

Syllabus

IN THE MATTER OF

STATE SEWING MACHINE CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5895. Complaint, June 27, 1951—Decision, Mar. 8, 1952

When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and are not marked, or are not adequately marked, showing that they are of foreign origin, or if markings are covered or otherwise concealed, such public understands and believes such articles to be wholly of domestic origin.

There is among the members of the purchasing public a substantial number who have a decided preference for products, including sewing machine heads, originating in the United States, over such products originating in whole or in part in foreign countries.

Where a corporation and its three officers, engaged in the importation from Japan of sewing machine heads upon which there appeared the words "Made in Occupied Japan" or "Japan," and in the attachment to said heads of a motor, in the process of which the aforesaid words were covered and so were no longer visible, and in the sale of said products in commerce in competition with makers and sellers of domestic sewing machines and with sellers of imported machines, some of whom adequately informed the public as to the source of their said products—

- (a) Failed adequately to disclose on the said sewing machine heads—some of which were marked with a medallion upon which appeared, in small and indistinct words, "Made in Occupied Japan" or "Japan"—that said products were made in Occupied Japan; with result of placing in the hands of dealers a means to mislead and deceive the purchasing public as to the place of origin of said heads, and with tendency and capacity to lead substantial numbers of the purchasing public into the erroneous belief that their said products were of domestic origin, and with result of thereby causing substantial numbers thereof to purchase such machines, and thereby substantial trade and commerce was diverted unfairly to them from their competitors, to the substantial injury of competition in commerce; and
- (b) Without disclosing the terms and conditions of the guarantee, made such confusing and misleading statements in their advertising as "guaranteed" or "lifetime guarantee" and "State with the Lifetime Guarantee":

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and their competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. William L. Taggart for the Commission.

Mr. Norman Kaliski, of New York City, for respondents.

Complaint

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that State Sewing Machine Corporation, a corporation, and Lazare Gelin, Sydel M. Empel, William J. Melson, and Dorothy B. Gelin, 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, State Sewing Machine Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 West 42nd Street, New York, New York. Respondents Lazare Gelin, Sydel M. Empel, William J. Melson and Dorothy B. Gelin are President and Treasurer, Secretary, Vice President, and Vice President, respectively, of corporate respondent and acting as such officers, formulate, direct and control the policies, acts and practices of said corporation. The address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now and have been for several years last past engaged in the sale of sewing machine heads imported by them from Japan and complete sewing machines of which said heads are a part to distributors and also to retailers who in turn sell to the purchasing public. In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machine heads are imported by respondents, the words "Made in Occupied Japan" or "Japan" appear on the back of the vertical arm. Before the heads are sold to the purchasing public as a part of a complete sewing machine, it is necessary to attach a motor to the head in the process of which the aforesaid words are covered by the motor so that they are not visible. In some instances, said heads, when received by respondents, are marked with a medallion placed on the front of the vertical arm upon which the words "Made in Occupied Japan" or "Japan" appear. These words are, however, so small and indistinct that they do not constitute adequate notice to the public that the heads are imported.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are not adequately marked showing that they are of foreign origin or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 5. There is among the members of the purchasing public a substantial number who have a decided preference for products originating in the United States over products originating in whole or in part in foreign countries, including sewing machine heads.

PAR. 6. Respondents in their advertising make such statements as the following:

Guarantee Bond Lifetime Guarantee
State with the Lifetime Guarantee

The use of the words "guaranteed" or "lifetime guarantee" without disclosing the terms and conditions of the guarantee is confusing and misleading to the public and purchasers and constitutes an unfair and deceptive practice.

PAR. 7. Respondents, by placing in the hands of dealers their said sewing machine heads and completed sewing machines, provide said dealers a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said heads.

PAR. 8. Respondents, in the course and conduct of their business, are in substantial competition in commerce with the makers and sellers of domestic sewing machines and also with sellers of imported machines, some of whom adequately inform the public as to the source of origin of their said product.

PAR. 9. The failure of respondents to adequately disclose on the sewing machine heads that they are manufactured in Occupied Japan has the tendency and capacity to lead substantial numbers of the purchasing public into the erroneous and mistaken belief that their said product is of domestic origin and causes substantial numbers of the purchasing public to purchase sewing machines of which said heads are a part because of their erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 8, 1952, the initial decision in the instant matter of Hearing Examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1951, issued and subsequently served its complaint in the above-entitled proceeding upon the respondents State Sewing Machine Corporation, a corporation, and Lazare Gelin, Sydel M. Empel, William J. Melson and Dorothy B. Gelin, individually and as officers of said corporation, charging them with unfair and deceptive acts and practices in commerce in violation of said Act. On August 22, 1951, respondents filed an answer to said complaint. Thereafter, on October 30, 1951, at a hearing held in New York, New York, a motion was made and granted on behalf of respondents to withdraw the answer previously filed herein and to substitute therefor an answer, which was thereupon read into the record, admitting all of the material allegations of fact set forth in said complaint, except that it was stated therein that the respondent Sydel M. Empel was Secretary of the respondent corporation only until about May 1, 1951. Said answer reserved the right to submit proposed findings and conclusions and to appeal from the initial decision herein. Thereafter the proceeding regularly came on for final consideration by the above-named hearing examiner theretofore duly designated by the Commission upon said complaint and answer thereto, proposed findings and conclusions submitted by counsel for respondents, oral argument thereon not having been requested and no proposed findings having been submitted by counsel supporting the complaint; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent State Sewing Machine Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business

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located at 11 West 42nd Street, New York, New York. Respondents Lazare Gelin, William J. Melson and Dorothy B. Gelin are President and Treasurer, Vice President, and Vice President, respectively, of the corporate respondent and, acting as such officers, formulate direct and control the policies, acts and practices of said corporation. The address of said individual respondents is the same as that of the corporate respondent.

Respondent Sydel M. Empel ceased to be employed as the Secretary of the respondent corporation on or about May 1, 1951.

PAR. 2. Respondents have been for several years last past engaged in the sale of sewing machine heads imported by them from Japan, and complete sewing machines of which said heads are a part, to distributors and also to retailers who in turn sell to the purchasing public. In the course and conduct of their business, respondents caused their said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States, and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been substantial.

PAR. 3. When the sewing machine heads were imported by respondents, the words "Made in Occupied Japan" or "Japan" appeared on the back of the vertical arm. Before the heads were sold to the purchasing public as a part of a complete sewing machine, it was necessary to attach a motor to the head, in the process of which the aforesaid words were covered by the motor so that they were not visible. In some instances said heads when received by respondents, were marked with a medallion placed on the front of the vertical arm upon which the words "Made in Occupied Japan" or "Japan" appeared. These words were, however, so small and indistinct that they did not constitute adequate notice to the public that the heads were imported.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are not adequately marked showing that they are of foreign origin or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 5. There is among the members of the purchasing public a substantial number who have a decided preference for products, including sewing machine heads, originating in the United States, over such products originating in whole or in part in foreign countries.

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PAR. 6. Respondents in their advertising made such statements as the following:

Guarantee Bond
Lifetime Guarantee
State with the Lifetime
Guarantee.

The use of the words "guaranteed" or "lifetime guarantee" without disclosing the terms and conditions of the guarantee were confusing and misleading to the public and purchasers and constituted an unfair and deceptive practice.

PAR. 7. Respondents, by placing in the hands of dealers their said sewing machine heads and completed sewing machines, provided said dealers a means and instrumentality whereby they might mislead and deceive the purchasing public as to the place of origin of said heads.

PAR. 8. Respondents, in the course and conduct of their business, were in substantial competition in commerce with the makers and sellers of domestic sewing machines and also with sellers of imported machines, some of whom adequately informed the public as to the source of origin of their said product.

PAR. 9. The failure of respondents adequately to disclose on the sewing machine heads that they were manufactured in Occupied Japan had the tendency and capacity to lead substantial numbers of the purchasing public into the erroneous and mistaken belief that their said product was of domestic origin and caused substantial numbers of the purchasing public to purchase sewing machines of which said heads were a part, because of such erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

CONCLUSION

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

ORDER

It is ordered, That the respondents, State Sewing Machine Corporation, a corporation, Lazare Gelin, William J. Melson and Dorothy B. Gelin, individually and as officers of said corporation, and said respondents' representatives, agents and employees, directly or through

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any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign made sewing machine heads, or sewing machines of which foreign made heads are a part, without clearly and conspicuously disclosing on the heads, in such a manner that it will not be hidden or obliterated, the country of origin thereof;

2. Representing, directly or by implication, that their sewing machine heads or sewing machines are sold under a lifetime guarantee, or that they are otherwise guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Sydel M. Emple, without prejudice to the right of the Commission to institute further proceedings against her, should future facts so warrant.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of March 8, 1952].

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IN THE MATTER OF

JERROLD A. ROWLEY AND STANLEY EISENBERG TRADING AS RICHARD DONIGAN AND DISCOUNT SALES COMPANY

COMPLAINT, DECISION, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5726. Complaint, Dec. 20, 1949—Decision, Mar. 10, 1952

Where an individual engaged in the interstate sale and distribution of radios, fountain pens and other articles—

- (a) Made use of sales promotion plans pursuant to which he mailed to large numbers of prospective purchasers throughout the United States, advertisements of a table radio, order blanks, explanatory letters and push cards for use in accordance with a scheme whereby the cost of a "push" was determined by the chance number secured, persons selecting by chance the feminine name corresponding with that concealed in the card's master seal received one of the radios, persons securing two specified numbers received ball point pens, others received nothing, and the purchaser of the assortment for the approximate amount realized from the sale of the punches became entitled, upon the remission thereof, to the second radio included therewith; and
- (b) Shipped and delivered, in response to hundreds of orders received as a result of the aforesaid mailing, radios and ball points to purchasers located throughout the United States; and

Thereby supplied to and placed in the hands of purchasers of his merchandise the means of conducting lotteries or games of chance in connection with the resale or distribution thereof, in contravention of an established public policy of the United States Government; in the violation of which he thus assisted and participated:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair acts and practices.

Before *Mr. Clyde M. Hadley*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Nash & Donnelly, of Washington, D. C., for respondents.

