondents' preparations, but merely took their case histories and referred them to Dr. Cherken. The latter conducted a limited otoscopic examination and sent them to a hospital for audiometric tests and X-ray examination. Only two of the five individuals examined actually testified. In the opinion of the examiner the testimony regarding the use of respondents' preparations by the five individuals in question has little probative value on the issues here presented. If anything, it tends to establish the lack of therapeutic value of the preparations. Of the five persons who had used respondents' preparations, at least three continued to have some type of ear noise after their completion of the recommended treatment.[18] Furthermore, there is no substantial medical evidence that whatever auditory difficulties these individuals were suffering from were caused by catarrhal conditions of the head. Dr. Calesnick conceded that he could not tell from the

[16] For example, the text by Dr. Lawrence R. Boies refers to the use of ear drops "for the pain accompanying otitis media," and "to relieve earache in acute middle ear disease." It also refers to nose drops and sprays as "add[ing] somewhat to the patient's comfort." Reference is also made to nasal douching as "useful for the patient's comfort" (RX 10 C-D).

[17] One text states that treatment should be directed to "cure the primary affection and to restore the patency of the Eustachian tube" (RX 14-B). Another stresses that treatment should be "directed to the various etiologic [causative] factors" (RX 16-C). Still another states: "Primarily, the cause should be sought and, if possible, removed" (RX 17-C).

[18] According to Dr. Calesnick's testimony, Joseph Akle and Edna Gildersleeve, were still complaining of ear noises at the time he examined them in July 1964 (Tr. 698, 699, 701). While claiming that Joseph McDonald did not complain of ear noises at that time, McDonald testified that he still had noise in one ear, although he claimed it had ceased in the other (Tr. 752). With respect to the other individuals, Dr. Calesnick testified that "[a]s far as I can tell," they were not complaining of noises at the time he saw them (Tr. 700). Mrs. Gildersleeve was still complaining of ear noises at the time of her testimony in September 1964 (Tr. 760).

symptoms described by them, and without a medical examination, what the cause of their difficulties was (Tr. 685, 687, 701). The testimony of Dr. Cherken tends to rule out, in at least three of the cases, the possibility that the ear noises were of catarrhal origin.[19] Dr. Cherken's testimony also establishes that the hearing impairment some of these individuals were suffering from (in addition to ear noises) was not due to catarrhal causes.[20] Dr. Cherken made no claim that respondents' preparations could bring, or had brought, relief to any of the individuals examined, except to the limited extent that their hearing noises were purely subjective and they had become convinced that the preparations were doing them some good (Tr. 739-741). The examiner finds nothing in the lay testimony of the two user witnesses to establish that the preparations have any value for the indicated conditions.

31. The examiner now turns to a consideration of each of respondents' preparations, in terms of their pharmacologic properties, with a view to determining the possible therapeutic value of each of them for the conditions at issue. In making this analysis it must be borne in mind that the relief which respondents claim for their preparations is limited to that of softening the dried exudates produced by a catarrhal condition of the head. The softening and removal of the exudates, it is contended, help to restore the patency of the eustachian tube, the blocking of which by catarrhal secretions results in the production of a serous fluid in the middle ear and interferes with the conduct of sound, thereby causing ear noises and a lack of hearing acuity (Tr. 380; Answer, Par. 6-7; Pre-Hearing Order, Par. A6-7; RPF, pp. 8-11). It has heretofore been found that excess catarrhal secretions are responsible for only an insignificant proportion of cases of deafness and ear noises, and that a serous condition of the middle ear frequently occurs without any blockage of the eustachian tube. The question which will now be considered is what value each of respondents'

[19] There is no dispute that, to the extent hearing impairment arises from a catarrhal inflammation which blocks the eustachian tube, there is a drop in pressure within the tube which causes the tympanic membrane (eardrum) to retract (Tr. 728). In the cases of Joseph Akle and Edna Gildersleeve, both of whom were still suffering from ear noises at the time of their examination, Dr. Cherken found that their tympanic membranes were normal (Tr. 726, 729). In the case of Joseph McDonald, who claimed that he still had noise in his *left* ear at the time he testified, Dr. Cherken's examination revealed that "both tympanic membranes appeared normal except for the *right* that was slightly pulled in or retracted" (Tr. 727).

[20] The only case in which the medical history revealed a hearing impairment, in addition to ear noises, was that of Joseph McDonald (Tr. 687). However, his audiometric examination revealed that his hearing loss was "due to deterioration of the nerve of hearing rather than mechanical obstruction in the ear itself" (Tr. 733). Joseph Akle was found to be suffering from a loss of hearing in high frequencies, which was due to "accoustic trauma" caused by "working around noise" (Tr. 735).

preparations has in the narrow class of cases in which it is claimed that they afford relief.

a. *Preparation No. 1 (Ear Oil).* According to respondents' expert in pharmacology, Dr. Cattell, this preparation has "a mild irritant effect * * * is an emollient [and] is a mild antiseptic. It would tend to increase the circulation somewhat," mainly through the action of the methyl salicylate, oil of eucalyptus and capsicum, which act as counterirritants (Tr. 600, 582). Dr. Cattell made no claim that the preparation would have any effect in the softening or removing of dried exudates or otherwise unblocking the eustachian tube. In the instructions which accompany the preparations, respondents claim that this preparation "should help to stimulate the nerves and blood supply to the ear and to lubricate the ear canal and help to relieve any stiffness of the eardrum" (RX 2-A). Nothing is said with reference to the removal of exudate. According to the textual material in Pharmacology offered by respondents, counterirritant drugs are "used to irritate the intact skin for the purpose of relieving pain" and their action in relieving pain has "a strong psychic component" (RX 8-B). This comports with statements in the textual material in Otolaryngology, previously referred to, that ear drops are used principally to relieve pain (n. 16, p. 960, *supra).* The credible testimony of the expert witnesses called by complaint counsel (which includes that of Dr. Fox, who is a pharmacologist as well as an otolaryngologist)[21] is to the effect that such preparations are of no value in releasing obstructions in the ear and may even make the condition worse (Tr. 239-243, 312, 413, 449-450).

b. *Preparation No. 2 (Nasal Cleanser).* According to respondents' expert, Dr. Cattell, the effect of this preparation would be that "of a mild antiseptic, a mild local anesthetic, a mild irritant," which would "tend to liquefy, wash out mucus * * * [o]ut of the nose and throat, wherever it gets to" (Tr. 601). No claim was made by Dr. Cattell that the preparation would loosen dried exudate in the ear canal, or would otherwise unblock the eustachian tube. According to the credible testimony of the experts called in support of the complaint, nasal irrigation with drugs of this type has no value in clearing up ear troubles and, moreover, is actually harmful since it may wash away the mucus which is a protective coating of the mucous membrane and may slow down

[21] Dr. Fox was responsible for the revision of the chapters relating to the eye, ear, nose and throat in Krantz & Carr's textbook on Pharmacology, portions of which were offered in evidence by respondents (RX 8). This is the most widely used book on Pharmacology in the English language (Tr. 295).

ciliary activity, making the patient more liable to infection (Tr. 177, 191, 202, 272, 312, 389-391, 397, 461, 473). This testimony comports with the textual material offered by respondents, to the effect that "[a]ny medication which arrests ciliary activity is considered to be harmful," and advises nasal spraying only in cases where there is *extreme dryness and crusting* in the nose since "in this situation we are not concerned with ciliary activity." Nasal douching is prescribed merely as "useful for the patient's comfort" (RX 10-D).

c. *Preparation No. 3 (Throat Gargle)*. According to respondents' expert, Dr. Cattell, this preparation has "mild anesthetic, mild astringent and mild analygesic effects" (Tr. 602). There is nothing in his testimony to suggest that it will be effective in removing dried exudates or otherwise unblocking the eustachian tube. In their directions for use, respondents indicate that the gargle is intended "to help remove the catarrhal secretions, or mucus, from the *throat*" (emphasis supplied). The textual material offered by respondents makes only two references to throat gargling. In one it is stated that it "may afford relief," the nature of the relief afforded not being specified (RX 17-D). In the other instance it is stated that the "actual value of gargling as a treatment for throat infection has always seemed doubtful" (RX 10-E). The latter comports with the credible testimony of Dr. Fox, the otolaryngologist-pharmacologist, who testified that gargling will not reach the affected areas, will not remove mucus or catarrhal secretion and may be harmful (Tr. 300, 314).

d. *Preparation No. 4 (Vapor Inhaler)*. The only preparation with respect to which respondents make any specific claim of opening the eustachian tube is the vapor inhaler. The instructions accompanying this preparation state that: "This method should help to open or inflate the Eustachian Tubes * * * and send these vapors into the tubes and middle ear, where possible" (RX 2-A). Respondents' expert witness, Dr. Cattell, testified that the drugs would have "primarily" a "counterirritant" action, but would also act as a "local anesthetic" and "an antiseptic" (Tr. 602). The action of a counterirritant has previously been discussed as being that of "relieving pain" and as having "a strong psychic component" (p. 962, *supra*). Dr. Cattell confirmed the fact that the action of such drugs is that of relieving "pain and congestion," but conceded that such action "isn't too well understood." While claiming that the ingredients in the inhaler would reach the opening of the eustachian tube, he made no claims that they would remove

dried exudates (Tr. 603, 605). According to the credible testimony of Dr. Fox, the ingredients in this preparation will merely anesthetize or numb the tissue and cause a person to "feel as though it is opened up because it is anesthetized," but will actually "irritate the eustachian tube and cause them to then become more blocked" (Tr. 316). The only textual material introduced by respondents referring to this type of treatment recommends its use only in cases of "acute laryngitis" and makes no reference to the therapeutic value of the oils and ingredients other than the water, stating that it is the "warm moist air" which is the "most important ingredient in the inhalation" (RX 10-F). According to the greater weight of the credible evidence, even if the ingredients in this preparation were to reach the opening of the tube, they would not be effective since they would not reach or remove the inflammation in the middle ear which is responsible for the difficulty (Tr. 391, 396-399, 468, 482).

e. *Preparation No. 5 (Massage Ointment).* The claim made for this preparation by respondents in the instructions accompanying it is that it "should help to stimulate the nerves and blood supply to the external ear" (RX 2-B). Their witness, Dr. Cattell, classified its action as being that of a counterirritant, with the petrolatum being merely an oily solution for the capsicum, but he conceded that he wasn't "qualified to testify" whether the preparation would relieve any pain or discomfort in the middle ear (Tr. 606). The credible testimony of Drs. Proctor and Fox establishes that the preparation is wholly ineffective since it will not be able to penetrate the inch of bone and tissue between the back of the ear and the middle ear (Tr. 284, 316). None of the textual material offered by respondents recommends the use of such preparations in the treatment of middle ear diseases.[22]

f. *Preparation No. 6 (Nasal Ointment).* The claim made for this preparation in the instructions accompanying it is that it "should help to relieve much of the catarrhal mucus in the nose and assist in controlling catarrhal congestion and irritation at the mouth of the Eustachian Tubes" (RX 2-B). No claim is specifically made that the preparation will soften and remove dried exudates,

[22] Extracts from a 1928 textbook make reference to a procedure called "Otomassage," which is not described in the textual material offered by respondents. However, from the discussion of the procedure it would appear to involve the use of mechanical devices by a physician, and one type of such massage is referred to as "of doubtful efficiency" (RX 14-C). Reference to "judicious massage with a hand-or engine-driven masseur" is made in another text, which was written in the 1930's (n. 14, *supra*), as being "of benefit" (RX 17-E). The procedure obviously contemplates use by a physician. Such mechanical devices are now regarded as ineffective and as dangerous, even when used by a physician (Tr. 482-483).

but the ambiguous statement is made that "if these tubes are open or can be opened, the vapor should penetrate to the middle ear." According to the credible testimony of Drs. Proctor and Fox such ointments have no value in opening the eustachian tube. They merely anesthetize the tissues and make them feel cool, while actually having an irritating effect. The use of such oily preparations can actually be harmful (Tr. 285, 302, 317). Dr. Cattell, respondents' witness, testified that the ingredients would have a slightly antiseptic and anesthetic action, and would tend to increase circulation, but made no claim that they would help to open the eustachian tubes (Tr. 588, 607). No claim is made in any of the textual material offered by respondents that this method of treatment will help open the eustachian tube.[23]

g. *Elmo No. 7 (Nasal Douche)*. This device is merely used to apply the ingredients in Preparation No. 2, the nasal cleanser, which has been previously discussed. No further comment is required since whatever efficacy the device has is by virtue of the ingredients in Preparation No. 2.

h. *Elmo No. 8 (Ear Vibrator)*. The instructions which are in evidence do not include any explanation as to what is expected to be achieved by the use of this device. It is merely referred to as being "included in the second month's treatment * * * if you need a second month's treatment" (RX 2-B). Presumably, its purpose is to inflate and open the eustachian tubes. Some of the textual material offered by respondents refers to the use of such mechanical devices as being for the purpose of "tympanic inflation" (RX 16-C, 17-B). However, according to the credible testimony of all the expert witnesses called in support of the complaint, while such equipment was used years ago by doctors, it has fallen into disuse, is regarded as ineffective, and is particularly dangerous when used by a layman because of the possibility of puncturing the eardrum and forcing infection into the inner ear (Tr. 207, 212, 317, 482, 485-487). While the instructions accompanying the device do state that it should not be used if "infection is present in the ear canal," laymen cannot ordinarily determine whether infection is present except when there is an actual discharge from the ear (Tr. 310).