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 Jerrold A. Rowley and Stanley Eisenberg, individuals and co-partners trading as Richard Donigan and Discount Sales Company, 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 thereto

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would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Jerrold A. Rowley and Stanley Eisenberg are individuals and co-partners trading and doing business under the trade names, Richard Donigan and Discount Sales Company, with their office and principal place of business located at 110 West 42nd Street in the city of New York, New York.

Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of radios, fountain pens and other articles of merchandise and have caused said merchandise, when sold, to be transported from their places of business in the city of New York, New York to purchasers thereof at their respective points of location in the various States of the United States other than New York and in the District of Columbia. There is now, and has been for more than two years last past, a course of trade in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business as described in Paragraph One hereof respondents in soliciting the sale of and in selling and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. One method or sales plan adopted and used by respondents is substantially as follows:

Respondents distribute and have distributed to operators and to members of the public certain literature and instructions including among other things push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise and a circular explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards and to members of the purchasing and consuming public. One of the respondents' said push cards bears 80 feminine names with ruled columns on the back of said card for writing in the name selected. Said push card has 80 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is a number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding

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to the one under the master seal receives a camera. The push card bears the following legend or instruction :

NAME UNDER SEAL RECEIVES A
BEAUTIFUL SHERATON RADIO
NEW

Amazing Performance—Beautiful Appearance

| | |
|--|--------------------------------------|
| RCA licensed superheterodyne radio | Nos. 22 & 33 each receive a |
| Multi-power tubes, including beam power output tube | handsome ALAMAC BALL POINT PEN. |
| Permanent magnetic speaker with magnifi- cent tone and volume | 1¢ to 39¢ NO HIGHER |
| Durable plastic cabinet of modern design | Nos. 1 to 39 Pay What is |
| Plays anywhere on AC or DC | Drawn. Nos. over 39 pay only 39¢. |

PUSH OUT WITH PENCIL

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions and said prizes or premiums are allotted to the customer or purchaser from said card in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid and the amount to be paid for the merchandise or the chance to receive said merchandise are thus determined wholly by lot or chance.

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards is the same as that hereinabove described varying only in detail.

PAR. 3. The persons to whom respondents furnish and have furnished said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 20, 1949, issued and subsequently served its complaint in this proceeding upon the respondents Jerrold A. Rowley and Stanley Eisenberg charging said respondents with violation of the provisions of that Act. An answer to said complaint was filed by respondent Jerrold A. Rowley but no answer was filed by respondent Stanley Eisenberg. Testimony and other evidence in support of the complaint were then introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, and the hearing examiner having duly considered the record, on December 28, 1950, filed his initial decision herein with the Commission.

Within the time permitted by the Commission's Rules of Practice, counsel for respondent Jerrold A. Rowley filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to the

appeal and oral argument of counsel; and the Commission, having issued its order granting said appeal in part and denying it in part, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Jerrold A. Rowley is an individual, with his office and principal place of business at 110 West 42nd Street, New York, New York. Prior to October 31, 1947, respondents Jerrold A. Rowley and Stanley Eisenberg were partners trading as Richard Donigan and Discount Sales Company, with their office and principal place of business at the same address. This partnership was discontinued as of October 31, 1947. Respondent Stanley Eisenberg has had no connection with the acts and practices alleged in the complaint herein.

PAR. 2. Respondent Jerrold A. Rowley, trading under the name Richard Donigan, in the latter part of 1947 and the early part of 1948 engaged in the sale of radios, fountain pens and other articles of merchandise and caused said merchandise, when sold, to be transported from his place of business in the State of New York to purchasers thereof in other States of the United States, maintaining a course of trade in such merchandise between the State of New York and the various other States of the United States. Since that time respondent Jerrold A. Rowley has engaged in the manufacture and sale of novelty merchandise under the name of Discount Sales Company.

PAR. 3. In the course and conduct of his said business of selling merchandise in commerce under the name Richard Donigan, respondent Jerrold A. Rowley on two separate occasions mailed lottery devices designed for use in the resale of his merchandise to a large number of prospective purchasers located throughout the United States. On one of these occasions he mailed to 50,000 such prospective purchasers sales promotional literature consisting of a push card, a circular advertising a table model radio, an order blank and a form letter describing respondent's sales promotional scheme. This form letter stated that by purchasing two radios and two ball point pens from said respondent for \$29.95, selling all of the chances on the enclosed push card and distributing one of the radios and both of the ball point pens to the persons selecting the winning punches in accordance with the instructions on the push card, the purchaser could keep the second radio at practically no cost to himself. The total amount received from the

sale of punches approximately equalled the total purchase price of the merchandise of \$29.95.

The push cards which were enclosed in the letters carried the following legend and instructions:

NAME UNDER SEAL RECEIVES A

BEAUTIFUL SHERATON RADIO

NEW

Amazing Performance—Beautiful Appearance

| | |
|---|-------------------------|
| RCA licensed superheterodyne radio | Nos. 22 & 23 |
| Multi-power tubes, including beam power output tube | each receive a handsome |
| Permanent magnetic speaker with magnificent tone and volume | ALAMAC BALL POINT PEN. |
| Durable plastic cabinet of modern design | 1¢ to 39¢— |
| Plays anywhere on AC or DC | NO HIGHER |
| | Nos. 1 to 39 Pay |
| | What Is Drawn. |
| | Nos. over 39 pay |
| | only 39¢. |

PUSH OUT WITH PENCIL

Write your name on the reverse side opposite the name you select.

Each card contained eighty squares which were each inset with a small round detachable disc bearing a feminine name clearly displayed. In addition it contained the large red seal, referred to in the legend above, which concealed the winning feminine name. Additional instructions are set out on the reverse side of the card. If the push card is operated in accordance with these instructions, a purchaser of a chance selects and punches out one of the small discs. He then writes his own name on the reverse side of the card opposite the feminine name on the disc he selected. The amount he pays for the chance is determined by the figure concealed under the disc he punched out. If that number is either 22 or 23, he wins one of the ball point pens. After all of the punches have been sold, the radio is received by the person who punched out the disc containing the feminine name concealed under the large seal. Whether a purchaser of a chance receives one of the articles of merchandise or receives nothing for the amount paid, and the amount he pays for the chance itself, are both determined purely by lot or chance.

Respondent Jerrold A. Rowley received between 400 and 500 orders for radios and ball point pens in response to the above-described mailing. This merchandise, sold upon these orders, was shipped and delivered from the State of New York to the purchasers thereof located

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throughout the other States of the United States. The other mailing of lottery devices by this respondent to other prospective purchasers was made in a substantially similar manner as the mailing above described, varying from it only in minor details.

Respondent Jerrold A. Rowley, trading under the name Discount Sales Company, is presently engaged in the sale of novelty merchandise in connection with the sale of some of which he gives lottery devices to the purchasers thereof.

PAR. 4. Respondent Jerrold A. Rowley, trading as Richard Donigan in the manner above described, supplied to and placed in the hands of purchasers of his merchandise the means of conducting lotteries or games of chance in connection with the resale or distribution of such merchandise. The sale of merchandise by and through such means is a practice which is in contravention of an established public policy of the Government of the United States and this respondent, through the supplying of such means, in commerce, assisted and participated in the violation of such policy.

CONCLUSION

The acts and practices of respondent Jerrold A. Rowley, trading under the name of Richard Donigan, as hereinabove found, were all to the prejudice and injury of the public and constituted unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Jerrold A. Rowley, trading as Richard Donigan, or Discount Sales Company, or under any other name or designation, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or other lottery devices which are to be used or may be used in the sale and distribution of said merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling, or otherwise disposing of, any merchandise by means of a game of chance, gift enterprise or lottery scheme.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Stanley Eisenberg.

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Order

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

Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion in Docket No. 5203, Worthmore Sales Company.¹

¹ 46 F. T. C. 606.

IN THE MATTER OF
SAMUEL COHEN AND IRWIN H. FISHER TRADING AS
MONROE SALES COMPANY

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5782. Complaint, May 31, 1950—Decision, Mar. 10, 1952

Where two partners engaged in the interstate sale and distribution of watches, novelties and other articles, some at wholesale but by far the greater portion direct to members of the public, through traveling salesmen, mailed circulars, and recommendations of customers—

Sold much of their merchandise in the form of such typical assortments as two watches, two cigarette case and compact sets, together with a recording card and punchboard, for use in the resale and distribution of said products by the assortment's purchaser under a plan whereby the person who punched by chance the number corresponding to that of the "star punch", received a watch, those who punched two specified numbers received the compact and cigarette case sets, price of the particular punch was determined by chance, those who did not punch a lucky number received nothing further, and the operator-purchaser remitted the proceeds in payment for the assortment, retaining the second watch as his own prize or profit:

Held: That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair acts and practices.

As respects contentions by way of defense that the only relation between respondents and the persons who resold their merchandise was that of seller and purchaser; that the purchaser was under no compulsion to use the punchboard and was entirely free to dispose of the merchandise as he saw fit subject to remission of the agreed purchase price; that the board, like the other articles, was sold separately as an item of merchandise;

Said position overlooked the fact that the entire merchandising plan contemplated the use of the punchboard by the purchaser of the assortment, and the resale or distribution of the assortment to the public by means of a lottery or game of chance since, aside from testimony as to actual instances in which the punchboard was so used, the nature of the transaction and the supplying by respondents of the lottery device which could serve no other purpose made such a conclusion inescapable.

In said connection the further fact that the price of the assortment included a specified amount, for punchboard and card, as contended, was immaterial, and while the fact that respondents did not sell the assortment to minors, but only to mature and responsible persons regarded by them as acceptable credit risks, was a mitigating circumstance, it did affect the legal principle involved.

As respects respondents' contention that the entire proceeding was fatally defective because the complaint did not charge, nor the evidence establish, that their merchandising plan was an unfair method of competition or that there was any injury to their competitors as a result of its use; it is no longer necessary, since the adoption of the Wheeler-Lea Amendment, to allege or

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prove in such a proceeding as the instant one, evidence of competition or any injury thereto, and the present complaint proceeded upon the theory that the practice of a seller of merchandise of placing in the hands of others lottery devices for use in the sale and distribution of such merchandise to the public, is an unfair act or practice which promotes and encourages gambling and is in contravention of public policy.

Before *Mr. William L. Pack*, hearing examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Mr. Alfred L. Bennett, Mr. Wilbur N. Baughman and *Mr. James Perkins Parker*, of Washington, D. C., for respondents.

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 Samuel Cohen and Irwin H. Fisher, individuals and partners trading as Monroe Sales Company, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Samuel Cohen and Irwin H. Fisher are individuals and partners trading and doing business as Monroe Sales Company, with their office and principal place of business located at 32 South Street, in the city of Baltimore, Maryland. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution of watches, novelties and other articles of merchandise and have caused said watches, novelties, and merchandise when sold to be transported from their place of business in the city of Baltimore, Maryland, to purchasers thereof at their respective points of location in the various States of the United States other than Maryland and in the District of Columbia. There is now and has been for more than one year last past a course of trade by respondents in such merchandise, in commerce, between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business, as described in Paragraph One hereof, respondents sell and have sold to dealers and members of the public certain assortments of merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when such merchandise is sold and distributed to the purchasing public; and have furnished various plans of merchandising which involve the operation of a game of chance, gift enterprise, or lottery scheme when said merchandise is sold

and distributed to the purchasing and consuming public. One method or sales plan adopted and used by the respondents is substantially as follows:

Respondents advertise in certain periodicals having a general circulation in various States of the United States for salesmen and through them sell certain merchandise deals consisting of punch boards and merchandise and push cards and merchandise. Respondents also sell directly to members of the purchasing public these deals, of which a typical one is described as follows:

The punch board deal sold by respondents consists of a small punch board and two watches. Each of the punch boards contains 160 punches and a prize punch, which is not punched until all of the punches are sold. Accompanying said punch board is a list on which is to be written the name of the purchaser of each punch opposite the number which is revealed when he purchases a punch. The purchaser of the board pays the price for his punch as shown by the punch received. When all of the punches have been sold, the prize punch is punched and the winner is disclosed. The person who has purchased a punch corresponding to the number disclosed by the prize punch is awarded a watch. The punch board has on its face the following legend or instructions:

WIN A GUARANTEED
10K Gold R. G. P.
FULLY JEWELLED WATCH
(FREE) Nos. 1 to 25 (FREE)
Star Prize—Do Not Punch
Until Entire Board is Sold
Nos. 26 to 50 pay what you draw
Nos. over 50 pay only 50¢
Nos. 33 and 44 each receive
Matched Compact & Cigarette Set

and the list on which the names of purchasers are written bears the legend as follows:

NUMBER UNDER STAR PRIZE RECEIVES
GUARANTEED 10K GOLD R. G. P.
FULLY JEWELLED WATCH
Nos. 33 and 44 Each Receive
MATCHED COMPACT AND CIGARETTE CASE SET

Respondents sell their punch board deals as above described to persons located in the various States of the United States, and these customers of respondents make sale of respondents' merchandise by means of said punch boards in accordance with the above described legend or instructions, and said watches and merchandise are awarded

to the customers or purchasers from said punch board in accordance with the above described legend. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the chance to receive said merchandise is thus determined wholly by lot or chance. The watches and other merchandise have a retail value greater than the price paid for any of the chances.

Respondents sell and distribute various other punch board and push card and merchandise deals, all of which involve the sale of said merchandise by means of said other punch board and push card deals and vary only in detail. All of said merchandise plans embody the distribution of merchandise by game of chance, gift enterprise, or lottery schemes.

PAR. 3. Retail dealers, operators and others who purchase respondents' push card and punch board and watch assortments or deals, directly or indirectly, use the said push cards or punch boards for distribution of the watches to the purchasing public in accordance with the sales plan above described. Respondents thus supply to and place in the hands of other the means of conducting lotteries or games of chance in the sale of their products in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans and methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 10, 1952, the initial decision in the instant matter of Hearing Examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 31, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Subsequently, the proceeding regularly came on for final consideration by the hearing examiner on the complaint, answer, testimony and other evidence, and proposed findings and conclusions submitted by counsel (oral argument not having been requested, the matter having already been argued at length upon a motion to dismiss the complaint made by respondents' counsel earlier in the proceeding), and the hearing examiner, having duly considered the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents, Samuel Cohen and Irwin H. Fisher, are individuals and partners trading under the name Monroe Sales Company, with their office and principal place of business located at 32 South Street, Baltimore, Maryland. Respondents are now, and since March 1949 have been engaged in the sale and distribution of watches, novelties and other articles of merchandise, and cause and have caused their products, when sold, to be transported from their place of business in the State of Maryland to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in

their merchandise in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. While respondents sell some of their merchandise at wholesale, by far the greater portion is sold direct to members of the public. These customers are obtained in various ways—through solicitation by respondents' traveling salesmen, by advertising circulars sent by respondents through the mail, and through the recommendation of persons who are themselves customers of respondents.

Much of the merchandise so sold by respondents is in the form of assortments or combinations of merchandise and certain other articles, and it is these assortments which form the subject matter of the present proceeding. One of these assortments, which is typical of the sales method used by respondents, includes two watches, two cigarette case and compact sets, and a "sales outfit" consisting of a "block" and "chart." The block is in fact a small punchboard; the chart is merely a card upon which are to be written the names of persons playing or punching the board. The purchase price of the entire assortment is \$64.50, which includes 75¢ for the punchboard and card. The assortment is shipped only upon the written order of the purchaser, and usually upon credit terms, prepayment of the purchase price not being required.

The punchboard contains 160 small holes in each of which is a number, the number being concealed from view until the punch has been made and the number separated from the board. There is also a "star" or master punch which likewise contains a concealed number. On the face of the board appears the following:

WIN A GUARANTEED
10K Gold R. G. P.
FULLY JEWELLED WATCH
(FREE) Nos. 1 to 25 (FREE)
Star Prize—Do Not Punch
Until Entire Board is Sold
Nos. 26 to 50 pay what you draw
Nos. over 50 pay only 50¢
Nos. 33 and 44 each receive
Matched Compact & Cigarette Set

At the top of the chart or card appears the following:

NUMBER UNDER STAR PRIZE RECEIVES
GUARANTEED 10K GOLD R. G. P.
FULLY JEWELLED WATCH
Nos. 33 and 44 Each Receive
MATCHED COMPACT AND CIGARETTE CASE SET

Persons purchasing the assortment from respondents sell the 160 punches on the board to other members of the public in accordance

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with the foregoing instructions, noting on the card the name of each person punching the board, together with the number punched by such person. After all 160 punches have been sold, the star or master punch is separated from the board and the person who has punched the number on the board corresponding to the number of the star punch receives the main prize, which is one of the watches. The cigarette case and compact sets are also awarded in accordance with the instructions on the board and card. Persons not punching one of the lucky numbers receive nothing for the respective amounts paid by them other than the privilege of punching or playing the board. The sale of the 160 punches nets the operator of the board \$64.50, which he remits to respondents to cover the purchase price of the assortment. The second watch is retained by the operator as his own prize or profit from the transaction. Both of the watches are of good quality, each having a retail value greatly in excess of the amount paid for any of the punches on the board.

PAR. 3. It is clear from the foregoing that the sale or distribution of the merchandise in question to the ultimate consumer or general public involves the operation of a lottery or game of chance, and that respondents supply to and place in the hands of others lottery devices for use in the sale or distribution of respondents' merchandise. In addition to the punchboard described above, respondents have also supplied to purchasers of their merchandise push cards and other punchboards, all of which devices involved the operation of games of chance in the resale of such merchandise.

CONCLUSIONS

In their defense respondents urge that there is no relation of principal and agent existing between themselves and the persons who resell their merchandise, the only relation being that of seller and purchaser; that respondents require only that the purchaser pay them the stipulated price of the merchandise, the purchaser being under no compulsion or instruction to use the punchboard at all; that the purchaser is entirely free to keep all of the merchandise for himself, sell it in regular course without the use of the punchboard, or give it away, provided he remits to respondents the agreed purchase price of the merchandise; that the punchboard is not supplied or furnished by respondents free but is sold to the purchaser as an item of merchandise just as are the other articles in the assortment; that a purchaser is not required to buy any merchandise in assortments but is free to purchase any or all of the articles separately and without the punchboard, and may also purchase the punchboard separately and without any merchandise at

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all if he wishes to do so. Respondents further point out that they do not sell these assortments to children but only to mature and responsible persons whom respondents regard as acceptable credit risks.

The weakness in respondents' position is that it overlooks the fact that the entire merchandising plan contemplates the use of the punchboard by the purchaser of the assortment, and the resale or distribution of the merchandise to the public by means of a lottery or game of chance. Actual instances are disclosed by the testimony in which the punchboard was so used by purchasers, but even if there were no testimony at all on this point the conclusion would be inescapable from the nature of the transaction and the supplying by respondents of the lottery device. The punchboard could serve no other purpose. The fact that the purchase price of the assortment includes a specified amount for the punchboard and card is immaterial. While the fact that respondents do not sell the assortments to minors is a mitigating circumstance, it does not affect the legal principle involved.

It is further and earnestly urged by respondents that this entire proceeding is fatally defective for the reason that the Commission's complaint does not charge, nor does the evidence establish, that respondents' merchandising plan is an unfair method of competition or that there is any injury to respondents' competitors as a result of the use of the plan. As the examiner understands the decisions of the courts since the adoption of the Wheeler-Lea amendment to the Federal Trade Commission Act, it is no longer necessary to allege or prove in a proceeding of this kind either the existence of competition or any injury to competition. The present complaint proceeds upon the theory that the practice of a seller of merchandise of placing in the hands of others lottery devices for use in the sale or distribution of such merchandise to the public is an unfair act or practice, unfair to the public in that it promotes and encourages gambling and is in contravention of public policy. This theory appears to find ample support in the authorities. It is therefore concluded that the absence of the element of competition constitutes no bar to the present proceeding.