32. Respondents make a final argument for the efficacy of their preparations, based on the manner in which the preparations are ordered and paid for. As previously noted, respondents decline

[23] A 1931 text recommends the application of "an oily solution" in cases of chronic *nasal* catarrh, following the spraying of the nose (RX 15-B). A more current text recommends the use of nose drops "infrequently and only to allay prolonged nasal obstruction" (RX 18-B). Medical opinion views the use of any oily preparation in the nose as dangerous (Tr. 283, 285).

approximately one-third of the orders they receive, on the basis of answers to the questionnaire which suggest that the treatment would be ineffective (Tr. 106). The balance of the orders is sold on a 30-day trial basis, under which the user need not pay unless he is satisfied that the treatment has helped him. Approximately 60% of those receiving the treatment pay for it. Respondents suggest that some inference favorable to the therapeutic value of the treatment should be drawn from the fact that there have been "a quarter of a million persons over 30 years who have secured sufficient relief to justify them in writing to Elmo to pay for the treatment" (RR, p. 13).[24]

33. In the opinion of the examiner there is no merit to respondents' position in this respect. In the first place, the fact that one-third of the orders is declined does not give rise to any inference that the remaining two-thirds is sold only to persons with a catarrhal condition of the head (the only condition for which the treatment is claimed to be effective).[25] The declination or acceptance of an order is not made upon the basis of sufficiently reliable information, or by a sufficiently knowledgeable person, to insure that only persons with catarrhal deafness or ear noises will receive the treatment.[26] Secondly, and more importantly, the fact that 60% of the persons receiving the treatment pay for it has no probative value. The record suggests any number of reasons why payment was made, other than the fact that relief was secured from the preparations. For example, the evidence which respondents introduced indicates that many cases of tinnitus are of purely subjective origin (Tr. 741; RX 18-C). Very often persons imagine they have a catarrhal condition when they are merely overly conscious of normal mucus secretions (Tr. 100, 225, 462). Even in cases of actual excess mucus secretion and resultant serous otitis media, the condition is frequently self resolving and the patient recovers spontaneously (Tr. 679, 739; RX 10-B, 18-C). It is obvious that persons who were merely over-conscious of normal mucus secretions, or whose tinnitus was subjective or would have disappeared without any treatment, may have paid for respondents' preparations under the impression

[24] The figure of 225,000 is based on the fact that respondents sell 15,000 treatments annually, of which 9,000 are paid for, and that they and their predecessor have been in business for 30 years (Tr. 545).

[25] Although it was stipulated that one-third of the orders were declined, the actual testimony is that 25% or 30% were declined (Tr. 524).

[26] The decision to accept or reject orders is made by respondent Johann's wife, whose only claim to competence in evaluating the applications is that she formerly worked as a medical records librarian (Tr. 553). Her decision is based solely on the "yes" or "no" answers by lay persons as to whether they have symptoms of a catarrhal condition of the head and whether they want treatment for hearing impairment and ear noises (Tr. 552).

that they had been helped when actually the treatment was merely a placebo.[27] Since some of the preparations merely anesthetize the tissues, and may produce a feeling, but not the reality, of relief, it seems likely that many persons may have paid for the preparations under the mistaken impression they had actually been helped. There could be any number of additional explanations why persons paid for the treatment even though they had not secured relief, such as the natural tendency of many people to pay for what they have ordered. However, in the light of the overwhelming medical and scientific evidence in the record to the contrary, it is clear that no inference favorable to the therapeutic value of respondents' preparations can be drawn merely from the fact that many users paid for them under the 80-day trial arrangement.

Concluding Findings As To Falsity of Advertisements

34. From the record as a whole, including the evidence hereinabove discussed, it is concluded and found that:

a. Respondents have represented and are now representing in their advertising literature that the use of their preparations and devices will cure or constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head.

b. Even if respondents' advertising literature may be interpreted as offering prospective users merely temporary, and not permanent, relief from the foregoing conditions, respondents have represented and are now representing therein that such relief will be effective for a reasonably extended period.

c. Respondents concede, for purposes of this proceeding, that their preparations and devices have no therapeutic efficacy in excess of affording temporary relief for deafness or impaired hearing and ear or head noises caused by a catarrhal (excess fluid mucus) condition of the head. Respondents contend that the temporary relief afforded by its preparations and devices in such conditions is secured by the softening of dried exudates, which have blocked the eustachian tube and interfered with the conduction of sound in the middle ear.

d. Respondents have represented and are now representing that catarrhal conditions of the head are a common cause of poor hearing and ear noises. In offering their preparations for the relief of catarrhal deafness and ear noises respondents have implied and

[27] There is a strong suggestion that the two user witnesses, one of whom was in the 70's and the other in the middle 60's, were merely overly conscious of normal mucus secretions. Both paid for the treatment despite the fact that they continued to have ear noises. The principal relief they claimed was from mucus in the nose and throat (Tr. 750, 758).

now imply that the prospective users thereof are able to determine whether their hearing impairment or ear noises are of catarrhal origin.

e. Only an insignificant proportion of cases of poor hearing or ear noises are the result of a catarrhal (excess fluid mucus) condition of the head. The average layman cannot determine, without a medical examination, whether his hearing impairment or ear noises are of catarrhal origin. While respondents purport to describe the symptoms of catarrhal deafness and ear noises in their advertising literature, a number of such symptoms are applicable to deafness and ear noises arising from a variety of diseases and conditions in the middle ear and inner ear, other than from a catarrh.

f. The record establishes, and respondents concede, that respondents' preparations and devices, when used as directed or otherwise, will not cure and do not constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head. The record also establishes that respondents' preparations and devices, when used as directed or otherwise, will not afford effective relief from any of the foregoing conditions and will not have any beneficial effect thereon.

g. It is concluded and found that the respondents' advertisements, portions of which are set forth in Paragraphs 5-10 of this decision, were and are misleading in material respects and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act.

CONCLUSION OF LAW

The dissemination by respondents of false advertisements, as hereinabove found, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Drive-X Company, Inc., a corporation, trading as The Elmo Company, and its officers, and Craig Sandahl and Richard Johann, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of preparations and devices referred to as the "Elmo Palliative Home Treatment," or any other preparations or devices of similar composition or possessing substantially similar properties, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing the dissemination of, any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication, that the use of its said preparations and devices, singly or in combination, as directed or otherwise, will have any beneficial effect on hearing loss or head noises or ear noises or catarrhal conditions of the head, including the nose, ear and air passages.

2. Disseminating, or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparations and devices, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

ORDER DISMISSING COMPLAINT AND VACATING EXAMINER'S INITIAL DECISION

The Commission having this day issued an "Order Vacating Order to Show Cause and Reopening Proceeding to Determine Whether a Change of Law or Fact or the Public Interest Requires Setting Aside Consent Settlement in Whole or in Part" in Docket No. 5959 [p. 1229 herein], and it thus appearing to the Commission that it is no longer necessary or appropriate to continue the proceeding herein; accordingly

It is ordered, That

The complaint in Docket No. 8615 be, and it hereby is, dismissed as to all respondents, and the initial decision of the hearing examiner issued February 4, 1965, be, and it hereby is, vacated.

IN THE MATTER OF

JOSEPH A. KAPLAN & SONS, INC.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), (d) AND (e) OF THE CLAYTON ACT

Docket 7813. Complaint, March 10, 1960—Decision, Dec. 2, 1965

Order modifying Paragraph 3 of a cease and desist order of the Commission dated November 15, 1963, in accordance with the decision of the Court

of Appeals, District of Columbia, dated May 13, 1965, 347 F. 2d 785, by omitting all reference to "any other service or facility" contained in the original order, 63 F.T.C. 1308.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the District of Columbia Circuit a petition to review and set aside the order to cease and desist issued herein on November 15, 1963 [63 F.T.C. 1308]; and the court on May 13, 1965, having issued its decision and entered judgment modifying said order to cease and desist, and on June 11, 1965, having entered its final decree affirming and enforcing said order to cease and desist as so modified; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said judgment of the court of appeals, to read as follows:

It is ordered, That respondent Joseph A. Kaplan & Sons, Inc., a corporation, its officers, employees, assignees, and representatives, directly or through any corporate or other device, in or in connection with the sale of shower curtains, shower curtain sets, shower curtain accessories, and related products in commerce, as commerce is defined in the Clayton Act, as amended, forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of said products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

2. Paying or contracting to pay, or granting or contracting to grant, or allowing, directly or indirectly, anything of value, including checks and credits, to or for the benefit of a customer as compensation or in consideration of any advertising or promotional services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondent's products, unless such payments, credits, grants or allowances are available on proportionally equal terms to all other customers competing in the distribution of said products.

3. Discriminating directly or indirectly among competing purchasers of its products by contracting to furnish, furnishing, or contributing to the furnishing of the service or facility of

accepting the return of its unsold products to any purchaser of said products bought for resale, with or without processing, unless such service or facility is accorded on proportionally equal terms to all purchasers competing in the resale of said products.

IN THE MATTER OF

ACCRO WATCH COMPANY, INC., ET AL.

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

Docket 8639. Complaint, August 24, 1964—Decision, Dec. 2, 1965

Order requiring a New York City importer of watches and watchcases to cease misrepresenting the guarantee on its watches and the composition and origin of its watchcases.

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 Accro Watch Company, Inc., a corporation, and Joseph Udell, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Accro Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 580 Fifth Avenue, in the city of New York, State of New York.

Respondent Joseph Udell is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of watches to retailers for resale to the public, under the trade names "Accro," "Gaylord," "Royal Geneva," and "Invicta."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, 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 maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The cases of certain of the watches offered for sale and sold by respondents consist of two parts, that is, a back and a bezel. The back part has the appearance of stainless steel and is marked "stainless steel back." The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

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

PAR. 5. The cases of certain of respondents' watches have bezels which have the appearance of being rolled gold plate, gold filled or solid gold. Certain of these watches are marked "5 micron bezel." Respondents do not disclose that these bezels are composed of a stock of base metal to which has been electrolytically applied a flashing or coating of precious metal of a very thin and unsubstantial character. This practice is deceptive and confusing to the consuming public unless the thin and unsubstantial character of the flashing or coating is disclosed by an appropriate marking.

PAR. 6. The cases of certain of respondents' watches are imported from Hong Kong and France and this is not disclosed except by marking on the inside of the cases, which cannot be seen after the watch movements have been assembled into the cases. These watchcases house movements which are imported from Switzerland, and when delivered to respondents' customers for resale, the watches are marked "Swiss" on the dials.

In the absence of an adequate disclosure that the aforesaid watchcases are of Hong Kong or French origin, the public believes

and understands that they are of domestic or Swiss origin, a fact of which the Commission takes official notice.

As to such watchcases, a substantial portion of the purchasing public has a preference for domestic or Swiss products, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country or place of origin of said watch cases is, therefore, to the prejudice of the purchasing public.

PAR. 7. Respondents state on tickets placed in conjunction with their watches, on certificates or cards which accompany their watches, and in certain advertising material, that their watches are "BONDED," and are accompanied by a "Guarantee Bond."

Respondents thereby represent, directly or by implication, that they have executed a bond, agreement or insurance policy which is supported by a fund set aside by respondents or another party for the purpose of assuring fulfillment of the terms of respondents' guarantee.

PAR. 8. In truth and in fact, respondents have not executed a bond, agreement or insurance policy which is supported by a fund set aside by respondents or any other party for the purpose of assuring fulfillment of the terms of respondents' guarantee or for any other purpose.

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

PAR. 9. In the course and conduct of their business, respondents cause to be placed in conjunction with their watches, guarantee certificates or cards which state that the watch "* * * is guaranteed against any inherent defects in material and workmanship for one year from date of purchase." This statement of guarantee does not disclose what one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, the manner in which the guarantor will perform under the guarantee, or the full identity of the guarantor.

The aforesaid practice has a tendency and capacity to mislead members of the purchasing public unless the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder, and the full identity of the guarantor are clearly and conspicuously disclosed.

PAR. 10. By and through the acts and practices hereinafter set forth, respondents place in the hands of retailers and others the means and instrumentalities whereby retailers and others may

mislead the public as to the metal composition and the country or place of origin of their watchcases, and the nature and extent of their guarantee.

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 in the sale of watches of the same general kind and nature as those sold by respondents.

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

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Sheldon Feldman supporting the complaint.

Simon & Graff, New York, N.Y., by *Mr. Leonard M. Simon* for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

JUNE 9, 1965

The Federal Trade Commission issued its complaint against respondents on August 24, 1964, charging them with violations of Section 5 of the Federal Trade Commission Act for failure to disclose the true metallic content of the bezels of certain of the watches assembled and sold by respondents and for failure to disclose the foreign origin of certain cases for watches which the respondents assembled and sold. The complaint also charged respondents with representing that their watches were bonded and guaranteed without disclosing the true terms of the bond or guarantee and further charged respondents with placing deceptive means and instrumentalities in their customers' hands by which they mislead the public. The respondents filed an answer in which they admitted certain allegations of the complaint and denied that they had violated Section 5 of the Federal Trade Commission Act.

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

FINDINGS OF FACT

1. Respondent Accro Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 580 Fifth Avenue, in the City of New York, State of New York (Stip. of Facts, CX 23, Tr. 5).

2. Respondent Joseph Udell is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent (Stip. of Facts, CX 23, Tr. 5).

3. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of watches to retailers for resale to the public, under the trade names "Accro," "Gaylord," "Royal Geneva," and "Invicta" (Stip. of Facts, CX 23, Tr. 5).

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, 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 maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act (Stip. of Facts, CX 23, Tr. 5).

5. The cases of certain of the watches offered for sale and sold by respondents consist of two parts, that is, a back and a bezel. The back part has the appearance of stainless steel and is marked "stainless steel back." The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel (Stip. of Facts,

CX 23, Tr. 5-6; CX 2, CX 62; CX 8A, CX 12, CX 13, CX 18).

6. The practice of respondents of offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal or stainless steel, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel (hearing examiner's Order Granting Motion to Take Official Notice, dated January 4, 1965).

7. The cases of certain of respondents' watches have bezels which have the appearance of being rolled gold plate, gold filled or solid gold. Certain of these watches are marked "5 micron bezel." Respondents do not disclose that these bezels are composed of a stock of base metal to which has been electrolytically applied a flashing or coating of precious metal of a very thin and unsubstantial character (Stip. of Facts, CX 23, Tr. 6).

8. Watchcases which incorporate bezels composed of a stock of base metal to which has been electrolytically applied a very thin flashing or coating of precious metal on which there is no disclosure of the true metal composition of the bezels, have a tendency and capacity to lead members of the purchasing public to believe that said bezels are rolled gold plate, gold filled or solid gold (hearing examiner's Order Granting Motion to Take Official Notice, dated January 4, 1965; CX 6T, 6V, 7B, 7D, 7E, 8B, 14, 16, 21; see also F.T.C. Trade Practices; Rules for the watch case industry, Rule 174.2(i), 16 C.F.R. 513, 515).

9. The cases of certain of respondents' watches are imported from Hong Kong and France and this is not disclosed except by marking on the inside of the cases, which cannot be seen after the watch movements have been assembled into the cases. These watchcases house movements which are imported from Switzerland, and when delivered to respondents' customers for resale, the watches are marked "Swiss" on the dials (Stip. of Facts, CX 23, Tr. 6; CX 12-14, 18, 21).

10. In the absence of an adequate disclosure that the aforesaid watchcases are of Hong Kong or French origin, the public believes and understands that they are of domestic or Swiss origin. As to such watchcases, a substantial portion of the purchasing public has a preference for domestic or Swiss products. Respondents' failure clearly and conspicuously to disclose the country or place of origin of said watchcases is, therefore, to the prejudice of the purchasing public (Par. Six of Complaint).