It is further concluded that the acts and practices of respondents as hereinabove set out are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Samuel Cohen and Irwin H. Fisher, individually and as partners trading under the name Monroe Sales Company or under any other name, and respondents' agents,

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representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of watches, novelties or any other merchandise, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others punchboards, push cards, or other lottery devices, either with assortments of merchandise or separately, which punchboards, push cards, or other lottery devices are to be used or may be used in the sale or distribution of respondents' merchandise to the public.
2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of March 10, 1952].

Complaint

IN THE MATTER OF

WILL-WELD MANUFACTURING COMPANY ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5922. Complaint, Sept. 11, 1951—Decision, Mar. 13, 1952

Where a corporation and its three officers, engaged in the interstate sale and distribution of unassembled electric home welding machines; in advertising the same through magazines and circulars—

Represented that their said machine, made by assembling the various parts, would operate consistently and safely on the electric circuit ordinarily found in a home, on a 30 ampere fuse, use of which they recommended;

The facts being that their said machine could not be used safely in a home: the electric circuit in most homes is wired with No. 14 American wire gauge wire, which necessitates use of 15 ampere fuses; and use of their said machine with a 30 ampere fuse, which requires a No. 10 wire, on a No. 14 wire would cause overloading until the circuit breaker or fuse opened and result in overheating and a dangerous fire hazard, danger of which they failed to reveal or caution the public against;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that their assembled machine would operate safely on the ordinary home lighting circuit, and thereby induce purchase of said parts and the assembling and use of said machines in homes:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. John W. Russell for the Commission.

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 Will-Weld Manufacturing Company, a corporation, and W. O. Schneiderwind, W. J. Dillman, and L. B. Bush, 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 Will-Weld Manufacturing Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Nebraska, having its office and prin-

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principal place of business at 1038 South 19th Street in the city of Omaha, State of Nebraska. Said corporation trades and does business under the name of Atomic Arc Welder Company.

Respondents W. O. Schneiderwind, W. J. Dillman and L. B. Bush are President, Vice-President and Secretary-Treasurer, respectively, of corporate respondent and also have their principal office and place of business at 1038 South 19th Street in the city of Omaha, in the State of Nebraska. The individual respondents formulate, direct and control the acts and practices of corporate respondent.

PAR. 2. Said respondents are now, and for several years last past have been, engaged in the sale and distribution of unassembled electric home welding machines.

PAR. 3. Respondents cause, and have caused, the unassembled parts of said welding machines to be shipped from their aforesaid place of business in the State of Nebraska to purchasers thereof located in other States of the United States and maintain, and at all times mentioned herein have maintained, a course of trade in said unassembled machines in commerce among and between the various States of the United States. Their volume of trade in said commerce is and has been substantial.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their said product in commerce, respondents have made certain statements and representations concerning the welding machines assembled from the parts sold by them by means of advertisements inserted in magazines and in circulars sent to members of the purchasing public. Among and typical of the statements and representations contained in said advertisements and circulars are the following:

Profit or pleasure in your home or work shop

Gives 100% penetration. Welds are stronger than original metal. Operates on 110 or 220 A. C.

Your Atomic Arc Welder will operate on either 110 or 220 alternating current, 50 or 60 cycle. On 110 or 220 volts you can use $\frac{1}{8}$ " electrodes and weld $\frac{1}{4}$ " plate in one pass.

The Atomic Arc Welder gives the maximum amount of heat practical on the ordinary 110 volt lighting circuit.

The Atomic Arc Welder is a transformer type Arc Welder. Not a Resistance type welder. Safe, rugged, compact and portable.

IN YOUR HOME OR WORKSHOP

The ATOMIC ARC WELDER

is . . . Safe . . . can be used consistently on 30 ampere fuse.

PAR. 5. Through the use of the aforesaid statements and representations and others of the same import not specifically set out herein,

respondents represented that the welding machine assembled by the use of the various parts sold by them will operate safely in the home on the electrical circuit ordinarily found in the home.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. Most homes operate on a 110 volt lighting circuit, are wired with No. 14 gauge wire and use 15 ampere fuse plugs. Respondents recommend the use of 30 ampere fuse plugs. The operation of their welding machine upon such a circuit and using 30 ampere fuse plugs is not safe as a definite fire hazard will result.

PAR. 7. At no place in respondents' advertising or elsewhere is the fact revealed that a dangerous fire hazard will result from operating their said machine on the ordinary home lighting circuit fused as recommended. Furthermore, respondents do not inform purchasers of the proper wiring and fusing necessary to safely operate said machine in the home. By failing to reveal these facts respondents impliedly represent, contrary to the facts, that the use of said machine in the home is safe under all conditions of ordinary use.

PAR. 8. The use by the respondents of the aforesaid statements and representations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements and representations are true and that their assembled machine will operate safely on the ordinary home lighting circuit and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said unassembled parts and to assemble and use said welding machines in their homes.

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

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 13, 1952, the initial decision in the instant matter of Hearing Examiner Webster Ballinger, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WEBSTER BALLINGER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on September 11, 1951, issued and

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subsequently served its complaint in this proceeding upon respondents Will-Weld Manufacturing Company, a corporation, and W. O. Schneiderwind, W. J. Dillman and L. B. Bush, individually and as officers of said corporation, charging them and each of them with the use of unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. The corporate respondent answered, no answer being filed by any of the individual respondents, and, after reasonable notice, hearing was held, at which testimony and other evidence in support of the allegations of the complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, which said evidence was duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, all intervening procedure before the examiner being waived; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Will-Weld Manufacturing Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Nebraska, having its office and principal place of business at 1038 South 19th Street in the city of Omaha, State of Nebraska. Said corporation trades and does business under the name of Atomic Arc Welder Company.

Respondents W. O. Schneiderwind, W. J. Dillman and L. B. Bush are President, Vice-President and Secretary-Treasurer, respectively, of the corporate respondent and also have their principal office and place of business at 1038 South 19th Street in the city of Omaha, State of Nebraska. The individual respondents formulate, direct and control the acts and practices of the corporate respondent.

PAR. 2. Said respondents are now, and for several years last past have been, engaged in the sale and distribution of unassembled electric home welding machines.

PAR. 3. Respondents cause, and have caused, the unassembled parts of said welding machines to be shipped from their aforesaid place of business in the State of Nebraska to purchasers thereof located in other States of the United States and maintain, and at all times mentioned herein have maintained, a course of trade in said unassembled machines in commerce among and between the various States of the

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United States. Their volume of trade in said commerce is, and has been, substantial.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their said product in commerce, respondents, by means of advertisements inserted in magazines and circulars sent to members of the purchasing public, represented that their electric home welding machine, made by the assembling of the various parts sold by them for a complete welding machine, would operate consistently and safely on the electric circuit ordinarily found in a home, on a 30 ampere fuse, the use of which they recommend.

PAR. 5. The electric circuit found in most homes is wired with No. 14 American wire gauge wire which provides 115 to 120 volts and necessitates the use of 15 ampere fuse plugs.

PAR. 6. A 30 ampere fuse requires a No. 10 American wire gauge wire. The use of respondents' welding machine with a 30 ampere fuse on a No. 14 American wire gauge wire (the numbering system used on wiring runs in reverse), will cause an overloading of the circuit until the circuit breaker or fuse opens, resulting in overheating and producing a dangerous fire hazard. Respondents do not reveal to or caution the public against this danger but, on the contrary, represent to the public that their welding machine can be safely used in homes.

PAR. 7. The use by the respondents of the statements and representations referred to in Paragraph Four has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and that their assembled machine will operate safely on the ordinary home lighting circuit and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said unassembled parts and to assemble and use said welding machines in their homes.

CONCLUSION

The acts and practices of respondents, as set forth in the findings, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents Will-Weld Manufacturing Company, a corporation, and W. O. Schneiderwind, W. J. Dillman and L. B. Bush, individually and as officers of the corporate re-

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spondent, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of unassembled electric home welding machines, by that or any other name or designation, do forthwith cease and desist from:

(1) Representing, directly or indirectly, that their electric home welding machine, made by the assembling of the various parts sold by them for a complete machine, will operate consistently and safely on the electric circuit ordinarily found in a home with a 30 ampere fuse.

(2) Selling or offering for sale their electric home welding machine without, in large type appearing in all literature relating thereto, expressly informing the purchaser or purchasers that their home welding machine cannot be safely connected with the electric current ordinarily found in a home by an ampere fuse in excess of 15 amperes and that the use of a larger fuse may cause an overloading of the electric circuit and produce a dangerous fire-hazard condition.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of March 13, 1952].

Complaint

IN THE MATTER OF
BULOVA WATCH COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5830. Complaint, Dec. 1, 1950—Decision, Mar. 17, 1952

Under the provisions of subsec. (d) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act, the seller has the free choice whether to contract to pay allowances to or for the benefit of its customers in consideration of services or facilities furnished by such customer in connection with the resale of products purchased, and has the further free choice as to the basis upon which such payments will be made, but if decision to pay such allowances has been made, the statute enjoins the seller to make such payments available on proportionally equal terms to all customers competing in the resale of the seller's products.

Where a corporate manufacturer of men's and women's watches which in 1948 sold about \$48,000,000 worth to single retail jewelry stores, chain jewelry stores, and department stores, competing with one another—

Paid or contracted to pay money to customers as compensation for advertising services furnished by them in connection with the sale or offering for sale of its watches without making such payments available on proportionally equal terms to all in that competing customers, received varying percentages on their respective purchase volume due to the varying percentages allowed for the different purchase brackets:

Held, That such acts and practices, under the circumstances set forth, violated subsec. (d) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Peter J. Dias* for the Commission.

Cravath, Swaine & Moore, of New York City, and *Clifford & Miller*, of Washington, D. C., for respondent.

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 (d) of section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Bulova Watch Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 630 Fifth Avenue, New York, New York.

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PAR. 2. Respondent is now, and for many years has been, engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in plants located in New York, Rhode Island, and Massachusetts, and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are single-unit retail jewelry stores, multiple-unit or chain retail jewelry stores, and department stores. During the year 1948, respondent's dollar volume of sales of said watches amounted to approximately \$48,000,000.

PAR. 3. In the course and conduct of said business, respondent engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said watches, or caused them to be transported, from said States in which its said plants are located to said purchasers with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce respondent paid, or contracted to pay, money, credits, allowances, or other things of value to or for the benefit of some of its customers as compensation and in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the sale, or offering for sale, of respondent's watches which it manufactures, or offers for sale; and respondent did not make, or contract to make, such payments or considerations available on proportionally equal terms to all other of its customers competing in the distribution of respondent's said products.

PAR. 5. Among the payments alleged in Paragraph Four were those for advertising services or facilities, or advertising allowances. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

No advertising allowances was available to those customers in the first or smallest volume bracket. To those customers in the second and each of the other progressively larger volume brackets, adver-

tising allowances were available which, as between and among customers in the same volume bracket, amounted to the same percentage or an equal proportion of their respective volumes, but which, as between and among customers in different volume brackets, amounted to different percentages or unequal proportions of such volumes, for the reason that the larger the volume bracket the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next largest or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

PAR. 6. As illustrative of respondent's advertising allowance practices, during the year 1948, said volume brackets and said percentages or proportions of volume available as said advertising allowances were substantially as shown in columns one and two, respectively, of the table herein set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets, and the total number of customers in all of said volume brackets. The fourth column in said table sets forth approximately the total volumes of all customers in each of said volume brackets and the total volumes of all customers in all of said volume brackets. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the total dollar amount of said advertising allowances paid to all of the customers in all of said volume brackets. Said advertising allowances were paid by check, credit memoranda or by permitting customers to make deductions from invoiced prices.

| (1) Volume Brackets | (2) Percent- ages | (3) Number of Customers | (4) Volumes | (5) Amount of Allowance |
|-------------------------------|-------------------------|-------------------------------|----------------|-------------------------------|
| Under \$10,000..... | 0 | 8,900+ | \$23,300,000+ | 0 |
| \$10,000 to \$20,000..... | 1 | 345 | 4,532,413 | \$45,324 |
| \$20,000 to \$40,000..... | 2 | 199 | 5,052,473 | 101,049 |
| \$40,000 to \$75,000..... | 3 | 81 | 4,275,585 | 128,277 |
| \$75,000 to \$125,000..... | 4 | 33 | 2,741,033 | 109,641 |
| \$125,000 to \$200,000..... | 5 | 11 | 1,580,009 | 79,000 |
| \$200,000 to \$300,000..... | 6 | 9 | 2,359,224 | 141,553 |
| \$300,000 to \$400,000..... | 7 | 3 | 1,275,555 | 89,289 |
| \$400,000 to \$500,000..... | 8 | 0 | 0 | 0 |
| \$500,000 to \$800,000..... | 9 | 1 | 877,311 | 78,958 |
| \$800,000 to \$1,000,000..... | 10 | 1 | 1,467,221 | 143,722 |
| \$1,000,000 and over..... | | | | |
| | | 8,683+ | 47,553,919+ | 919,806 |

Respondent classified its customers as retail cash and credit jewelers, chain retail stores and department stores. The above table includes all of respondent's said customers, and each customer in each volume bracket was in competition with one or more other customers in one or more other volume brackets in the resale of respondent's watches to consumers.

PAR. 7. The acts and practices of the respondent as above alleged violate subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. Sec. 13), the Federal Trade Commission on December 1, 1950, issued and subsequently served its complaint in this proceeding upon Bulova Watch Company, Inc., a corporation, charging said respondent with violation of subsection (d) of Section 2 of said Act, as amended. After the filing by respondent of its answer to the complaint, pursuant to leave to withdraw such original answer and to file amended answer as subsequently granted to respondent by the hearing examiner of the Commission designated in the complaint, respondent's amended answer was filed in which amended answer the respondent, for the purposes of this proceeding, admitted all the material allegations of fact set forth in the complaint, waived hearing as to the facts and consented to the entry of findings as to the facts based upon the complaint and the answer and the issuance against it of an order to cease and desist, upon the condition, however, that no order to cease and desist be issued or served upon it until orders are entered disposing of the complaints against The Gruen Watch Company, Federal Trade Commission Docket No. 5836, and Elgin National Watch Company, Federal Trade Commission Docket No. 5837; and on May 25, 1951, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondent appealed from the initial decision of the hearing examiner and this proceeding regularly came on for final consideration by the Commission upon the record herein, including the respondent's brief in support of its appeal and the brief in opposition thereto filed by counsel supporting the complaint (oral argument not having been requested); and the Commission, having duly considered

the record and having ruled upon said appeal and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Bulova Watch Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 630 Fifth Avenue, New York, New York.

PAR. 2. Respondent is now, and for many years has been, engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in plants located in New York, Rhode Island, and Massachusetts, and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are single-unit retail jewelry stores, multiple-unit or chain retail jewelry stores, and department stores. During the year 1948, respondent's dollar volume of sales of said watches amounted to approximately \$48,000,000.

PAR. 3. In the course and conduct of its business as aforesaid and during all of the times mentioned herein, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, having shipped its watches, or caused them to be transported, from the States in which its plants are located to the purchasers thereof with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent paid or contracted to pay money to some of its customers as compensation and in consideration for advertising services furnished by such customers in connection with the sale or offering for sale of watches manufactured and sold by respondent in accordance with the advertising allowance plan set out in Paragraphs Five and Six of these findings as to the facts, and such plan did not make or purport to make such payments available on proportionally equal terms to all of its customers competing in the distribution of respondent's said products.

PAR. 5. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

No advertising allowance was available to those customers in the first or smallest volume bracket. To those customers in the second and each of the other progressively larger volume brackets, advertising allowances were available which, as between and among customers in the same volume bracket, amounted to the same percentage or an equal proportion of their respective volumes, but which, as between and among customers in different volume brackets, amounted to different percentages or unequal proportions of such volumes, for the reason that the larger the volume bracket the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next smaller volume bracket or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

PAR. 6. As illustrative of respondent's advertising allowance practices, during the year 1948, said volume brackets and said percentages or proportions of volume available as said advertising allowances were substantially as shown in columns one and two, respectively, of the table herein set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets, and the total number of customers in all of said volume brackets. The fourth volume in said table sets forth approximately the total volumes of all customers in each of said volume brackets and the total volumes of all customers in all of said volume brackets. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the total dollar amount of said advertising allowances paid to all of the customers in all of said volume brackets. Said advertising allowances were paid by check, credit memoranda or by permitting customers to make deductions from invoiced prices.

Conclusion

| (1) Volume Brackets | (2) Percent- ages | (3) Number of Customers | (4) Volumes | (5) Amount of Allowance |
|-------------------------------|-------------------------|-------------------------------|----------------|-------------------------------|
| Under \$10,000..... | 0 | 8,000+ | \$23,300,000+ | 0 |
| \$10,000 to \$20,000..... | 1 | 345 | 4,532,413 | \$45,324 |
| \$20,000 to \$40,000..... | 2 | 199 | 5,052,473 | 101,049 |
| \$40,000 to \$75,000..... | 3 | 81 | 4,275,585 | 128,267 |
| \$75,000 to \$125,000..... | 4 | 33 | 2,741,033 | 109,641 |
| \$125,000 to \$200,000..... | 5 | 11 | 1,580,109 | 73,000 |
| \$200,000 to \$400,000..... | 6 | 9 | 2,359,224 | 141,553 |
| \$400,000 to \$ 00,000..... | 7 | 3 | 1,275,565 | 89,289 |
| \$ 00,000 to \$800,000..... | 8 | 0 | 0 | 0 |
| \$800,000 to \$1,000,000..... | 9 | 1 | 877,311 | 78,958 |
| \$1,000,000 and over..... | 10 | 1 | 1,467,221 | 146,722 |
| | | 8,683+ | 47,953,919+ | 919,806 |

Respondent classified its customers as retail cash and credit jewelers, chain retail stores and department stores. The above table includes all of respondent's said customers, and each customer in each volume bracket was in competition with one or more other customers in one or more other volume brackets in the resale of respondent's watches to consumers.

CONCLUSION

1. Respondent under subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, has the free choice whether to pay or contract to pay allowances to or for the benefit of its customers in consideration of services or facilities furnished by such customer in connection with the resale of products purchased, and has the further free choice as to the basis upon which such payments will be made by it.

2. When the decision to pay such allowances has been made, the statute enjoins respondent to make such payments available on proportionally equal terms to all customers competing in the resale of respondent's products.

3. This injunction has been ignored by respondent, on the facts admitted and found in this proceeding in two particulars. Respondent selected annual dollar volume of purchases as the basis for payments to its customers. It classified its customers according to arbitrarily fixed annual dollar purchase volume brackets and paid the same percentage or proportion of each customer's annual dollar purchase volume to each such customer within a given bracket. However, these percentages or proportions varied with the bracket so that each competing customer of respondent did not receive the same percentage or proportion of his purchase volume. Thus one customer received 10% of his annual dollar purchases, 199 others only 2% of theirs.

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Furthermore, where purchases did not aggregate \$10,000 for the year, a customer received nothing. Eight thousand of respondent's customers thus received nothing; 683 received \$919,806. There was thus a lack of equal proportionality between many customers competing in the sale of respondent's products who received payments and a complete absence of any proportionality between those customers who received something and those competing customers who received nothing.

4. The acts and practices of the respondent, in the particulars mentioned above, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent Bulova Watch Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of men's and women's watches, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer for advertising services or facilities furnished by or through such customer unless such payment or consideration is available on proportionally equal terms to all other customers of respondent who, in fact, compete with the favored customer in the resale of respondent's products.

(2) Paying or allowing, or contracting to pay or allow, anything of value to or for the benefit of any customer for advertising services or facilities furnished by or through said customer, as a percentage or proportion of dollar volume of purchases by such customer different from the percentage or proportion offered or granted any other customer where such customers compete in fact in the resale of such products and where such payments are based on the amount of purchases made.

(3) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer, as compensation, or in consideration for, any services or facilities furnished by, or through, such customer in connection with the processing, handling, sale or offering for sale, of any products manufactured or sold by respondent, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.