11. Findings 6, 8, and 10 above are based upon the taking of official notice of certain facts by the Commission itself in the complaint in this matter and by the examiner in his Order of January 4, 1965. The respondents have been given full opportunity to present evidence in rebuttal of the facts officially noticed. The respondents have failed to avail themselves of this opportunity to rebut any of the facts officially noticed and found in Findings 6 and 8. As to the facts found in Finding 10 above, of which the Commission itself took official notice in the complaint, the respondents urge that there can be no deception arising from respondents' failure to disclose that cases incorporated into watches marked "Swiss" on their face, actually come from France or Hong Kong (see Respondents' Proposed Findings 13-21). Respondents' contention in this regard must be rejected.

The only evidence in support of this contention is that of individual respondent Joseph Udell and Sheldon Parker, the president of W.M.R. Watch Case Company, one of respondents' principal suppliers of watchcases. The testimony of these two witnesses does not support respondents' contention. The fact that cases manufactured in Hong Kong or France are much cheaper and easier to obtain than Swiss or domestic cases does not establish that the public has no preference for Swiss or domestic cases. Mr. Udell even admitted that if the cases were properly marked as to origin his watches would probably be harder to sell (Tr. 66-67).

Furthermore, these precise questions have been previously litigated and decided adversely to respondents' position in a number of proceedings. *Detra Watch Case Corp.*, F.T.C. Docket 8597, decided September 24, 1964 [64 F.T.C. 848]; *W.M.R. Watch Case Corp.*, F.T.C. Docket 8573, decided March 24, 1964, *aff'd*, 343 F. 2d 302 (D.C. Cir., 1965); *Delaware Watch Company*, F.T.C. Docket 8411, decided August 15, 1963, *aff'd*, 332 F. 2d 745 (2nd Cir., 1964).

In addition, respondents' contention that its watchcases are properly marked in accordance with Customs Rulings and Regulations and therefore are properly marked for all purposes must be rejected. *L. Heller & Son, Inc.*, v. *F.T.C.*, 191 F. 2d 954 (7th Cir., 1951); *Baldwin Bracelet Corp.* v. *F.T.C.*, 325 F. 2d 1012 (D.C. Cir., 1963), *certiorari denied*, 377 U.S. 923 (1964); *Delaware Watch Co.* v. *F.T.C. (supra)*.

12. Respondents state on tickets placed in conjunction with their watches, on certificates or cards which accompany their watches, and in certain advertising material, that their watches are "BONDED," and are accompanied by a "Guarantee Bond."

Respondents thereby represent, directly or by implication, that they have executed a bond, agreement or insurance policy which is supported by a fund set aside by respondents or another party for the purpose of assuring fulfillment of the terms of respondents' guarantee (Stip. of Facts; CX 23; Tr. 6-7; CX 2, 3, 4 5A-F, 22).

13. In truth and in fact, respondents have not executed a bond, agreement or insurance policy which is supported by a fund set aside by respondents or any other party for the purpose of assuring fulfillment of the terms of respondents' guarantee or for any other purpose (Stip. of Facts, CX 23, Tr. 7).

14. In the course and conduct of their business, respondents cause to be placed in conjunction with their watches, guarantee certificates or cards which state that the watch "* * * is guaranteed against any inherent defects in material and workmanship for one year from date of purchase." This statement of guarantee does not disclose what one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, the manner in which the guarantor will perform under the guarantee, or the full identity of the guarantor (Stip. of Facts, CX 23, Tr. 7).

The aforesaid practice has a tendency and capacity to mislead members of the purchasing public unless the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder, and the full identity of the guarantor are clearly and conspicuously disclosed. *Baldwin Bracelet Corp.*, 61 F.T.C. 1345 (1962), *aff'd*, 325 F. 2d 1012 (D.C. Cir., 1963), *certiorari denied*, 377 U.S. 923 (1964).

15. In the conduct of their business, at all times mentioned in the complaint, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of watches of the same general kind and nature as those sold by respondents (Stip. of Facts, CX 23, Tr. 7).

16. By and through the acts and practices set forth in the complaint, respondents place in the hands of retailers and others the means and instrumentalities whereby retailers and others may mislead the public as to the metal composition and the country or place of origin of their watchcases, and the nature and extent of their guarantee.

CONCLUSIONS

1. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said

statements and representations were and are true and into the purchase of substantial quantities of respondents' watches by reason of said erroneous and mistaken belief.

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

ORDER TO CEASE AND DESIST

It is ordered, That respondents, Accro Watch Company, Inc., a corporation, and its officers, and Joseph Udell, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling watches:

(a) the cases of which are in whole or in part composed of base metal which has been treated or processed to simulate or have the appearance of precious metal or stainless steel, or

(b) the cases of which are in whole or in part composed of base metal that has been treated with an electrolytically applied flashing or coating of precious metal of less than 1½ of one thousands of an inch over all exposed surfaces after completion of all finishing operations,

without clearly and conspicuously disclosing on such cases or parts the true metal composition in a form consistent with the Trade Practice Conference Rules for the Watch Case Industry (set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 174).

2. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof by marking on the exterior of the cases of such watches on an exposed surface, or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the watches, with such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

3. Representing, by use of the words "Bonded," "Guarantee Bond," or any other words of similar import or meaning, that a bond, agreement or insurance policy has been executed which is supported by a fund set aside by respondents or any other party for the purpose of assuring fulfillment of the terms of respondents' guarantee or for any other purpose.

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

5. Misrepresenting, in any manner, or supplying to or placing in the hands of any retailer or other purchaser means or instrumentalities whereby retailers or others may deceive and mislead the purchasing public as to:

a. The metal composition of watchcases or parts thereof;

b. The country or place of origin of watchcases or parts thereof; or

c. The nature or extent of respondents' guarantee.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto, and the Commission having decided to deny the appeal:

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

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

Commissioner Jones concurring in the result.

IN THE MATTER OF

PARENTS' MAGAZINE ENTERPRISES, INC., ET AL.

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

Docket 8652. Complaint, Nov. 25, 1964—Decision, Dec. 3, 1965

Order requiring a New York City publisher, to cease misrepresenting in letters and notices disseminated to delinquent customers that delinquent accounts are turned over to an independent, bona fide collection agency.

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 Parents' Magazine Enterprises, Inc., a corporation, Parents' Home Service Institute, Inc., a corporation, and Edward A. Sand and G. Theodore Zignone, individually and as officers of each of said corporations, and Allison R. Leininger, individually and as an officer of Parents' Magazine Enterprises, Inc., and Eugene J. Foley, individually and as an officer of Parents' Home Service Institute, Inc., hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 52 Vanderbilt Avenue in the city of New York, State of New York. Prior to July, 1962, said respondent was known as The Parents Institute, Inc.

Respondent Parent's Home Service Institute, 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 52 Vanderbilt Avenue in the city of New York, State of New York. It is a wholly owned subsidiary of respondent Parents' Magazine Enterprises, Inc.

Respondents Edward A. Sand and G. Theodore Zignone are individuals and officers of each of said corporations. Respondent Allison R. Leininger is an individual and an officer of Parents' Magazine Enterprises, Inc. Respondent Eugene J. Foley is an individual and an officer of Parents' Home Service Institute, Inc.

Respondents Edward A. Sand, G. Theodore Zignone and Allison R. Leininger formulate, direct and control the acts and practices of respondent Parents' Magazine Enterprises, Inc., including the acts and practices hereinafter set forth.

Repondents Edward A. Sand, G. Theodore Zignone and Eugene J. Foley formulate, direct and control the acts and practices of respondent Parents' Home Service Institute, Inc., including the acts and practices hereinafter set forth.

The address of the individual respondents is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of magazines, publications and other merchandise to the general public by and through the United States mails.

PAR. 3. In the course and conduct of their business, respondents now cause and for some time last past have caused said magazines, publications and other merchandise, when sold, to be shipped from their places of business and sources of supply in the State of New York to purchasers thereof located in the 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 magazines, publications and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents offer for sale certain magazines, publications and other merchandise through the United States mails. Said magazines, publications and other merchandise are distributed and payment made therefor through the United States mails.

For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the aforesaid transactions, respondents have made certain statements and representations in letters and notices disseminated through the United States mails to purportedly delinquent customers.

Typical, but not all inclusive of such statements and representations are the following:

(a) On respondents' letterheads:

PAYMENT IS NOW PAST DUE

Your PAST DUE Account has again been brought to my attention for review. Before we take any drastic measures to enforce collection, I believe you should be advised on how serious it is to withhold payment on an account and what effect it may have on your credit. * * *

If we received a request from any credit company or credit bureau concerning your paying habits we have to report that you are not paying your account with us as you agreed. Such a reply may result in further credit being withheld from you by others. Furthermore, we may request our attorney to take any steps against you which he believes are necessary to collect this balance. * * *

Your account, long past due, remains unpaid.

Considering the arrears on your account, we think it well to write you that when payment is not received in time, we must refer all unpaid balances to a collection agency. * * *

Your account will be held open for the next ten days to await your payment before steps are taken to protect our interest.

Avoid any action by the Collection Agency, which may prove embarrassing

and costly to you, by sending us payment of your unpaid balance in the enclosed envelope NOW—BEFORE YOU FORGET!!!

(b) On the following letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., NEW YORK 18, N. Y.

Re: Claim of PARENTS' HOME SERVICE INSTITUTE, INC.

Your account has been referred to us because of your failure to comply with several requests for payment. * * *

Unless we receive payment from you within *ten* days, our client's attorney may have to take legal action on your account to secure a judgement against you. * * *

Unless we receive your remittance by return mail, your account may be referred by our client to their lawyer for proceedings against you. * * *

Such action may incur charges for court costs, disbursements and interest, all to be added to the total balance you now owe. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondents have represented directly and by implication that:

A. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency.

B. If payment is not made, the customer's general or public credit rating will be adversely affected.

C. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," is a separate bona fide collection and credit reporting agency located in New York City.

D. Respondents have turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection and other purposes.

E. If payment is not made, the delinquent customer's account will be transferred to an outside attorney with instructions to institute suit or to take other legal steps to collect the outstanding amount due.

F. Letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

A. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency.

B. If payment is not made, the customer's general or public credit rating is not adversely affected.

C. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," is not a separate bona fide collection or credit re-

porting agency. Said organization is a fictitious name utilized by respondents and others for the purpose of disseminating collection letters.

D. Respondents have not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection or any other purpose.

E. If payment is not made, the delinquent customer's account is not transferred to an outside attorney with instructions to institute suit or other legal steps to collect the outstanding amount due.

F. The letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have not been prepared or mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondents. Replies and responses to said letters and notices are forwarded unopened to respondents.

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

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the payment of substantial sums of money to respondents by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Terral A. Jordan supporting the complaint.

Lowenstein, Pitcher, Hotchkiss & Parr, New York, N.Y., by *Mr. James C. Sargent, Mr. Norman G. Sade*, and *Mr. John M. Hadlock* for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

AUGUST 31, 1965

The Federal Trade Commission issued its complaint against respondents on November 25, 1964, charging them with violations of Section 5 of the Federal Trade Commission Act in that respond-

ents made various false and misleading statements in attempting to collect delinquent accounts. The respondents filed an answer in which they admitted certain allegations of the complaint and denied that they had violated Section 5 of the Federal Trade Commission Act and alleging certain defenses discussed hereinafter.

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

FINDINGS OF FACT

1. Respondent Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 52 Vanderbilt Avenue, in the city of New York, State of New York. Prior to July, 1962, said corporate respondent was known as and was one and the same corporate entity known as The Parents' Institute, Inc. (Stipulation of Facts, CX 27, p. 1).

2. Respondent Parents' Home Service Institute, 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 52 Vanderbilt Avenue in the city of New York, State of New York. It is a wholly owned subsidiary of respondent Parents' Magazine Enterprises, Inc. Virtually all of the officers of respondent Parent's Home Service Institute, Inc., are officers and/or employees of respondent Parents' Magazine Enterprises, Inc. Respondent Parents' Home Service Institute, Inc., is operated as a subscription sales company by Parents' Magazine Enterprises, Inc., for its publications (Stipulation of Facts, CX 27, pp. 1, 2).

3. Respondent Edward A. Sand is the president and a member of the board of directors of Parents' Magazine Enterprises, Inc.; the president and a member of the board of directors of Parents' Home Service Institute, Inc., and exercises the usual functions and duties of his respective offices (CX 1). While he did not personally participate in the day-to-day operations, he was aware of the con-

tinuing use of the facilities of The Mail Order Credit Reporting Association, Inc., for many years (CX 1).

4. Respondent G. Theodore Zignone is the executive vice president and treasurer and a member of the board of directors of Parents' Magazine Enterprises, Inc., and a vice president and treasurer and a member of the board of directors of Parents' Home Service Institute, Inc. (CX 2). He was aware of and participated in the decision to utilize the facilities of The Mail Order Credit Reporting Association and was aware of its continued use (CX 2).

5. Respondent Allison R. Leninger is the chairman of the Executive committee, a member of the board of directors and advertising director of Parents' Magazine Enterprises, Inc. He has held the offices of president, executive vice president and vice president of Parents' Magazine Enterprises, Inc., and its predecessor Parents' Institute, Inc., and has been associated with said corporations for 32 years. He is a member of the board of directors but not an officer of Parents' Home Service Institute, Inc. From July 5, 1961 to March 25, 1963, he was executive vice president of Parents' Home Service Institute, Inc. (CX 3).

6. Respondent Eugene Foley has been an assistant vice president of Parents' Magazine Enterprises, Inc., since 1963 and a vice president and secretary of Parents' Home Service Institute, Inc., since 1962 (CX 4). From 1954 through 1962 he was engaged primarily in the operations of Family Publication Service, Inc., and Homemakers' Library League, Inc., in both of which corporations Parents' Magazine Enterprises, Inc., has an interest (CX 4).

7. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of magazines, publications and other merchandise to the general public by and through the United States mails (Amended Answer, Paragraph 2, Stipulation of Facts, CX 27, pp. 2, 3).

8. In the course and conduct of their business, respondents now cause and for some time last past have caused said magazines, publications and other merchandise, when sold, to be shipped from their places of business and sources of supply 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 magazines, publications and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (Amended Answer, Paragraphs 2 and 3, Stipulation of Facts, CX 27, pp. 2, 3).

9. In the course and conduct of their business, respondents offer for sale certain magazines, publications and other merchandise through the United States mails. Said magazines, publications and other merchandise are distributed and payment made therefor through the United States mails (Amended Answer, Paragraph 3, Stipulation of Facts, CX 27, p. 3).

10. For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the aforesaid transactions, respondents have made certain statements and representations in letters and notices disseminated through the United States mails to purportedly delinquent customers (Stipulation of Facts, CX 27, pp. 3-6). Typical, but not all inclusive of such statements and representations are the following:

(a) On respondents' letterheads:

Your PAST DUE account has again been brought to my attention for review. Before we take any drastic measures to enforce collection, I believe you should be advised on how serious it is to withhold payment of an account and what effect it may have on your credit. * * *

If we received a request from any credit company or credit bureau concerning your paying habits we would have to report that you are not paying your account with us as you agreed. Such a reply may result in further credit being withheld from you by others. Furthermore, we may request our attorney to take any steps against you which he believes are necessary to collect this balance. * * * (CX 11)

Your account, long past due, remains unpaid.

Considering the arrears on your account, we think it well to write you that when payment is not received in time, we must refer all unpaid balances to a collection agency. * * *

Your account will be held open for the next ten days to await your payment before steps are taken to protect our interests.

Avoid any action by the Collection Agency, which may prove embarrassing and costly to you, by sending us payment of your unpaid balance in the enclosed envelope NOW—BEFORE YOU FORGET!!! (CX 12)

(b) On the following letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., NEW YORK 18, N. Y.

Re: Claim of PARENTS' HOME SERVICE INSTITUTE, INC.

Your account has been referred to us because of your failure to comply with several requests for payment. * * *

Unless we receive payment from you within *ten* days, our client's attorney may have to take legal action on your account to secure a judgment against you. * * * (CX 14)

(Same letterhead in part reads)

Unless we receive your remittance by return mail, your account may be referred by our client to their lawyer for proceedings against you.

Such action may incur charges for court costs, disbursements and interest, all to be added to the total balance you now owe. * * * (CX 13; see also CX 8-18)

11. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondents have represented, directly or by implication, that:

A. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency.

B. If payment is not made, the customer's general or public credit rating may be adversely affected.

C. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," is a separate bona fide collection and credit reporting agency located in New York City.

D. Respondents have turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection and other purposes.

E. If payment is not made, the delinquent customer's account will be transferred to an outside attorney with instructions to institute suit or to take other legal steps to collect the outstanding amount due.

F. Letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have been prepared and mailed by that organization.

12. In truth and in fact:

A. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency (Amended Answer, paragraph 4).

B. If payment is not made, the customer's general or public credit rating is not adversely affected.

C. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," is not a separate bona fide collection or credit reporting agency. Said organization is a fictitious name utilized by respondents and others for the purpose of disseminating collection letters (Amended Answer, Paragraph 4, Stipulation of Facts, CX 19 A & B, CX 20 A-C, CX 21 A-D, CX 22 A-D, CX 23 A & B).

D. Respondents have not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection or for any other purpose (Stipulation of Facts, pp. 3, 4).

E. If payment is not made, the delinquent customer's account is not transferred to an outside attorney with instructions to institute suit or take other legal steps to collect the outstanding amount due (Amended Answer, Paragraph 4).

F. The letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have

not been prepared or mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondents. Replies and responses to said letters and notices are forwarded unopened to respondents (Amended Answer, Paragraph 4, Stipulation of Facts, pp. 4-6).

G. Therefore, the statements and representations as set forth in finding 10 hereof were and are false, misleading and deceptive.

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

14. In their proposed findings and memorandum brief, counsel for the respondents raised three points which merit discussion.

First, counsel for respondents urge that respondents never represented that The Mail Order Credit Reporting Association, Inc. was an independent and separate collection agency. The facts of record do not bear out respondents' contention. Counsel for respondents stipulated in the record, "The final letter of any selective series under the name of 'Parents' Home Service Institute, Inc.' usually refers to the fact that if payments were not received, the unpaid balance would be sent to a collection agency and is exemplified by CX 12." CX 12 reads, in part, "Considering the arrears on your account, we think it well to write you that when payment is not received in time, we must refer all unpaid balances to a collection agency * * * Avoid any action by the Collection Agency." Commission Exhibits 13 and 14 are follow-up letters on The Mail Order Credit Reporting Assoication, Inc. letterhead and constitute obvious representation that the delinquent claim has been transferred to a bona fide, separate collection agency.

Second, counsel for respondents urge that the use of The Mail Order Credit Reporting Asociation, Inc. was discontinued in December of 1963 prior to the issuance of the complaint in this matter and that, therefore, the issuance of an order would serve no purpose at this time. This contention must likewise be rejected. In issuing its complaint the Commission undoubtedly took into consideration the past history of the respondents and their advertising activities and the number of times these have been under scrutiny by the Commission. It appears clear that an order to cease and desist prohibiting the activities charged in the complaint is not only proper but necessary under the circumstances.

Third, respondents urge that none of the individuals named in the complaint should be included in any order to cease and desist and that the proceeding should be dismissed as to the individual respondents. This argument must likewise be rejected as to all respondents with the exception of the individual Allison R. Leininger. The evidence in the record makes it clear that the individual respondents Sand, Zignone and Foley were fully apprised of the activities charged in the complaint, and, while not being involved in such actions on a day-to-day basis, were well aware of their existence and condoned them and therefore must be held responsible for such actions (CX 1, 2 and 4). The record contains no evidence that the respondent Leininger participated in any of the acts or practices charged or was even aware of their existence. The record indicates that he was almost exclusively engaged in advertising and promotion of respondents' various publications (CX 3).

CONCLUSIONS

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

2. The complaint should be dismissed as to the respondent Allison R. Leininger, named individually and as an officer of Parents' Magazine Enterprises, Inc.

ORDER TO CEASE AND DESIST

It is ordered, That respondent Parents' Magazine Enterprises, Inc., a corporation, and its officers and respondent Parents' Home Service Institute, Inc., a corporation, and its officers and respondents Edward A. Sand and G. Theodore Zignone, individually and as officers of each of said corporations, and Eugene J. Foley, individually and as an officer of Parents' Home Service Institute, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of magazines, publications or other merchandise 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. A customer's name will be or has been turned over to a bona fide credit reporting agency for failure to pay delinquent accounts: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents

to establish that where payment is not received the information of said delinquency is referred to a separate, bona fide credit reporting agency.

2. That the general or public credit rating of a customer whose account is delinquent will be adversely affected: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that where payment is not received the information of said delinquency is referred to a separate, bona fide credit reporting agency.

3. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such accounts are in fact turned over to such agencies.

4. Delinquent accounts will be turned over to an attorney to institute suit or other legal action to effect payment: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish such fact.

5. Delinquent accounts will be or have been turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose.

6. "The MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." any other fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control is an independent, bona fide collection or credit reporting agency.

7. Letters, notices or other communications in connection with the collection of respondents' accounts which have been prepared or originated by respondents, have been prepared or originated by any other person, firm or corporation.

It is further ordered, That the complaint be dismissed as to the individual respondent Allison R. Leininger.

FINAL ORDER

Respondents and complaint counsel have withdrawn their notices of intent to appeal. The Commission has determined that the case should not be placed on its own docket for review and that pursuant to § 3.21 of the Commission's Rules of Practice the initial decision of the hearing examiner, filed August 31, 1965, the effective date of which has been stayed, should be adopted and issued as the decision of the Commission.

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

It is further ordered, That respondents Parents' Magazine Enterprises, Inc., Parents' Home Service Institute, Inc., Edward A. Sand, G. Theodore Zignone and Eugene J. Foley shall, within sixty (60) days after service of this order upon them, file with the Commission a report, in writing, setting forth the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

IN THE MATTER OF

TEXAS INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8656. Complaint, Jan. 22, 1965—Decision, Dec. 3, 1965

Consent order requiring a Texas producer and seller of portland cement to sell within 2 years all of the ready-mixed concrete facilities it had obtained through the acquisition of a Memphis, Tenn., ready-mix concrete company, and for 3 years following this divestiture it shall not produce or sell ready-mixed concrete in the Memphis area.

COMPLAINT

The Federal Trade Commission has reason to believe that Texas Industries, Inc. has acquired the stock and assets of Fischer Lime & Cement Company, Inc., a corporation, in violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended, and therefore, pursuant to Section 11 of said Act, it issues its complaint, stating its charges in that respect as follows:

I

Definitions

1. For the purposes of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as designated by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "Concrete products" includes all masonry products, concrete pipe, precast and prestressed concrete products, precast architectural products and packaged premixed concrete, all of which are manufactured from portland cement.

d. "Memphis area" includes Shelby County, Tennessee and Crittenden County, Arkansas.

II

Texas Industries, Inc.

2. Texas Industries, Inc., respondent herein, is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices located at 715 Avenue H East, Arlington, Texas.

3. Respondent, directly or through its subsidiaries, is principally engaged in the production and sale of materials employed in the manufacture of concrete, including cement, heavyweight aggregates and Haydite lightweight aggregates and in the production and sale of a full range of finished concrete products utilizing such materials. For the fiscal year ended May 30, 1963, respondent had sales of $26,401,088, assets of $30,570,804 and income of $2,180,164.

4. Respondent, directly or through its subsidiaries, owns and operates one or more manufacturing plants, aggregate producing operations or distribution facilities in Corpus Christi, Dallas, Eastland, Fort Worth, Houston, Midlothian and Odessa, Texas; Des Moines, Iowa; Kansas City, Kansas; Alexandria, Monroe, New Orleans and Shreveport, Louisiana; Detroit, Michigan; Minneapolis, Minnesota; and Memphis, Tennessee.

5. In 1960, respondent commenced producing portland cement at its plant located at Midlothian, Texas. This cement plant was originally constructed with a rated annual capacity of 1,500,000 barrels and was subsequently enlarged in 1963 to the present rated annual capacity of 3,000,000 barrels. Respondent's total portland cement shipments in 1962 amounted to 1,724,466 barrels and in 1963, 2,306,483 barrels. Approximately 60% of these portland cement shipments were utilized in respondent's own operations.

6. Respondent has grown from 7 ready-mixed concrete plants in 1955 to 47 such plants in 1963, principally through a series of acquisitions. Respondent's sales of ready-mixed concrete and concrete products for the fiscal years ended May 30, 1961 through May 30, 1963, and the nine month period ended February 29, 1964, stated in millions of dollars, were approximately as follows:

	Ready-mixed Concrete	*Concrete Products*
1961	$ 9.8	$6.6
1962	10.2	7.2
1963	10.7	7.7
1964	19.2	6.5

7. At all times relevant herein, respondent was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

III

Fischer Lime & Cement Company, Inc.

8. Fischer Lime & Cement Company, Inc. (Fischer), is a corporation organized and existing under the laws of the State of Delaware with offices located at 269 Walnut Street, Memphis, Tennessee. By an agreement dated August 23, 1963, Fischer was organized as a transferee corporation to receive all of the operating assets of Fischer Lime & Cement Company, Inc. (Fischer Tennessee), a Tennessee corporation.

9. Prior to the acquisition Fischer Tennessee was principally engaged in the production and sale of ready-mixed concrete and concrete products in the Memphis area. In 1962, Fischer Tennessee had sales of $6,871,491, assets of $4,036,041 and net income of $91,053.

10. Fischer Tennessee operated five ready-mixed concrete plants and was either the largest or second largest producer of ready-mixed concrete, and the largest or second largest consumer of portland cement, in the Memphis area. During 1962, Fischer Tennessee consumed 345,059 barrels of portland cement and sold 217,640 cubic yards of ready-mixed concrete.

11. At all times relevant herein, Fischer and Fischer Tennessee were engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

Acquisitions

12. On or about September 30, 1963, respondent, through its wholly owned subsidiary, National Concrete Industries, Inc. (National), acquired all of the issued and outstanding capital stock of Fischer in exchange for all of the capital stock of Fischer Tennessee owned by National. The consideration had an aggregate value of $2,600,000.

V

The Nature of Trade and Commerce

13. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is the essential ingredient in the manufacture of ready-mix concrete and concrete products. There is no practicable substitute for portland cement in the manufacture of concrete.

14. The portland cement industry in the United States is substantial. In 1963, there were about 51 companies operating approximately 182 plants. Total shipments of portland cement in that year amounted to 349,321,000 barrels having a value of $1,116,555,000.

15. On a national basis, approximately 57% of all portland cement is shipped to companies engaged in the production of ready-mixed concrete. In the heavily populated metropolitan areas, the percentage of portland cement consumed by ready-mixed concrete companies is generally higher. Ready-mixed concrete producers are the only businesses engaged in the sale of concrete as a commodity.

16. Due to such factors as transportation costs and the necessity of supplying competitive delivery service to consumers, the effective market area of portland cement production and distribution facilities is limited. Similar considerations limit the market area for ready-mix companies.

17. Cement producers sell their portland cement to consumers, such as ready-mixed concrete companies, manufacturers of concrete products, contractors and building materials dealers. In the past such consumers, in general, have not been integrated or affiliated with portland cement producers.

18. In recent years there has been a trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan areas in various portions of the United States have become integrated with portland cement companies. As ready-mix companies have been acquired by producers of cement, competing cement producers have sought to acquire other cement consumers in order to protect their markets against the actual or expected foreclosure caused by these acquisitions, and to prevent additional foreclosure of their markets as a result of future such acquisitions by their competitors. Thus each acquisition by a cement producer of a substantial consumer of portland cement forms an integral part of a chain reaction of acquisitions—contributing both to the share of the market already foreclosed by acquisitions, and to the impetus for further such acquisitions.

19. In recent years, the Memphis area has been dominated by two ready-mixed concrete companies, including Fischer. These two companies accounted for approximately 50% of the ready-mixed concrete shipments in the Memphis area. The two dominant ready-mixed concrete producers in the Memphis area have since 1963 become integrated, through acquisitions, with portland cement companies.

VI

Violation of Section 7

20. The effect of the acquisition of Fischer Lime & Cement Company, Inc., by Texas Industries, Inc., both in itself and by aggravating the trend towards vertical integration between suppliers and consumers of portland cement, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the Memphis area, in adjoining markets, or in the United States as a whole, in the following ways, among others:

(a) Competitors of respondent may have been or may be foreclosed from a substantial share of the market for portland cement.

(b) The entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented.

(c) The ability of non-integrated competitors of respondent effectively to compete in the sale of portland cement may be substantially impaired.

(d) As an integrated manufacturer and seller of portland cement and ready-mixed concrete respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, or ready-mixed concrete.

(e) The production of ready mixed concrete, now a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few producers of portland cement.

Now, therefore, the acquisition of Fischer Lime & Cement Company, Inc. by Texas Industries, Inc., as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

Decision and Order

The Commission having issued its complaint on January 22, 1965, charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined that in the circumstances presented the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

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

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Texas Industries, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 715 Avenue H. East, Arlington, Texas.