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

Complaint

IN THE MATTER OF
GRUEN WATCH COMPANY

COMPLAINT, FINDINGS, ORDER, AND STATEMENT RE CONCURRENCE, AND ANSWER THERETO, IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5836. Complaint, Jan. 4, 1951—Decision, Mar. 17, 1952

Under the provisions of subsec. (d) of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act, the seller has the free choice of making payments for advertising services furnished by the customer in connection with the sale or offering for sale of products made by said seller, or of not making such payments, and choice of the basis on which any such payments shall be made, subject to the requirement simply that such payments shall be available on proportionally equal terms to all customers who compete in distribution of said products.

Where a corporation long engaged in the manufacture and interstate sale of men's and women's watches to large numbers of customers throughout the United States, including retail jewelry stores and a few department stores and industrial houses, many in competition with each other in the resale thereof—

Paid or contracted to pay money to customers as compensation for advertising services furnished by them in connection with the sale or offer of its said watches, without making such payments available on proportionally equal terms to all of competing customers in that, due to the varying percentages allowed for the different annual purchase brackets, competing customers received varying percentages on their respective purchase volume; so that while no volume bracket of customers was excluded from participation, and there was equality of participation on the part of competing customers within a particular volume bracket, there was inequality among competing customers in different brackets:

Held, That such acts and practices, under the circumstances set forth, violated subsec. (d) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Peter J. Dias* for the Commission.
Taft, Stettinius & Hollister, of Cincinnati, Ohio, and *Guggenheimer, Untermeyer, Goodrich & Amram*, of Washington, D. C., for respondent.

COMPLAINT

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

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

PARAGRAPH 1. The Gruen Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Time Hill, Cincinnati 6, Ohio.

PAR. 2. Respondent is now and for many years has been engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in its factory located in the State of Ohio and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are retail jewelry stores and a few department stores and industrial houses. During the year 1949 respondent's dollar volume of sales of said watches amounted to approximately \$12,190,000.

PAR. 3. In the course and conduct of said business respondent engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said watches, or caused them to be transported, from said State in which its said plant is located to said purchasers with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent paid or contracted to pay money or other things of value to or for the benefit of some of its customers as compensation and in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the sale, or offering for sale, of respondent's watches which it manufactures or offers for sale; and respondent did not make or contract to make such payments or considerations available on proportionally equal terms to all other of its customers competing in the distribution of respondent's said products.

PAR. 5. Among the payments alleged in Paragraph Four were those for advertising services or facilities, or advertising allowances. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

Advertising allowances were available to customers in each volume bracket which, as between and among customers in the same volume bracket, amounted to the same percentage or an equal proportion of their respective volumes, but which, as between and among customers in different volume brackets, amounted to different percentages or unequal proportions of such volumes, for the reason that the larger the volume bracket the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next largest or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures but not in excess of the percentage or proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. For a number of years past respondent has had in effect, and has now in effect, an advertising allowance plan substantially as set forth in Paragraph Five. As illustrative of respondent's advertising allowance practices, during the year 1949 said volume brackets and said percentages or proportions of volume available as said advertising allowances were as shown in columns one and two, respectively, of the table herein set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets, and the total number of customers in all of said volume brackets. The fourth column in said table sets forth approximately the total volumes of all customers in each of said volume brackets and the total volumes of all customers in all of said volume brackets. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the total dollar amount of said advertising allowances paid to all of the customers in all of said volume brackets.

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| (1) Volume Brackets | (2) Percent- ages | (3) Number of Customers | (4) Volumes | (5) Amount of Allowance |
|-----------------------------|-------------------------|-------------------------------|----------------|-------------------------------|
| Up to \$14,999..... | 2 | 1,021 | \$2,840,113 | \$51,118.16 |
| \$15,000 to \$29,999..... | 3 | 20 | 412,831 | 10,124.62 |
| \$30,000 to \$49,999..... | 4 | 6 | 225,099 | 7,733.53 |
| \$50,000 to \$99,999..... | 5 | 7 | 447,862 | 19,726.17 |
| \$100,000 to \$249,999..... | 6 | 1 | 103,811 | 5,980.00 |
| \$250,000 to \$499,999..... | 7 | 1 | 313,896 | 19,515.20 |
| \$500,000 and over..... | 8 | 0 | 0 | 0 |
| ----- | | 1,056 | 4,346,582 | 114,197.68 |

The above table includes approximately all of respondent's customers during said year and many of said customers, purchasing different volumes and receiving different percentages or proportions of volume as advertising allowances, were in competition with each other in the sale of respondent's watches to consumers.

PAR. 7. The acts and practices of the respondent, as above alleged, violate subsection (d) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. Sec. 13), the Federal Trade Commission on January 4, 1951, issued and subsequently served its complaint in this proceeding upon The Gruen Watch Company, a corporation, charging said respondent with violation of subsection (d) of Section 2 of said Act, as amended. After the filing by respondent of its answer to the complaint, respondent filed motion to withdraw such answer and to file substitute answer annexed thereto admitting, solely for the purposes of this proceeding and the enforcement or review thereof, various allegations of material fact set forth in the complaint including reasonable inferences which may be drawn therefrom, waiving hearing on the complaint and consenting that the Commission may make and enter its findings as to the facts based on the complaint and such substitute answer and thereupon issue its order, which substitute answer was proffered on the condition, however, that no order to cease and desist be issued and served herein until orders are entered by the Commission disposing of the proceedings pending in Docket No. 5830, Bulova Watch Company, and in Docket No. 5337, Elgin National Watch Company. Respondent's motion, as aforesaid, was duly granted by a hearing examiner of the Commission theretofore designated by it to act in this proceeding, this proceeding was

closed for the taking of evidence and on May 25, 1951, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondent appealed from the initial decision of the hearing examiner and this matter came on for final hearing before the Commission upon the complaint, the substitute answer, the initial decision of the hearing examiner and respondent's appeal therefrom, briefs in support of and in opposition to such appeal and oral arguments; and the Commission, having duly considered the record and ruled upon said appeal and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The Gruen Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Time Hill, Cincinnati 6, Ohio.

PAR. 2. Respondent is now and for many years has been engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in its factory located in the State of Ohio and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are retail jewelry stores and a few department stores and industrial houses. During the year 1939 respondent's dollar volume of sales of said watches amounted to approximately \$12,190,000.

PAR. 3. In the course and conduct of its business, as aforesaid, and during all the times mentioned herein, respondent engaged in commerce, as "commerce" is defined in the Clayton Act, having shipped its watches, or caused them to be transported, from the State in which its plant is located to said purchasers with places of business located in Ohio and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent paid or contracted to pay money to its customers as compensation and in consideration for advertising services furnished by such customers in connection with the sale or offering for sale of watches manufactured and sold by respondent in accordance with the advertising allowance plan set out in Paragraphs Five and Six of these findings as to the facts. Such plan did not make or purport to make such pay-

ments available on proportionally equal terms to all of respondent's customers competing in the distribution of its said products.

PAR. 5. Said advertising allowances were available from respondent and respondent paid or contracted to pay them upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

Advertising allowances were available to each customer in every volume bracket. As between and among customers in the same volume bracket, the advertising allowances available to them amounted to the same percentage or an equal proportion of their respective volumes. As between and among customers in different volume brackets, the advertising allowances available to them amounted to different percentages or unequal proportions of their respective volumes for the reason that, the larger the volume bracket, the greater the percentage or proportion of volume available thereunder as an advertising allowance.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next smaller volume bracket or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures, but not in excess of the percentage or proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. For a number of years past respondent has had in effect, until February 20, 1951, an advertising allowance plan substantially as set forth in Paragraph Five. As illustrative of respondent's advertising allowance practices, during the year 1949 said volume brackets and said percentages or proportions of volume available as said advertising allowances were as shown in columns one and two respectively, of the table hereinafter set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets availing themselves of all or part of the advertising allowances offered them under the plan. The fourth column in said table sets forth approximately the total volumes of customers in each of said

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volume brackets availing themselves of all or part of the advertising allowances offered them under the plan. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to the customers in each of said volume brackets availing themselves of all or part of the advertising allowances offered them under the plan.

| (1) Volume Brackets | (2) Percent- ages | (3) Number of Customers | (4) Volumes | (5) Amount of Allowance |
|-----------------------------|-------------------------|-------------------------------|----------------|-------------------------------|
| Up to \$14,999..... | 2 | 1,378 | \$3,211,094 | \$58,419.14 |
| \$15,000 to \$29,999..... | 3 | 27 | 510,647 | 13,734.21 |
| \$30,000 to \$49,999..... | 4 | 7 | 225,039 | 7,733.53 |
| \$50,000 to \$99,999..... | 5 | 8 | 517,059 | 23,186.02 |
| \$100,000 to \$249,999..... | 6 | 1 | 101,049 | 6,052.94 |
| \$250,000 to \$499,999..... | 7 | (*) | | |
| \$500,000 and over..... | 8 | 0 | 0 | 0 |
| | | 1,421 | | |

*There was one customer in this bracket during 1949, but all its sales were made exclusively outside of the United States and its territories, hence figures thereon have been omitted.

The foregoing table includes only those of respondent's customers during said year who availed themselves of respondent's advertising allowance plan, although respondent had over 7,500 accounts during the year 1949. Many of the customers who purchased different volumes and received different percentages or proportions of volume as advertising allowances, were in competition with each other in the sale of respondent's watches to consumers.

CONCLUSION

1. Subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, gives respondent the free choice of making payments for advertising services furnished by the customer in connection with the sale or offering for sale of products manufactured or sold by it, or of not making payments, and the further choice of the basis on which any such payments shall be made. The statute simply requires that such payments shall be available on proportionally equal terms to all customers competing in the distribution of such products.

2. Respondent, as a matter of business policy, determined to make such payments, selected as a basis therefor the annual dollar volume of purchases by each customer and classified its customers accordingly.