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

ORDER

I

It is ordered, That respondent, Texas Industries, Inc. (hereinafter "Texas Industries"), within two years after the effective date of this order, divest, absolutely and in good faith, and to a purchaser or purchasers approved by the Federal Trade Commission, the following ready-mixed concrete facilities located in Shelby County, Tennessee, acquired from Fischer Lime & Cement Company, Inc.:

Getwell plant and leasehold interest;

Bodley plant, together with a sufficient portion of the leasehold on which it is located to permit the efficient operation of the plant;

Hunter plants 1 and 2 and related facilities, not including dry-mix facilities, together with a sufficient portion of the approximately six-acre site owned by Fischer Concrete Company, Inc., bounded on the south by Hunter Street to permit the efficient operation of the plants and related facilities;[1]

[1] Nothing herein shall prevent Texas Industries from retaining a right of access over said site to reach its dry-mixed concrete facilities, or the right to joint use of the quality control laboratory or radio communications system facilities there located, or agreeing with the person or persons to which divestiture is made for the retention of a portion of the tools, service equipment and spare parts at the truck repair shop there located.

Portable plant, commonly known as Allen Road plant, now located at Hunter Street site;[2]

Portable plant, commonly known as Pontotoc plant, now located at Linden-Walnut Street property;[2]

All machinery and vehicles, including ready-mixed concrete mixer trucks, committed to the production of ready-mixed concrete.

With respect to any land required to be divested hereunder Texas Industries shall have the right, if the person to whom said land is divested so elects, in lieu of selling said land to lease said land for a term which, if the lessee exercises all its renewal options, will extend for a period of at least ten years.

Nothing in this paragraph shall be deemed to prohibit Texas Industries from retaining, accepting and enforcing bona fide liens, mortgages, deeds of trust or other forms of security on all or parts of the assets required to be divested hereunder for the purpose of securing to Texas Industries full payment of the price at which said assets are disposed of or sold, or to prohibit Texas Industries from accomplishing the required divestiture in whole or in part by means of a lease-purchase agreement or agreements, or a conditional sale or sales, pursuant to which Texas Industries retains title to the assets until the purchase price is fully paid: *Provided, however,* That if, after bona fide disposal pursuant to the divestiture order, Texas Industries, by enforcing a bona fide lien, mortgage, deed of trust or other form of security, or by reason of the purchaser's failure to comply with the terms of a lease-purchase agreement or conditional sale agreement when and as required, regains control of any of said assets Texas Industries shall divest itself of said assets within twelve months from the time of said reacquisition to a purchaser or purchasers approved by the Federal Trade Commission: *And provided further,* That so long as Texas Industries retains a security interest with respect to any of the assets divested hereunder, or with respect to assets as to which divestiture is made by lease-purchase or conditional sale agreement any part of the sale price remains unpaid and owing, Texas Industries shall not in any calendar year supply more than thirty-five percent of the portland cement purchased by the purchaser of said assets for consumption in ready-mix concrete producing facilities divested hereunder. Sales of portland cement for consumption in any of said facilities as a result of the specification by a customer, in an oral or written agree-

[2] In lieu of divesting said plant, Texas Industries may remove said plant to a point outside Shelby County, Tennessee and Crittenden County, Arkansas, within the time permitted for divestiture hereunder.

ment with the operator of said facilities, requiring the purchase of Texas Industries' cement, shall not be taken into consideration in computing the amount of cement supplied or consumed in accordance with this paragraph.

II

It is further ordered, That, in any divestiture, Texas Industries not sell or transfer, directly or indirectly, any of the aforesaid assets to any corporation, or to anyone who is at the time of divestiture an officer, director, employee or agent of a corporation, engaged in the production and sale of portland cement or the principal business of which is the distribution of portland cement, or to any corporation or person controlled by one of the foregoing corporations or persons, or to any person who at the time of divestiture is an officer, director, employee or agent of, or under the control or direction of, Texas Industries or any of its subsidiaries or affiliates, or owns or controls, directly or indirectly, more than one percent of the outstanding shares of common stock of Texas Industries.

III

It is further ordered, That for a period of three years from the date upon which the divestiture required by this order is completed Texas Industries not produce, sell or distribute ready-mixed concrete in Shelby County, Tennessee, or Crittenden County, Arkansas.

IV

It is further ordered, That Texas Industries, within sixty days after the effective date of this order and every one hundred and eighty days thereafter until Texas Industries has fully complied with the divestiture provisions of this order, submit in writing to the Federal Trade Commission the names and addresses of all prospective purchasers of the assets required to be divested by this order with which Texas Industries has had contacts or negotiations; and that Texas Industries, until it has fully complied with the divestiture provisions of this order, maintain a file of all written communications between it and such prospective purchasers relating to the potential purchase of said assets, which file shall be made available to the Federal Trade Commission in the event that the divestiture required herein is not completed within two years after the effective date of this order.

IN THE MATTER OF

CONGRESS TEXTILE PRINTERS, INC., ET AL.

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

Docket C-1021. Complaint, Dec. 8, 1965—Decision, Dec. 8, 1965

Consent order requiring a New Jersey textile processor to cease using lacquer or other highly flammable substances in processing its net fabrics or textile articles unless clear disclosure is made that such articles are dangerously flammable and unsafe for ordinary use.

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 Congress Textile Printers, Inc., a corporation, and Peter B. Levy and Abraham H. Levy, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Congress Textile Printers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business at 179 Goffle Road, in the city of Hawthorne, State of New Jersey.

Respondents Peter B. Levy and Abraham H. Levy are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth. Their office and principal place of business is the same as that of the aforesaid corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the printing and processing of textile fabrics for customers and principals who ship or deliver such textile fabrics in commerce to respondents for such purposes.The aforesaid textile fabrics, when printed or processed by respondents are shipped or delivered from respondents' place of business in the State of New Jersey to respondents' customers or principals or other concerns located in various other States of the United States. Respondents maintain, and at all times mentioned, have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents in printing or processing net fabrics as aforesaid have used and employed lacquers and other materials or substances which are composed of or contain highly flammable materials, including nitrocellulose. Such materials when used in the printing or processing of net fabrics render the said fabrics dangerously flammable and unsafe for ordinary use. At no time do respondents reveal on the aforesaid fabrics or on labels or tags affixed thereto or in any other manner, that such fabrics are dangerously flammable and unsafe for ordinary use.

PAR. 4. The failure of respondents to reveal that said fabrics are dangerously flammable and unsafe for ordinary use has had, and now has, the tendency and capacity to mislead and deceive respondents' customers or principals and purchasers and prospective purchasers of said fabrics into the false and erroneous belief that said fabrics are safe and suitable for all ordinary uses. Respondents' failure to disclose that the said fabrics are dangerously flammable and unsafe for ordinary use is, therefore, to the prejudice of respondents' customers or principals and the purchasing public.

PAR. 5. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury to the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Congress Textile Printers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 179 Goffle Road, in the city of Hawthorne, State of New Jersey.

Respondent Peter B. Levy and Abraham H. Levy are officers of the corporate respondent and their address is the same as that of said corporate respondent.

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

ORDER

It is ordered, That respondents Congress Textile Printers, Inc., a corporation, and its officers, and Peter B. Levy and Abraham H. Levy, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the printing or processing of net fabrics or textile articles of a similar construction in commerce or in connection with the sale, offering for sale, shipment, distribution, transportation or causing to be transported of net fabrics or textile articles of a similar construction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using or employing finishes, lacquers, processing materials or substances of any nature whatsoever which are composed of or contain nitrocellulose or any dangerously flammable material or substance in connection with the printing or processing of such net fabrics or textile articles of a similar construction unless respondents clearly and conspicuously disclose on the fabrics or other textile articles or on labels or tags attached thereto and on all invoices, shipping memoranda and other documents relating to the shipment or delivery of such products that such substances or materials render the fabrics or other textile articles dangerously flammable and unsafe for ordinary use: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such materials or substances, after application to such net fabrics or textile articles of a similar construction, are self extinguishing and will not spread flame after removal of an igniting source.

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

Opinion

IN THE MATTER OF

BEATRICE FOODS CO.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

*Docket 6653. Complaint, Oct. 16, 1956—Decision, Dec. 10, 1965***

Order directing Beatrice Foods Co. of Chicago, Ill., to sell as going concerns, to purchasers approved by the Federal Trade Commission, four dairy companies it has acquired since 1953, and prohibits respondent from acquiring any domestic manufacturer, processor, distributor or seller of fluid milk, ice cream or frozen dessert within the next 10 years without prior Federal Trade Commission approval.

OPINION ACCOMPANYING FINAL ORDER

By the Commission:

On April 26, 1965 [67 F.T.C. 473], the Commission determined that respondents' acquisitions of Creameries of America, Inc., Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd.,[1] were unlawful under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). However, the Commission deferred entry of a final order pending receipt of the parties' views on the form and content of an appropriate order. Those views have been received and the Commission is now ready to formulate a final order that will provide effective and equitable relief against the adverse consequences of respondents' unlawful conduct.

In formulating relief, the Commission has considered the public interest in the restoration and maintenance of competition in the dairy industry, and in the markets directly affected by the illegal acquisitions, the need to harmonize, insofar as the facts permit and the public interest requires, the order entered against respondent with those which have already become effective against other leading dairy firms, and the practical problems and difficulties which might be involved in using the remedy of divestiture to restore and maintain competition.

The Commission has concluded, first, that to provide effective relief, divestiture of the assets acquired from Creameries of America, Inc., Durham Dairy Products, Inc., Greenbrier Dairy Products Company, and Community Creamery is essential. Divestiture is the normal, and usually the most appropriate, remedy

* The name of the respondent is incorrectly stated in the complaint as Beatrice Foods Company, see the initial decision, 67 F.T.C. 473, 486.

** Modified June 7, 1967, 71 F.T.C. 797.

[1] The assets of Dahl-Cro-Ma, Ltd., were destroyed by a tidal wave subsequent to their acquisition.

for removing the adverse consequences of Section 7 violations. (*United States* v. *E. I. DuPont de Nemours & Co.*, 366 U.S. 316, 326-31) The Commission finds that remedy especially appropriate here. As pointed out in our decision, the acquisitions of Creameries of America, Inc., Durham Dairy Products, Inc., and Greenbrier Dairy Products Company eliminated from already concentrated local markets just the kind of substantial and viable local dairy companies whose continued existence is so vital to competition in this industry. This was true of all the local markets involved in these acquisitions. The acquisitions, by substituting respondent, a powerful national organization already well entrenched in many markets, are also likely to substantially increase the difficulty of new entry into these concentrated markets. Moreover, in each of the markets involved, except possibly the Hawaii market involved in the Creameries acquisition,[2] these acquisitions eliminated substantial and important potential competition. The acquisition of Community Creamery, a horizontal acquisition, increased concentration in an already concentrated market. In these circumstances, we find that divestiture of the acquired properties and the reestablishment of the acquired firms as independent, viable competitors is the only remedy likely to dispel the anticompetitive effects of the acquisitions in each of the markets involved.

We have considered the problems which respondent suggests would be involved in divestiture of some of the properties, but we do not think that any of them is sufficient either to outweigh the need for divestiture or to pose a barrier to the practical effectuation of divestiture. We note that in each market involved respondent is maintaining and using the acquired facilities in substantially the same manner as acquired, or where it has rebuilt or substituted other facilities, has nevertheless maintained them as separate operations. There appear to be two exceptions. In California, respondent has apparently completely divested itself of part of the business and facilities acquired from Creameries. With respect to the facilities acquired from Durham Dairy, respondent informs us that it maintains the fluid milk operations as acquired, but has divested itself of the local ice cream facilities, and now services the ice cream market in that area from its own plants. The order requires only that respondent divest itself of assets and additions thereto now

[2] The acquisition of Creameries' Hawaiian assets had other substantial and equally important anticompetitive effects. The market was already highly concentrated. The Creameries' subsidiary acquired had 60% and 50% of the fluid milk and ice cream markets respectively. The substitution of respondent is likely to further increase the difficulty of new entry, as well as to diminish the desire of the few existing local firms to offer vigorous competition. Moreover, the substantial market power acquired by respondent in Hawaii adds to respondent's capacity to repel competition and new entry in other markets.

in use, and necessary to reestablish the acquired firm as a going concern in the fluid milk, ice cream and frozen dessert lines. The order would thus raise no problems with respect to those California operations from which respondent has apparently withdrawn, but would only require the divestiture of assets which are currently being used. With respect to Durham Dairy, the order would, of course, require divestiture of the fluid milk operations which respondent has operated and maintained as originally acquired; if it appears during the course of compliance proceedings that respondent is unable to reestablish Durham as a going concern in the ice cream business, the Commission could relieve respondent of its obligation to do so.

Respondent also suggests that a variety of problems will render it difficult to divest, or, in some circumstances, to find a purchaser satisfactory to the Commission. At the present time, we think these contentions are too speculative; under the order respondent will be entitled to raise these problems with the Commission in the event that its diligent and good faith efforts to effectuate a sale to a satisfactory purchaser should prove unavailing.

Finally, respondent urges that divestiture of the Hawaii assets acquired from Creameries' subsidiary would inflict a hardship upon it and would not be in the public interest because these operations are part of respondent's commitment to the Department of Defense to furnish dairy products to the armed forces in the Far East. Respondent entered into this commitment in 1964; it runs for approximately four more years. The hearing examiner's order which would have required respondent to divest these assets was filed on March 2, 1964. Although it is not clear whether respondent entered into its commitment with the Department of Defense before or after the order was filed by the examiner, respondent was obviously aware of the contingency of divestiture when it entered into its commitment with the Department of Defense. In any event, we are not convinced, and respondent does not state, that should it be required to divest its Hawaiian assets, its military commitments could not otherwise be fulfilled. We find that on balance the public interest requires divestiture of these assets.

The Commission also finds that full and adequate protection of the public interest requires the imposition of a 10-year ban on all future acquisitions by respondent of firms engaged in the manufacture, processing, sale or distribution of fluid milk, ice cream, or other frozen desserts, except upon prior approval of the Commission. As pointed out in our decision, respondent and several

other large national dairy companies have embarked on extensive and far-reaching programs of acquisitions whose effect has been the substantial increase of concentration in the industry, and the elimination of a middle tier of local or regional companies capable of furnishing effective competition. The mergers also eliminated respondent and other leading dairy firms as sources of potential competition in these concentrated local markets. If competition in this industry is to be restored and maintained, it is essential that this continuing elimination of viable local or regional competitors through acquisition be halted now and that respondent be restored as a potential competitor by precluding it from entering local markets by acquisition. See *Ekco Products Co.*, Docket No. 8122 (Opinion Accompanying Final Order, issued June 30, 1964) [65 F.T.C. 1163, 1204]. Moreover, as respondent itself points out, there are many practical barriers to the restoration of acquired firms as effective competitors through divestiture, years after a merger has occurred. Prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out in this industry. In recognition of these facts, the Commission has already imposed bans on future acquisitions by respondent's leading competitors. *Foremost Dairies, Inc.*, Docket No. 6495 (Modified Order, issued March 5, 1965) [67 F.T.C. 282]; *Borden Company*, Docket No. 6652 (Order Accepting Agreement Containing Order to Cease and Desist, issued April 15, 1964) [65 F.T.C. 296]; *National Dairy Products Corporation*, Docket No. 6651 (Order Waiving Notice and Accepting Agreement Containing Order to Cease and Desist, issued January 30, 1963) [62 F.T.C. 120]. Such a ban, especially in view of respondent's demonstrated proclivity to expansion through acquisition, is no less necessary here.

Commissioners MacIntyre and Jones do not participate.

FINAL ORDER

Pursuant to the Commission's order of April 26, 1965 [67 F.T.C. 473], complaint counsel and respondent have submitted their views on the form and content of an appropriate order. The Commission has fully considered these views and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in the light of the Commission's decision in this matter and is required by the public interest, and that it should be adopted and issued forthwith as the Commission's final order. Accordingly,

It is ordered, That:

I

Respondent Beatrice Foods Company, within a period not exceeding eighteen (18) months after the service upon it of this order, shall divest itself absolutely and in good faith of all stock, assets, properties, rights, and privileges, tangible or intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trademarks and good will, acquired by respondent as the result of its acquisitions of the stock, share capital, or assets of Creameries of America, Inc., and its subsidiaries, Greenbrier Dairy Products Company, Community Creamery, and Durham Dairy Products, Inc., which are now used in the businesses so acquired, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description, which have been added to the property of the above-named acquired firms, or placed on such premises by respondent, and which are now used in the businesses so acquired, in such manner as to restore each of them as going concerns in the manufacture, processing, distribution and sale of fluid milk, ice cream, and frozen desserts, to the extent that each of said acquired firms was engaged in any of those lines of commerce at the time of its acquisition.

II

By such divestitures, as set forth in Section I above, respondent shall not sell or transfer, directly or indirectly, any of said stock or assets to anyone who is at the time of divestiture an officer, director, employee or agent of, or under the control or direction of, respondent or any of its subsidiaries or affiliates, or to any person who owns or controls more than one percent (1%) of the outstanding shares of common stock of respondent, or any of its subsidiaries or affiliates, or to anyone who is not approved as a purchaser by the Federal Trade Commission in advance.

III

Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment, or other properties of whatever description, which would impair their capacity for the manufacture, processing, distribution or sale of fluid milk, ice cream or frozen desserts, or their market value, unless said capacity or value is restored prior to divestiture.

IV

Respondent shall divest itself of the above-identified assets in the following manner and subject to the following conditions:

A. Beginning promptly after the effective date of this order, respondent shall make diligent efforts in good faith to sell the above-identified assets in the manner set forth in Section I above and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of eighteen (18) months.

B. Within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with this order, respondent shall submit in writing, to the Federal Trade Commission, a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. All compliance reports shall include, but not be limited to, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested, the identity of all such potential purchasers, and copies of all written communications to and from all such potential purchasers.

C. If complete divestiture shall not have been accomplished within the aforesaid period of eighteen (18) months, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission issues any further order or orders which may be necessary or appropriate to achieve full compliance with this order.

V

For a period of ten (10) years from the effective date of this order respondent shall cease and desist from acquiring, directly or indirectly, by any device, or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in any state of the United States or in the District of Columbia, in the manufacture, processing, distribution or sale of fluid milk, ice cream or other frozen desserts, without the prior approval of the Federal Trade Commission.

Commissioners MacIntyre and Jones not participating.

IN THE MATTER OF
TOP FLIGHT FASHIONS, INC., ET AL.

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

Docket C-1022. Complaint, Dec. 10, 1965—Decision, Dec. 10, 1965

Consent order requiring three affiliated New York City manufacturers and wholesalers of fur and wool products to cease deceptive labeling and invoicing their products and furnishing false guaranties.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Top Flight Fashions, Inc., a corporation, Top Flight Rainwear Company, Inc., a corporation, Sophisticate Fashions, Inc., a corporation and Samuel Wind, Charles Scharff and N. Kalmar Wind, individually and as officers of the said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Wool Products Labeling Act of 1939, 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 Top Flight Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Top Flight Rainwear Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Sophisticate Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Samuel Wind, Charles Scharff and N. Kalmar Wind, as officers of the corporate respondents, formulate, direct and control the acts, practices and policies of the said corporate respondents including those hereinafter set forth.

Respondents are manufacturers and wholesalers of fur products and wool products with their office and principal place of business located at 226 West 37th Street, New York, New York.

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

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products which were labeled as "mink" when fur contained in such fur products was, in fact, "Japanese Mink."

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

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

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

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

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

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

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

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

(c) Sample fur products used to promote or effect sales of the products were not labeled to show the information required under the said Act and Regulations, in violation of Rule 33 of said Rules and Regulations.

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

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

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

PAR. 9. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guaranteed would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 11. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 12. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain wool products with labels on or affixed thereto, which

failed to disclose the percentage of total fiber weight of the wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight of (1) woolen fibers (2) each fiber other than wool present in the wool product in the amount of 5% or more by weight; (3) the aggregate of all other fibers.

PAR. 13. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. Information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder was set out on labels in abbreviated form, in violation of Rule 9 of the aforesaid Rules and Regulations.

2. Samples, swatches or specimens of wool products subject to the Act were not labeled in violation of Rule 22 of the aforesaid Rules and Regulations.

PAR. 14. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Top Flight Fashions, 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 226 West 37th Street, New York, New York.

Respondent Top Flight Rainwear Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and its office and principal place of business is the same as that of respondent Top Flight Fashions, Inc.

Respondent Sophisticate Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and its office and principal place of business is the same as that of respondent Top Flight Fashions, Inc.

Respondents Samuel Wind, Charles Scharff and N. Kalmar Wind, are officers of the said corporations and their address is the same as that of the said corporations.

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

ORDER

It is ordered, That respondents Top Flight Fashions, Inc., a corporation, and its officers, Top Flight Rainwear Company, Inc., a corporation, and its officers, Sophisticate Fashions, Inc., a corporation, and its officers, and Samuel Wind, Charles Scharff and N. Kalmar Wind, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

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

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

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

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

6. Failing to affix labels to sample fur products used to promote or effect sales of fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder.

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

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

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

It is further ordered, That respondents Top Flight Fashions, Inc., a corporation, and its officers, Top Flight Rainwear Company, Inc., a corporation, and its officers, Sophisticate Fashions, Inc., a cor-

poration, and its officers, and Samuel Wind, Charles Scharff and N. Kalmar Wind, individually and as officers of the said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur products may be introduced, sold, transported or distributed in commerce.

It is further ordered, That respondents Top Flight Fashions, Inc., a corporation, and its officers, Top Flight Rainwear Company, Inc., a corporation, and its officers, Sophisticate Fashions, Inc., a corporation, and its officers, and Samuel Wind, Charles Scharff and N. Kalmar Wind, individually and as officers of the said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Failing to securely affix to, or place on each such product a stamp, tag, label, or other means of identification, showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

2. Setting forth on labels affixed to wool products information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to label samples, swatches or specimens of wool products subject to the Wool Products Labeling Act of 1939 which are used to promote or effect sales of such wool products, with the information required under Section 4(a)(2) of the said Act.

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

IN THE MATTER OF

THE LOGAN-LONG COMPANY

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

Docket 7906. Complaint, May 20, 1960—Decision, Dec. 14, 1965

Order dismissing a complaint which charged an Illinois manufacturer of asphalt roofing with unlawfully discriminating in price among its customers and suppressing competition.

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, and is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13), and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. The Logan-Long Company, respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 6600 South Central Avenue, Chicago, Illinois.

PAR. 2. Respondent is now, and for many years has been, engaged in the manufacture, distribution and sale of asphalt roofing products. It also is engaged in the distribution and sale of certain specialty items, including asbestos siding. It sells all these products for use, consumption or resale within the various States of the United States.

Respondent's asphalt roofing products are sold and distributed under the names Logan-Long and Amalgamated Roofing Mills and such trade names as Tapers and Perma-Tabs. Respondent's sales are and have been substantial. Net sales during the fiscal year ended March 31, 1958, were $10,311,944.

PAR. 3. Respondent is one of the major manufacturers of asphalt roofing materials in the United States. It owns and operates four asphalt roofing manufacturing plants located in Chicago, Illinois; Franklin, Ohio; Fulton, New York; and Tuscaloosa, Alabama.

PAR. 4. In the course and conduct of its business, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act. It transports or causes to be transported its roofing products from the State of manufacture to purchasers located in other States. There is and has been a constant stream of trade and commerce in these products between and among the various States of the United States.

PAR. 5. In the course and conduct of its business in commerce, respondent is now, and has been, in substantial competition with other corporations, individuals, partnerships and firms engaged in the manufacture, sale and distribution of asphalt roofing products.

PAR. 6. In the course and conduct of its business in commerce, and particularly during and since 1956, respondent has discriminated in price between and among different purchasers of its asphalt roofing products of like grade and quality. This it has done by selling to some purchasers at prices higher than those charged other purchasers.

Among and typical of the discriminations alleged are transactions relating to 15-pound and 30-pound asphalt saturated felt in 60-pound rolls (sometimes hereinafter referred to as asphalt felt), and 215-pound asphalt shingles (12-inch standard 3-tab strip shingles, sometimes hereinafter referred to as shingles). These products respondent has sold to customers in certain geographical areas of the United States at prices substantially higher than those charged others of its customers outside such geographical areas.

In the sale of the aforesaid products, particularly during and since 1956, respondent has adopted and used a pricing system and pattern resulting in lower prices in the southeastern and southwestern areas of the United States than in other areas. This it has accomplished through a series of price lists and price bulletins establishing various systems of area and zone pricing, and through the application of varying discounts to an ostensibly uniform price.

For example, in November 1956, respondent charged certain customers in Wisconsin $6.24 per square for shingles while, for products of like grade and quality, it charged certain customers in Mississippi $5.55 per square. On asphalt felt, during the same period, certain customers in Wisconsin were charged $2.35 per roll, while, for products of like grade and quality, certain customers in Mississippi and Alabama were charged $2.01 per roll.

Similarly, in May 1958, certain customers in Mississippi and Tennessee were charged $1.63 per roll for asphalt felt, while, for products of like grade and quality, certain customers in Wisconsin were charged $2.02 per roll. In the sale of shingles during the same period, certain customers in Mississippi and Tennessee were charged $4.98 per square, while, for products of like grade and quality, certain customers in Wisconsin were charged $5.90 per square,

These examples are illustrative of the pricing practices of respondent, and other price lists and bulletins, and sales made pursuant thereto, during the period 1956 to date reflect a similar pattern of discrimination.

PAR. 7. The effect of these discriminations in price, as alleged in Paragraph Six of this complaint, has been or may be to divert to respondent, or to respondent's customers, substantial business from competitors; and such discriminations are and have been sufficient to divert substantial business from competitors to respondent, or to respondent's customers, in the future.

Where business has not been actually diverted, competitors have been required to meet, directly or indirectly, the discriminatory prices of respondent, with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete.

Thus, the effect of the aforesaid discriminations in price, as alleged in Paragraph Six of this complaint, has been or may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce in which respondent, its customers and its competitors are engaged, or to injure, destroy, or prevent competition with respondent or its customers.

PAR. 8. The foregoing discriminations in price by respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

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

PAR. 9. Paragraphs One through Five of Count I hereof are incorporated herein by reference and made a part of this Count as fully and with the same effect as if set forth herein verbatim, except that the reference to the Clayton Act in Paragraph Four of Count I is eliminated herein, and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 10. In the course and conduct of its business in commerce, and particularly since 1956, respondent has sold or offered to sell

and is selling or offering to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the country.

For example, in the sale of 15-pound and 30-pound asphalt saturated felt, during and subsequent to March 1958, respondent sold to certain customers in Mississippi, Tennessee and Florida at delivered prices of $1.63 per roll. It is alleged that such price was an unreasonably low price or was below respondent's cost of manufacture, sale and delivery, and that sales at such price were made for the purpose and with the intent and effect aforesaid.

PAR. 11. The effect and result of the pricing practices of respondent, as alleged in Paragraph Ten hereof, have been or may be substantially to lessen competition in the distribution and sale of asphalt roofing products, to the injury and prejudice of the public, and to the injury and prejudice of respondent's competitors, as aforesaid; and such pricing practices constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Bernard M. Williamson and *Mr. Bernard Turiel* for the Commission.

Cadwalader, Wickersham & Taft, 14 Wall St., New York, N.Y., attorneys for the respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

OCTOBER 29, 1965

I. THE COMPLAINT

The complaint in this proceeding, issued on May 20, 1960, charges in Count I that the respondent named above, in the course and conduct of its business in commerce, during and since 1956, discriminated geographically in the price charged different purchasers of its asphalt roofing products of like grade and quality, in violation of Section 2 of the Clayton Act, as amended.

The complaint further alleges in Count II that respondent has sold or offered to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose, and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeast and southwest areas of

the United States, in violation of Section 5 of the Federal Trade Commission Act.

II. THE ANSWER

Respondent, in its answer, denied the principal allegations of the complaint and affirmatively alleged that its lower prices in the southeast and southwest portions of the United States to any purchaser therein were made in good faith to meet an equally low price of a competitor or competitors.

III. HEARINGS

A hearing was held in Chicago, Illinois, on November 15, 1960. Counsel supporting the complaint stated at that time, however, that additional hearings would be required. Subsequently, in response to a motion by counsel supporting the complaint and because of the similarity between the present proceeding and that *In the Matter of Lloyd A. Fry Roofing Company*, Docket No. 7908 [p. 217 herein], an order was issued by the hearing examiner to the effect that no further hearings would be scheduled in the present proceeding pending the decision of the Commission in the Lloyd A. Fry Roofing Company case.