3. Upon the basis selected by respondent, all of its customers might receive payments but the payments were not made on a proportionally

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equal basis to all customers competing in the sale of respondent's products as required by law. This is true because many of respondents' customers received from respondent as payment or compensation for advertising services and facilities payments based on percentages or proportions of their annual dollar volume different from the percentages or proportions used by respondent in determining the payments received by other customers who were in competition with them in the sale of respondent's watches to consumers. Thus, while there has been no exclusion of any classification or volume bracket of customers from participation and while there has been equality of participation on the part of competing customers within a particular volume bracket, there has been inequality of possible and actual participation among competing customers in different classifications or brackets.

4. The acts and practices of the respondent, as herein found, have constituted violations of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent The Gruen Watch Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of men's and women's watches in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer, for advertising services or facilities furnished by or through such customer, as a percentage or proportion of the dollar volume of purchases by such customer, different from the percentage or proportion offered or granted any other customer where such customers compete in fact in the resale of said products and where such payments are based on the amount of purchases made.

(2) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products manufactured or sold by respondent, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a

report in writing setting forth in detail the manner and form in which it has complied with this order.

STATEMENT TO ACCOMPANY COMMISSIONER MASON'S
CONCURRENCE IN THE ABOVE MATTER

Under the present administrative policy of the Commission there is nothing to do but enter the order herein.

Respondents asked that they be permitted to make a record of their willingness at all times to comply with the Commission's official interpretation of the law as was disclosed at various conferences with staff members regarding the interpretation of the particular section of the Clayton Act which is basis of the present litigation. At the time of the conferences it appears that the Commission had not advised them their method of granting discounts was contrary to the Commission's policy at that time. If that were true, then the particular issue involved is now clear enough since the Commission has enunciated its interpretation of the law through a formal complaint without an opportunity for the respondents to bring their discount structure in line with this interpretation.

How much easier, quicker and especially how much fairer it would be if we adopted a policy of never suing on an alleged offense which we were first unwilling to define. I do not believe an administrative agency should prosecute a businessman for a method, act or practice in interstate commerce if it is unwilling to first answer an inquiry as to the legality of the same in terms of specific submitted facts. A suit based on the uncertainty or obscurity of a statute with no prior indication from the agency as to its interpretation of the same should seldom be the basis for Government prosecution. We are guilty of equivocation when we are unwilling to first interpret what we are willing to sue on. This equivocation is litigious in character. Government plays hide and seek with its knowledge.

An economic democracy cannot properly function without administrative processes, but if we are to successfully accept the full consequences of administrative functions, we must expect to be explicit. It may be more expedient to do otherwise but it is not justice in the broad moral sense. Waiting to make law by a prosecution means that the time of the enunciation of that law is set by the court clerk's official date mark on the final decree. This, the date mark of the decree, may be from one to ten years after the act complained of has occurred. This is *ex post facto* in effect. What the businessman has done is not proclaimed illegal until after he has done it. This is calling the rules after the play is made.

Answering Statement

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We are caught in the inexorable machinery of a hard and fast policy statement adopted by the Commission on May 11, 1949:

"It is not the policy of the Commission to grant the privilege of settling cases through * * * stipulation agreements (for) * * * violations of the Clayton Act."

The whole purpose of the Federal Trade Commission was to make explicit obscure and difficult phases of the law merchant, but by an order such as this, we shut the door to those who have evidenced a willingness to follow our interpretations, and we serve notice on the business world that any inquiry to the Commission for the purpose of guidance which might disclose a technical violation can accomplish nothing for the respondent except prosecution and a cease and desist order.

I am against this policy, but as long as it is the policy of the Commission, there is nothing to do but concur in this order.

ANSWERING STATEMENT OF COMMISSIONER CARSON TO COMMISSIONER MASON'S "CONCURRING" STATEMENT

Neither an opinion nor an interpretative statement would ordinarily be written in a case such as we have here before us. No new principle is established by the decision in this case. No novel facts are developed. The violation of the law was so obvious that counsel for the respondent offered only token opposition.

The justification for this answering statement is that a "concurring" statement has been filed for the record by one Commissioner. Were it not for that fact, the record would rest, as it should, on the findings of fact and the order of the Commission. But we are compelled, in the public interest, to answer the "concurring" statement. If it remained unanswered, the result might be, and we fear it would be, that the public and the respondent might be misled as to facts and law, and as to the authority and the procedures of this Commission. Thus this Commission and its ability to serve the public interest would be impaired, and the public interest would be injured.

My colleague states in his "concurring" statement that "under the present administrative policy of the Commission there is nothing to do but enter the order herein." The fact is that "under the *law* there is nothing to do but enter the order herein." And we are here to obey and enforce the law. There is obviously no provision of law which authorizes this Commission to adopt a policy which would be wholly outside the boundaries of the basic enabling Acts we are ordered to enforce.

Let us look at the law. It is so clear that he who runs may read.

Paragraph 2 of Section 11 of the Clayton Act, as amended by the Robinson-Patman Act, reads as follows:

“Whenever the Commission, authority, or board, vested with jurisdiction thereof, shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven or eight of this Act, it shall issue and serve upon such persons a complaint * * *.”

The law which we have solemnly pledged we will enforce states that the Commission “shall” do just what the Commission did in this case, and what it must do in all similar cases. The Commission had every “reason to believe” the law was being violated. The Commission issued a complaint which resulted in the presentation of evidence and a trial of the issues.

It is well to look again at Paragraph 2 of Section 11 of the Clayton Act, as amended. After a complaint has been issued, the law directs the Commission to provide for hearing and trial of the issues and then adds that “if the Commission shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations.”

The law again states that the Commission “shall” state its findings of fact and issue and serve an order to cease and desist. The Commission made its findings of fact and issued its order. It fulfilled the obligations it had assumed under a solemn oath of office.

Could it be that the author of the “concurring” statement is actually only intent upon opposing the Clayton Act, as amended by the Robinson-Patman Act? It would seem that that was his purpose, even though the nebula within the words and phrases of the “concurring” statement might justify the casual reader in assuming that he intended to criticism his colleagues. It is probable they would be justified in so believing. It is unfortunate that they might thus misinterpret the intent of the words and phrases. Of course, the answer to our colleague, the author of the “concurring” statement, and to anyone who is attacking the law, is that their cause should be presented to the Congress.

Complaint

48 F. T. C.

IN THE MATTER OF
ELGIN NATIONAL WATCH COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5837. Complaint, Jan. 4, 1951—Decision, Mar. 17, 1952

Under the provisions of subsec. (d) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act the seller has the free choice of making payments for advertising services furnished by customers in connection with the sale or offer of the seller's products, or not making such payments, and the further choice as to the basis on which any of such payments shall be made, subject simply to the statutory requirement that such payment if made shall be available on proportionally equal terms to all customers who compete in the distribution of such products.

Where a corporation which was engaged in the manufacture and interstate sale of men's and women's watches to some 15,000 customers throughout the United States, which included single retail jewelry stores, chain retail jewelry stores, mail order houses and premium houses, in competition with each other in the resale of its said watches to consumers;

Paid or contracted to pay money to some of its customers as compensation for advertising services furnished by them in connection with the sale or offer of its watches without making such payments available on proportionally equal terms to all competing customers in that, no advertising allowance was available to customers classified in the smallest annual purchase volume bracket, and customers in all of the other volume brackets had available to them greater percentage allowances on their respective purchase volumes than were available to customers in the next lower bracket:

Held, That such acts and practices, under the circumstances set forth, violated subsec. (d) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Peter J. Dias* for the Commission.

Gardner, Carton & Douglas, of Chicago, Ill., for respondent.

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 (d) of section 2 of the Clayton Act (U. S. C. Title 15, sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Elgin National Watch Company, is a corporation organized, existing and doing business under and by vir-

tue of the laws of the State of Illinois, with its office and principal place of business located at Elgin, Illinois.

PAR. 2. Respondent is now, and for many years has been engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in plants located in Illinois and Nebraska and sells them to approximately 15,000 customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are single-unit retail jewelry stores, multiple-unit or chain retail jewelry stores, mail order houses and premium houses.

PAR. 3. In the course and conduct of said business, respondent engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said watches, or caused them to be transported, from said States in which its said plants are located to said purchasers with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce respondent paid, or contracted to make payments to or for the benefit of some of its customers as compensation and in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the sale, or offering for sale, of respondent's watches which it manufactures, and offers for sale; and respondent did not make, or contract to make, such payments available on proportionally equal terms to all other of its customers competing in the distribution of respondent's said products.

PAR. 5. Among the payments alleged in Paragraph Four were those for advertising services or facilities, or advertising allowances. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of net purchases of respondent's watches during a specified twelve-month period. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

No advertising allowance was available to those customers in the first or smallest volume bracket.

To those customers in the second volume bracket advertising allowances were available, which amounted to the same percentage or an equal proportion of their respective volumes.