IV. MOTION TO DISMISS AND FINDINGS AS TO THE FACTS

On September 21, 1965, subsequent to the Commission's decision in the Fry case, *supra*, counsel supporting the complaint moved that the present proceeding be dismissed without prejudice to the right of the Commission to bring a new proceeding if the facts should so justify. In their supplemental statement to the motion to dismiss, filed on October 14, 1965, counsel supporting the complaint presented reasons and factual statements in support of their motion to dismiss, as follows:

> Information developed through additional investigation subsequent to the issuance of the complaint in this matter on May 20, 1960, together with other industry information coming to the attention of complaint counsel, including that developed and ultimately found in the *Lloyd A. Fry Roofing Company* case, Docket 7908 [p. 217 herein], disclosed facts inconsistent with some of the allegations contained in the complaint. For example, and contrary to information originally available, it does not now appear that respondent was a leader in establishing prices in this industry. In addition, for the fiscal years ending in 1959 and 1960, Logan-Long operated at substantial losses, whereas in preceding years it had operated at a profit.

The foregoing statement of facts has not been contradicted or questioned by the respondent, and it is accepted as correct and adopted as the findings of fact in this proceeding.

V. ORDER

Because of the above findings as to the facts,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to initiate further proceedings against the respondent, should future events so warrant.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 14th day of December, 1965, become the decision of the Commission.

By the Commission, without the concurrence of Commissioner MacIntyre.

IN THE MATTER OF

THE CELOTEX CORPORATION

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

Docket 7907. Complaint, May 20, 1960—Decision, Dec. 15, 1965

Order dismissing a complaint which charged an Illinois manufacturer of building and insulating materials with unlawfully discriminating in price among its customers and suppressing competition.

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, and is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13), and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest

of the public, hereby issues its complaint stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. The Celotex Corporation, respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 120 South LaSalle Street, Chicago, Illinois.

PAR. 2. Respondent is now, and for many years has been, engaged in the manufacture, distribution and sale of building and insulating materials, such as rock wool, gypsum plaster, lath, wall board and roofing, including asphalt roofing products. It sells these products for use, consumption or resale within the various states of the United States. Respondent sells and distributes its products under the brand name "Celotex."

Respondent's sales are and have been substantial. Its total net sales during the fiscal year ended October 31, 1958, were $67,726,783; its sales of asphalt roofing products have been in excess of $10,000,000 annually.

PAR. 3. Respondent is one of the major manufacturers of asphalt roofing products in the United States, owning and operating a total of three asphalt roofing plants situated at Cleveland, Ohio; Madison, Illinois; and Los Angeles, California. In addition, respondent operates a dry felt mill at Avery, Ohio, and a dry felt mill in connection with its Los Angeles, California, plant.

PAR. 4. In the course and conduct of its business, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act. It transports, or causes to be transported, its roofing products from the State of manufacture to purchasers located in other States. There is and has been a constant stream of trade and commerce in these products between and among the various States of the United States.

PAR. 5. In the course and conduct of its business in commerce, respondent is now, and has been, in substantial competition with other corporations, individuals, patnerships and firms engaged in the manufacture, sale and distribution of asphalt roofing products.

PAR. 6. In the course and conduct of its business in commerce, and particularly during and since 1956, respondent has discriminated in price between and among different purchasers of its

asphalt roofing products of like grade and quality. This it has done by selling to some purchasers at prices higher than those charged other purchasers.

Among and typical of the discriminations alleged are transactions relating to 15-pound and 30-pound asphalt saturated felt, in 60-pound rolls (sometimes hereinafter referred to as asphalt felt), and 215-pound asphalt shingles (12-inch standard 3-tab strip shingles, sometimes hereinafter referred to as shingles). These products respondent has sold to customers in certain geographical areas of the United States at prices substantially higher than those charged others of its customers outside such geographical areas.

In the sale of the aforesaid products, particularly during and since 1956, respondent has adopted and used a pricing system and pattern resulting in lower prices in the southeastern and southwestern areas of the United States than in other areas. This it has accomplished through a series of price lists and price bulletins establishing various systems of area and zone pricing, and through the application of varying discounts to an ostensibly uniform price.

For example, in September 1956, respondent charged certain customers in Michigan $6.54 per square for shingles while, for products of like grade and quality, it charged certain customers in Arkansas $6.03 per square. On asphalt felt, during the same period, certain customers in Wisconsin were charged $2.44 per roll, while, for products of like grade and quality, certain customers in Arkansas were charged $2.32 per roll.

Similarly, in January 1958, certain customers in Tennessee were charged $1.68 per roll for asphalt felt while, for products of like grade and quality, certain customers in Wisconsin were charged $2.34 per roll. In the sale of shingles during the same period, certain customers in Tennessee were charged $4.92 per square, while, for products of like grade and quality, certain customers in Indiana were charged $6.85 per square.

These examples are illustrative of the pricing practices of respondent, and other price lists and bulletins, and sales made pursuant thereto, during the period 1956 to date reflect a similar pattern of discrimination.

PAR. 7. The effect of these discriminations in price, as alleged in Paragraph Six of this complaint, has been or may be to divert to respondent, or to respondent's customers, substantial business from competitors; and such discriminations are and have been sufficient to divert substantial business from competitors to respondent, or to respondent's customers in the future.

Where business has not been actually diverted, competitors have been required to meet, directly or indirectly, the discriminatory prices of respondent, with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete.

Thus, the effect of the aforesaid discriminations in price, as alleged in Paragraph Six of this complaint, has been or may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce in which respondent, its customers and its competitors are engaged, or to injure, destroy, or prevent competition with respondent or its customers.

PAR. 8. The foregoing discriminations in price by respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

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

PAR. 9. Paragraphs One through Five of Count I hereof are incorporated herein by reference and made a part of this Count as fully and with the same effect as if set forth herein verbatim, except that the reference to the Clayton Act in Paragraph Four of Count I is eliminated herein, and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 10. In the course and conduct of its business in commerce, and particularly since 1956, respondent has sold or offered to sell and is selling or offering to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the country.

For example, in the sale of 15-pound and 30-pound asphalt saturated felt, during and subsequent to March 1958, respondent sold to certain customers in Tennessee at delivered prices of $1.63 per roll. It is alleged that such price was an unreasonably low price or was below respondent's cost of manufacture, sale and delivery, and that sales at such price were made for the purpose and with the intent and effect aforesaid.

PAR. 11. The effect and result of the pricing practices of respondent, as alleged in Paragraph Ten hereof, have been, or may be, substantially to lessen competition in the distribution and sale of asphalt roofing products, to the injury and prejudice of the public, and to the injury and prejudice of respondent's competitors,

as aforesaid; and such pricing practices constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Bernard M. Williamson and *Mr. Bernard Turiel* for the Commission.

Mr. J. B. Robinson, attorney for the respondent, *Dallstream, Schiff, Hardin, Waite & Dorschel*, 231 South LaSalle St., Chicago 4, Ill.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

OCTOBER 29, 1965

I. *The Complaint*

The complaint in this proceeding, issued on May 20, 1960, charges in Count I that the respondent named above, in the course and conduct of its business in commerce, during and since 1956, discriminated geographically in the price charged different purchasers of its asphalt roofing products of like grade and quality, in violation of Section 2 of the Clayton Act, as amended.

The complaint further alleges in Count II that respondent has sold or offered to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose, and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeast and southwest areas of the United States, in violation of Section 5 of the Federal Trade Commission Act.

II. *The Answer*

Respondent, in its answer, denied the principal allegations of the complaint and affirmatively alleged that its lower prices in the southeast and southwest portions of the United States to any purchaser therein were made in good faith to meet an equally low price of a competitor or competitors.

III. *Hearings*

A hearing was held in Chicago, Illinois, on October 25 and 26, 1960. Counsel supporting the complaint stated at that time, however, that additional hearings would be required. Subsequently, in response to a motion by counsel supporting the complaint, and because of the similarity between the present proceeding and that *In the Matter of Lloyd A. Fry Roofing Company*, Docket No. 7908

[p. 217 herein], an order was issued by the hearing examiner to the effect that no further hearings would be scheduled in the present proceeding pending the decision of the Commission in the Lloyd A. Fry Roofing Company case.

IV. *Motion to Dismiss and Findings as to the Facts*

On September 21, 1965, subsequent to the Commission's decision in the Fry case, *supra*, counsel supporting the complaint moved that the present proceeding be dismissed without prejudice to the right of the Commission to bring a new proceeding if the facts should so justify. In their supplemental statement to the motion to dismiss, filed on October 14, 1965, counsel supporting the complaint presented reasons and factual statements in support of their motion to dismiss, as follows:

Subsequent to the issuance of the complaint in this matter on May 20, 1960, additional investigation disclosed facts inconsistent with some of the allegations contained in the complaint. For example, the competitive significance of Celotex in the southeastern and southwestern markets of the United States has significantly diminished since 1956. During the period 1957 to 1959, the company stopped serving practically the entire southeastern and southwestern markets and in 1961 Celotex disposed of its only two asphalt roofing plants located east of the Rocky Mountains. Thus Celotex is no longer a competitive factor in the region east of the Rocky Mountains, the area involved herein.

The foregoing statement of facts has not been contradicted or questioned by the respondent, and it is accepted as correct and adopted as the findings of fact in this proceeding.

V. *Order*

Because of the above findings as to the facts,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to initiate further proceedings against the respondent, should future events so warrant.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 15th day of December, 1965, become the decision of the Commission.

Without the concurrence of Commissioner MacIntyre.

Complaint

IN THE MATTER OF

ROBERT CARP, INC., ET AL.

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

Docket C-1023. Complaint, Dec. 16, 1965—Decision, Dec. 16, 1965

Consent order requiring a nonprofit membership corporation located in New York City and its constituent members in the retail jewelry business, to cease knowingly inducing and receiving discriminatory payments for any service, facility or advertising when such payments are not made available on proportionally equal terms to competing retailers.

COMPLAINT

The Federal Trade Commission has reason to believe that the respondents named in the caption hereof have been and are now engaging in unfair acts and practices in commerce and in an unfair method of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45); and therefore, it issues this complaint, stating its charges in that respect as follows:

I

THE RESPONDENTS

1. Respondent Robert Carp, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 630 Fifth Avenue, New York, New York.

2. Respondent Robert Carp is an individual, and his address is the same as that of respondent Robert Carp, Inc. Said individual respondent formulates, directs and controls the acts, practices and policies of said corporate respondent. Said individual respondent caused said corporate respondent to be organized for the purpose of conducting, in corporate form, the business he had formerly conducted as a sole proprietorship.

3. Respondent National Jewelers Group, Inc., is a nonprofit membership corporation organized and existing under the laws of the State of New York, and its address is the same as that of respondent Robert Carp, Inc.

4. The following respondents (hereinafter referred to collectively as the "NJG members") are members of respondent National Jewelers Group, Inc.:

i. Coleman E. Adler & Sons, Inc., a corporation organized and

existing under the laws of the State of Louisiana, with its principal office and place of business located at 722-24 Canal Street, New Orleans 12, Louisiana.

ii. Claude S. Bennett, Inc., a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business located at 207 Peachtree Street, N.E., Atlanta 3, Georgia.

iii. Bromberg & Company, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 123 North Twentieth Street, Birmingham 3, Alabama.

iv. Carroll's Jewelers, Inc., a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 365 Miracle Mile, Miami 34 (Coral Gables), Florida.

v. B. C. Clark, Inc., a corporation organized and existing under the laws of the State of Oklahoma, with its principal office and place of business located at 113 North Harvey, Oklahoma City, Oklahoma.

vi. Cornell Group Service Corporation, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 53 Water Street, Newburgh, New York.

vii. Rudolph Deutsch Co., a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 1421 Euclid Avenue, Cleveland 15, Ohio.

viii. George R. Dodson, Inc., a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at West 517 Riverside Street, Spokane, Washington.

ix. Arthur A. Everts Company, a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1615 Main Street, Dallas 1, Texas.

x. Friedlander & Sons, Inc., a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 501 Pike Street, Seattle 1, Washington.

xi. J. Herbert Hall Co., Inc., a corporation organized and exising under the laws of the State of California, with its principal office and place of business located at 725 East Colorado Boulevard, Pasadena, California.

xii. H. J. Howe, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 201-3 South Salina Street, Syracuse, New York.

xiii. S. Jacobs Co., a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located at 811 Nicolett Avenue, Minneapolis 2, Minnesota.

xiv. J. Jessop & Sons, Inc., a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 1041 Fifth Avenue, San Diego 1, California.

xv. S. Joseph & Sons (Incorporated), a corporation organized and existing under the laws of the State of Iowa, with its principal office and place of business located at 320-22 Sixth Avenue, Des Moines, Iowa.

xvi. Keller & George, Inc., a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business located at 214 East Main Street, Charlottesville, Virginia.

xvii. Kimball's Inc., a corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 428 Gay Way, Knoxville, Tennessee.

xviii. Carl E. Lindquist and Dwight C. Lindquist, copartners doing business as Lindquist Jewelers, with their principal office and place of business located at 1137 Broadway, Rockford, Illinois.

xix. Thomas Long Company, a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and place of business located at 40-42 Summer Street, Boston 10, Massachusetts.

xx. Mermod, Jaccard & King Jewelry Company, a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at Ninth and Locust Streets, St. Louis 1, Missouri.

xxi. John M. Roberts & Sons Co., a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 492-31 Wood Street, Pittsburgh 22, Pennsylvania.

xxii. Harry Rosenzweig and Newton Rosenzweig, copartners doing business as I. Rosenzweig & Sons, with their principal office and place of business located at 35 North First Avenue, Phoenix 3, Arizona.

xxiii. Albert S. Samuels Co., a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 856 Market Street, San Francisco 2, California.

xxiv. Schneider's Jewelers, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 290 Wall Street, Kingston, New York.

xxv. Charles Schwartz & Son, Inc., a corporation organized and existing under the laws of the State of Maryland, with its principal office and place of business located at 1311-13 F Street, N.W., Washington 5, D.C.

xxvi. Underwood Jewelers, Inc., a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 229 Hogan Street, Jacksonville 2, Florida.

xxvii. William Wise & Son, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 487 Fulton Street, Brooklyn 1, New York.

xxviii. Harry Zell, Daniel Zell, Martin Zell, Milton Zell, Leonard Zell, and Allen Zell, copartners doing business at Zell Brothers, with their principal office and place of business located at 800 S. W. Morrison Street, Portland 5, Oregon.

xxix. Leonard G. Zimmer, Jr., and Victoria Zimmer, copartners doing business as Zimmer Brothers, with their principal office and place of business located at 329 Main Street, Poughkeepsie, New York, successors in interest to the partnership of Leonard G. Zimmer, Sr. and Leonard G. Zimmer, Jr., previously doing business as Zimmer Brothers with their principal office and place of business located at 329 Main Street, Poughkeepsie, New York.

5. Each of the NJG members is engaged, in its respective trading area, in the business of selling, directly or through subsidiaries and affiliated corporations and partnerships, jewelry, watches, china, silver, crystal and related products at retail to consumers.

II

RELATIONSHIPS BETWEEN RESPONDENTS

6. Respondent Robert Carp, acting individually and through respondent Robert Carp, Inc., is engaged in the business of acting as resident New York City buyer, agent and representative of the NJG members. In such capacity, respondent Robert Carp performs

various services for the NJG members including purchasing items for resale by the NJG members and arranging for the publication of catalogs for distribution by the NJG members. Respondents Robert Carp and Robert Carp, Inc., are compensated by each NJG member by the payment of commissions for such portion of the services performed for the NJG members as is attributed to the particular member, and by the payment of an annual fee of $425 per member for membership in respondent National Jewelers Group, Inc.

7. Respondent National Jewelers Group, Inc., was organized and is maintained for the sole purpose of permitting the NJG members to use the corporate form of business association in providing advice and assistance to respondents Robert Carp and Robert Carp, Inc.

8. The respondent NJG members make joint use of the various services provided by respondents Robert Carp and Robert Carp, Inc., and they collaborate together, through respondent National Jewelers Group, Inc., to assist and advise respondents Robert Carp and Robert Carp, Inc., in performing such services.

III

INTERSTATE COMMERCE

9. Each of the NJG members is substantially engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that each such member purchases various products for resale, in substantial quantities, from suppliers located in other States and causes such products to be transported from their State or States of origin to other States; in that each such member has collaborated with each other such member, through respondent National Jewelers Group, Inc., in furthering the activities of their mutual agents and representatives, respondents Robert Carp and Robert Carp, Inc.; and in that each such member has distributed substantial quantities of catalogs produced for the members of National Jewelers Group, Inc., pursuant to which distribution each such member has caused substantial quantities of catalogs to be transported from their State of origin to other States, and in the course of which distribution each such member has disseminated advertising paid for in substantial part by suppliers located in States other than the States in which such members are located and in which such members disseminate such advertising.

10. Respondent National Jewelers Group, Inc., is substantially engaged in commerce, as "commerce" is defined in the Federal

Trade Commission Act, in that said respondent acts as the conduit or instrumentality through which the NJG members associate and collaborate together to further the performance for them of various services by respondents Robert Carp and Robert Carp, Inc., which services include the purchase and transportation of substantial quantities of products in interstate commerce and the production and dissemination of substantial quantities of advertising material in interstate commerce.

11. Respondent Robert Carp, Inc., is substantially engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that said respondent acts as the conduit or instrumentality through which respondent Robert Carp provides various services for the NJG members which services include arranging for the purchase and transportation of substantial quantities of products in interstate commerce and arranging for the production and dissemination of substantial quantities of advertising material in interestate commerce. Respondent Robert Carp is substantially engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that, through his conduit or instrumentality, Robert Carp, Inc., he performs various services for the NJG members which services include arranging for the purchase and transportation of substantial quantities of products in interstate commerce and arranging for the production and dissemination of substantial quantities of advertising material in interstate commerce.

IV

RESPONDENTS' UNFAIR METHOD OF COMPETITION

12. The retail distribution of jewelry, watches, china, silver, crystal and related products, in which the respondent NJG members are each engaged, is carried on principally by retail jewelry and department stores, and is sometimes referred to as "the retail jewelry business." In each of the respective trading areas of the NJG members, there are several other enterprises engaged in the retail jewelry business. The retail jewelry business is characterized by substantial competition between and among all enterprises engaged in such business in each trading area. Such competition is characterized, in substantial part, by substantial expenditures, by all or many of the enterprises engaged in such competition, for advertising in local media of general circulation, such as newspapers, radio and television, as well as for other forms of advertis-

ing, such as direct mailings, distribution of promotional material at point of sale, and maintenance of elaborate displays at point of sale.

13. In the course of their engagement in the competition described in Paragraph 12 hereof, the NJG members regularly participate in the cooperative advertising programs promulgated by some of their suppliers. Each of such plans provides for reimbursement by the supplier of all or part of a customer's cost of advertising the supplier's products in certain local media. The only media in which advertising can be placed under the aforesaid plans are newspapers with paid circulations, radio and television.

14. As a further aspect of their engagement in the competition described in Paragraph 12 hereof, the NJG members distribute substantial quantities of catalogs, the production of which is arranged by respondents Robert Carp and Robert Carp, Inc., and which are copyrighted in the name of respondent Robert Carp. Such catalogs contain advertisements of the products of several suppliers, and are distributed to the public free of charge by the NJG members by direct mailing. When so distributed, such catalogs bear the imprint of the particular NJG member distributing them. The NJG members distribute such catalogs as a method of promoting their own sales generally and as a method of promoting their own sales of the products advertised therein specifically. Each year, respondents Robert Carp and Robert Carp, Inc. arrange for the production of three such catalogs for distribution by the NJG members: a so-called "Christmas catalog" which is distributed during the Christmas season, a prime retail sales period for the retail jewelry business; a so-called "Spring catalog" which is distributed during the spring, another prime retail sales period for the retail jewelry business; and a so-called "Charm catalog" which is distributed throughout the year and which is devoted exclusively to advertisements of charms.

15. In the course of arranging for the production of such catalogs, respondents Robert Carp and Robert Carp, Inc, acting as agents and representatives of the NJG members and acting with the collaboration and assistance of the NJG members, induce various suppliers of the NJG members to make substantial payments as compensation or in consideration for inclusion of their products in such catalogs. Such payments subsidize a substantial portion of the cost of production of such catalogs, thus making such advertising material available to the NJG members for substantially less than its actual cost of production. As an example of the

practices alleged herein, during the calendar year 1960, various suppliers of the NJG members paid a total of $73,725 for inclusion of their products in such catalogs.

16. Each of the respondents named herein knew, or should have known, that the suppliers making such payments were doing so, that such suppliers had been induced to do so by or in behalf of the NJG members as a group; and that, as a result of such payments, catalog advertising material was made available to the NJG members for substantially less than its actual cost of production. Each of the respondents named herein knew, or should have known, that each supplier making such payments did not make such payments or other consideration available on proportionally equal terms to all its other customers competing with the NJG members in the sale or distribution of the products of such supplier generally, or competing with the NJG members in the sale or distribution of the products of such supplier advertised in such catalogs specifically.

17. The acts and practices of respondents as alleged above are all to the prejudice and injury of competitors of respondents and of the public, and constitute unfair acts and practices in commerce and are an unfair method of competition, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Robert Carp, Inc., is a corporation organized and existing under the laws of the State of New York, with its

principal office and place of business located at 630 Fifth Avenue, New York, New York.

Respondent Robert Carp is an individual and officer of said corporation and his address is the same as that of said corporation.

2. Respondent National Jewelers Group, Inc., is a nonprofit membership corporation organized and existing under the laws of the State of New York, and its address is the same as that of respondent Robert Carp, Inc.

3. The following respondents are members of respondent National Jewelers Group, Inc.:

Respondent Coleman E. Adler & Sons, Inc., a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business located at 722-24 Canal Street, New Orleans 12, Louisiana.

Respondent Claude S. Bennett, Inc., a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business located at 207 Peachtree Street, N.E., Atlanta 3, Georgia.

Respondent Bromberg & Company, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 123 North Twentieth Street, Birmingham 3, Alabama.

Respondent Carroll's Jewelers, Inc., a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 365 Miracle Mile, Miami 34 (Coral Gables), Florida.

Respondent B.C. Clark, Inc., a corporation organized and existing under the laws of the State of Oklahoma, with its principal office and place of business located at 113 North Harvey, Oklahoma City, Oklahoma.

Respondent Cornell Group Service Corporation, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 53 Water Street, Newburgh, New York.

Respondent Rudolph Deutsch Co., a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 1421 Euclid Avenue, Cleveland 15, Ohio.

Respondent George R. Dodson, Inc., a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at West 517 Riverside Street, Spokane, Washington.

Respondent Arthur A. Everts Company, a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1615 Main Street, Dallas 1, Texas.

Respondent Friedlander & Sons, Inc., a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 501 Pike Street, Seattle 1, Washington.

Respondent J. Herbert Hall Co., Inc., a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 725 East Colorado Boulevard, Pasadena, California.

Respondent H. J. Howe, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 201-3 South Salina Street, Syracuse, New York.

Respondent S. Jacobs Co., a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located at 811 Nicollett Avenue, Minneapolis 2, Minnesota.

Respondent J. Jessop & Sons, Inc., a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 1041 Fifth Avenue, San Diego 1, California.

Respondent S. Joseph & Sons (Incorporated), a corporation organized and existing under the laws of the State of Iowa, with its principal office and place of business located at 320-22 Sixth Avenue, Des Moines, Iowa.

Respondent Keller & George, Inc., a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business located at 214 East Main Street, Charlottesville, Virginia.

Respondent Kimball's Inc., a corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 428 Gay Way, Knoxville, Tennessee.

Respondent Carl E. Lindquist and Dwight C. Lindquist, co-partners doing business as Lindquist Jewelers, with their principal office and place of business located at 1137 Broadway, Rockford, Illinois.

Respondent Thomas Long Company, a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and place of business located at 40-42 Summer Street, Boston 10, Massachusetts.

Respondent Mermod, Jaccard & King Jewelry Company, a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at Ninth and Locust Streets, St. Louis 1, Missouri.

Respondent John M. Roberts & Son Co., a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 492-31 Wood Street, Pittsburgh 22, Pennsylvania.

Respondents Harry Rosenzweig and Newton Rosenzweig, copartners doing business as I. Rosenzweig & Sons, with their principal office and place of business located at 35 North First Avenue, Phoenix 3, Arizona.

Respondent Albert S. Samuels Co., a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 856 Market Street, San Francisco 2, California.

Respondent Schneider's Jewelers, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 290 Wall Street, Kingston, New York.

Respondent Charles Schwartz & Son, Inc., a corporation organized and existing under the laws of the State of Maryland, with its principal office and place of business located at 1311-13 F Street, N.W., Washington 5, D.C.

Respondent Underwood Jewelers, Inc., a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 229 Hogan Street, Jacksonville 2, Florida.

Respondent William Wise & Son, Inc., a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 487 Fulton Street, Brooklyn 1, New York.

Respondents Harry Zell, Daniel Zell, Martin Zell, Milton Zell, Leonard Zell and Allen Zell, copartners doing business as Zell Brothers, with their principal office and place of business located at 800 S. W. Morrison Street, Portland 5, Oregon.

Respondents Leonard G. Zimmer, Jr. and Victoria Zimmer, copartners doing business as Zimmer Brothers, with their principal office and place of business located at 329 Main Street, Poughkeepsie, New York, successors in interest to the partnership of Leonard G. Zimmer, Sr. and Leonard G. Zimmer, Jr., previously doing business as Zimmer Brothers at same address.

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

ORDER

It is ordered, That respondents Robert Carp, Inc.; National Jewelers Group, Inc.; Coleman E. Adler & Sons, Inc.; Claude S. Bennett, Inc.; Bromberg & Company, Inc.; Carroll's Jewelers Inc.; B. C. Clark, Inc.; Cornell Group Service Corporation; Rudolph Deutsch Co.; George R. Dodson, Inc.; Arthur A. Everts Company; Friedlander & Sons, Inc.; J. Herbert Hall Co., Inc.; H. J. Howe, Inc.; S. Jacobs Co.; J. Jessop & Sons, Inc.; S. Joseph & Sons (Incorporated); Keller & George, Inc.; Kimball's Inc.; Thomas Long Company; Mermod, Jaccard & King Jewelry Company; John M. Roberts & Son Co.; Albert S. Samuels Co.; Schneider's Jewelers, Inc.; Charles Schwartz & Son, Inc.; Underwood Jewelers, Inc.; William Wise & Son, Inc.; each a corporation and their respective officers and directors; and respondents Robert Carp, individually and as an officer of Robert Carp, Inc.; Carl E. Lindquist and Dwight C. Lindquist, copartners doing business as Lindquist Jewelers; Harry Rosenzweig and Newton Rosenzweig, copartners doing business as I. Rosenzweig & Sons; Harry Zell, Daniel Zell, Martin Zell, Milton Zell, Leonard Zell, and Allen Zell, copartners doing business as Zell Brothers; and Leonard G. Zimmer, Jr. and Victoria Zimmer, copartners doing business as Zimmer Brothers; and each respondent's respective employees, agents and representatives, acting directly or through any corporate or other device, in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, severally and otherwise, from:

Inducing and receiving, or receiving, or contracting for the receipt of, the payment of anything of value to or for the benefit of any respondent or of any other retailer, as compensation or in consideration for any services or facilities consisting of advertising or other publicity in a catalog, newspaper, broadcast or telecast or in any other advertising medium, furnished, in whole or in part, by or through any repondent or any other retailer in connection with the processing, handling, sale, or offering for sale, of any products purchased by any respondent or by any other retailer, when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms by the manufacturer or supplier to all its other cus-

tomers competing in the distribution of such products with any respondent or any other retailer to whom or for whose benefit the payment or other consideration is made.

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

IN THE MATTER OF

ALHAMBRA MOTOR PARTS ET AL.

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

*Docket 6889. Complaint, Sept. 17, 1957—Decision, Dec. 17, 1965**

Order, following remand, requiring for the second time, a southern California trade association of automotive parts jobbers and its 60 jobber-members to cease illegally inducing and receiving discriminatory price discounts from manufacturers of automotive parts and accessories in violation of Sec. 2(f) of the Clayton Act; the Court of Appeals, Ninth Circuit, 309 F. 2d 213 (1962), 7 S.&D. 550, remanded cease and desist order dated October 28, 1960, 57 F.T.C. 1007, for further findings.

Mr. Hugh B. Helm and *Mr. Roy C. Palmer* supporting the complaint.

Lyle, Yudelson and Di Giuseppe, by *Mr. Harris K. Lyle*, of Van Nuys, Calif., for respondents.

SUPPLEMENTAL INITIAL DECISION ON REMAND OF PROCEEDING BY

JOHN LEWIS, HEARING EXAMINER

NOVEMBER 20, 1964

STATEMENT OF PROCEEDINGS

This proceeding is before the hearing examiner for decision on a remand from the United States Court of Appeals, for the Ninth Circuit. The complaint herein, issued September 17, 1957, charged the respondents herein with having violated subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing and receiving certain discriminations in

*The cease and desist order of December 17, 1965 relating to warehouse distributor discounts was set aside as to Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl E. Haase and Emma F. Wright by Commission's order dated May 5, 1966.