To those customers in all of the other volume brackets, advertising allowances were available which amounted to greater percentages or proportions of their respective volumes than the percentage or proportion which was available, as aforesaid, to customers in the second volume bracket, and which, as between and among said customers in said larger volume brackets purchasing different volumes, amounted to different percentages or unequal proportions of their respective volumes for the reason that the larger the volume the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to the customer or customers with the largest volume in said larger volume brackets was not available to competing customers with smaller volumes in said larger volume brackets or in the second and first volume brackets and the same was true with regard to each successively smaller percentage or proportion available in said larger volume brackets. The percentage or proportion which was available to all customers in the second volume bracket was not available to customers in the first volume bracket.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures but not in excess of the proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. The said volume brackets and percentages or proportions of volume which respondent made available to its customers in July 1946 and which are still in effect, are shown in columns (1) and (2) respectively of the table herein set forth. As illustrative of the operating results of respondent's said advertising allowance program there are set forth below, for the fiscal year ending June 30, 1948, in column (3) the approximate number of customers in the various brackets, and in column (4) the approximate total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the approximate total dollar amount of said advertising allowance paid to all of the customers in all of said volume brackets:

Decision

| (1) Volume Brackets | | (2) Percentages | | | (3) Number of Customers | (4) Allowances |
|------------------------|-----------------|--------------------|--------------------------------|-----------------------------------|-------------------------------|-------------------|
| Over | But Not Over | Lump Sum of | Plus Fol- lowing Percent | Of Pur- chases in excess of | | |
| 0 | \$1,500 | 0 | 0 | 0 | 14,300 | 0 |
| \$1,500 | 2,500 | 0 | 3 | \$1,500 | 71 | \$1,256.08 |
| 2,500 | 3,500 | \$30 | 4 | 2,500 | 107 | 4,902.77 |
| 3,500 | 5,000 | 70 | 5 | 3,500 | 121 | 11,985.31 |
| 5,000 | 6,500 | 145 | 6 | 5,000 | 88 | 15,383.44 |
| 6,500 | 8,000 | 235 | 7 | 6,500 | 57 | 15,355.85 |
| 8,000 | 10,000 | 340 | 8 | 8,000 | 50 | 18,511.12 |
| 10,000 | 15,000 | 500 | 9 | 10,000 | 52 | 29,877.27 |
| 15,000 | 20,000 | 950 | 10 | 15,000 | 41 | 41,279.34 |
| 20,000 | 30,000 | 1,450 | 11 | 20,000 | 33 | 58,571.79 |
| 30,000 | 40,000 | 2,550 | 12 | 30,000 | 19 | 50,683.53 |
| 40,000 | 50,000 | 3,750 | 13 | 40,000 | 9 | 34,134.20 |
| 50,000 | 60,000 | 5,050 | 14 | 50,000 | 7 | 40,446.02 |
| 60,000 | 70,000 | 6,450 | 15 | 60,000 | 3 | 18,826.86 |
| 70,000 | 85,000 | 7,950 | 16 | 70,000 | 3 | 23,638.58 |
| 85,000 | 100,000 | 10,350 | 17 | 85,000 | 1 | 940.70 |
| 100,000 | 125,000 | 12,500 | 18 | 100,000 | 3 | 39,131.08 |
| 125,000 | 150,000 | 17,400 | 19 | 125,000 | 0 | 0 |
| 150,000 | ----- | 22,150 | 20 | 150,000 | 3 | 107,031.61 |
| | | | | | 14,938 | 511,955.55 |

The above table includes approximately all of respondent's customers during said year and many of said customers purchasing different volumes and receiving different or no percentages or proportions of volume as advertising allowances, were in competition with each other in the sale of respondent's watches to consumers.

PAR. 7. The acts and practices of the respondent as above alleged violate subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, sec. 13).

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on January 4, 1951, issued and subsequently served its complaint in this proceeding upon the respondent, Elgin National Watch Company, a corporation, charging said respondent with having violated the provisions of subsection (d) of section 2 of said Clayton Act, as amended. After the issuance of said complaint and the filing of the respondent's answer thereto, the respondent, pursuant to leave granted by the hearing examiner of

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the Commission designated in the complaint, withdrew its original answer and filed an amended answer to the complaint, in which answer the respondent, for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the complaint, waived all hearings as to said facts, and consented to the entry of findings as to the facts and the issuance against it of an order to cease and desist based upon the complaint and said amended answer, upon the condition, however, that no order to cease and desist should be issued or served upon it until the entry of orders disposing of pending complaints against Bulova Watch Company, Inc., Federal Trade Commission Docket No. 5830, and the Gruen Watch Company, Federal Trade Commission Docket No. 5836; and, on May 25, 1951, the hearing examiner filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, the respondent filed with the Commission an appeal from said initial decision; and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including the respondent's brief in support of its appeal and the brief in opposition thereto, filed by counsel in support of the complaint (oral argument not having been requested); and the Commission, having issued its order sustaining in part and denying in part the respondent's appeal, and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom and order, the same to be in lieu of the findings as to the facts, conclusion and order included in the initial decision of the hearing examiner:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Elgin National Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at Elgin, Illinois.

PAR. 2. Respondent is now, and for many years has been, engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures its watches in plants located in Illinois and Nebraska and sells them to approximately 15,000 customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are single-unit retail jewelry stores, multiple-unit or chain retail jewelry stores, mail order houses and premium houses.

PAR. 3. In the course and conduct of its business as aforesaid, and during all of the time mentioned herein, respondent has engaged in

commerce, as "commerce" is defined in the Clayton Act, having shipped its watches, or caused them to be transported, from the States in which its plants are located to the purchasers thereof with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent has paid or contracted to pay money to some of its customers as compensation and in consideration for advertising services furnished by such customers in connection with the sale or offering for sale of watches manufactured and sold by respondent in accordance with the advertising allowance plan set out in Paragraphs Five and Six of these Findings as to the Facts. Such plan did not make or support to make such payments available on proportionally equal terms to all of respondent's customers competing in the distribution of its said products.

PAR. 5. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of net purchases of respondent's watches during a specified twelve-month period. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

No advertising allowance was available to those customers in the first or smallest volume bracket.

To those customers in the second volume bracket, advertising allowances were available, which amounted to the same percentage or an equal proportion of their respective volumes.

To those customers in all of the other volume brackets, advertising allowances were available which amounted to greater percentages or proportions of their respective volumes than the percentage or proportion which was available, as aforesaid, to customers in the second volume bracket, and which, as between and among said customers in said large volume brackets purchasing different volumes, amounted to different percentages or unequal proportions of their respective volumes for the reason that the larger the volume the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to the customer or customers with the largest volume in said larger volume brackets was not available to competing customers with smaller volumes in said larger volume brackets or in the second and first volume brackets and the same was true with regard to each successively smaller percentage or proportion available in said larger

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volume brackets. The percentage or proportion which was available to all customers in the second volume bracket was not available to customers in the first volume bracket.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures but not in excess of the proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. The said volume brackets and percentages or proportions of volume which respondent made available to its customers in July, 1946 are shown in columns (1) and (2) respectively of the table herein set forth. As illustrative of the operating results of respondent's said advertising allowance program there are set forth below, for the fiscal year ending June 30, 1948, in column (3) the approximate number of customers in the various brackets, and in column (4) the approximate total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the approximate total dollar amount of said advertising allowances paid to all of the customers in all of said volume brackets:

| (1) Volume Brackets | | (2) Percentages | | | (3) Number of Customers | (4) Allowances |
|------------------------|-----------------|--------------------|--------------------------------|-----------------------------------|-------------------------------|-------------------|
| Over | But Not Over | Lump Sum of | Plus Fol- lowing Percent | Of Pur- chases in excess of | | |
| 0 | \$1,500 | 0 | 0 | 0 | 14,300 | 0 |
| \$1,500 | 2,500 | 0 | 3 | \$1,500 | 71 | \$1,256.08 |
| 2,500 | 3,500 | \$30 | 4 | 2,500 | 107 | 4,902.77 |
| 3,500 | 5,000 | 70 | 5 | 3,500 | 121 | 11,985.31 |
| 5,000 | 6,500 | 145 | 6 | 5,000 | 88 | 15,383.44 |
| 6,500 | 8,000 | 235 | 7 | 6,500 | 57 | 15,355.85 |
| 8,000 | 10,000 | 340 | 8 | 8,000 | 50 | 18,511.12 |
| 10,000 | 15,000 | 500 | 9 | 10,000 | 52 | 29,877.27 |
| 15,000 | 20,000 | 950 | 10 | 15,000 | 41 | 41,279.34 |
| 20,000 | 30,000 | 1,450 | 11 | 20,000 | 33 | 58,571.79 |
| 30,000 | 40,000 | 2,550 | 12 | 30,000 | 19 | 50,683.13 |
| 40,000 | 50,000 | 3,750 | 13 | 40,000 | 9 | 34,134.20 |
| 50,000 | 60,000 | 5,050 | 14 | 50,000 | 7 | 40,446.02 |
| 60,000 | 70,000 | 6,450 | 15 | 60,000 | 3 | 18,826.86 |
| 70,000 | 85,000 | 7,950 | 16 | 70,000 | 3 | 23,638.58 |
| 85,000 | 100,000 | 10,350 | 17 | 85,000 | 1 | 940.70 |
| 100,000 | 125,000 | 12,900 | 18 | 100,000 | 3 | 39,131.08 |
| 125,000 | 150,000 | 17,400 | 19 | 125,000 | 0 | 0 |
| 150,000 | ----- | 22,150 | 20 | 150,000 | 3 | 107,031.61 |
| ----- | ----- | ----- | ----- | ----- | 14,668 | 511,955.55 |

The above table includes approximately all of respondent's customers during said year and many of said customers purchasing different volumes and receiving different or no percentages or propor-

tions of volume as advertising allowances were in competition with each other in the sale of respondent's watches to consumers.

CONCLUSIONS

1. Subsection (d) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, gives the respondent the free choice of making payments for advertising services furnished by customers in connection with the sale or offering for sale of products manufactured or sold by the respondent or of not making such payments, and the further choice of the basis on which any such payments shall be made. The statute simply requires that such payments, if made, shall be available on proportionally equal terms to all customers competing in the distribution of such products.

2. Respondent, as a matter of business policy, determined to make such payments and selected as a basis therefore the annual dollar volume of purchases by each customer and classified its customers accordingly.

3. In making payments on this basis respondent has, however, ignored the injunction of the statute on the facts admitted and found in this proceeding in two particulars: First, payments were not made available by respondent to all of its customers competing in the sale of its products—those purchasing less than \$1,500 annually who were in competition with those purchasing more than \$1,500 annually; and Secondly, respondent paid the same percentage or proportion of each customer's annual dollar purchase volume in excess of \$1,500 to each such customer within a given annual purchase bracket, but these percentages or proportions varied with the bracket so that competing customers of respondent who received payments did not all receive the same percentage or proportion of their purchase volumes. Thus, 71 customers, each purchasing between \$1,500 and \$2,500 per year, some of whom were in competition with other customers purchasing respondent's products in other amounts, received 3 percent of their purchases; whereas 121 purchasers, purchasing between \$3,500 and \$5,000 a year, some of whom were in competition with other customers purchasing respondent's products in other amounts, received 5 percent, and 3 customers purchasing in excess of \$150,000 a year, some of whom were in competition with other customers purchasing respondent's products in other amounts, received 20 percent of their purchases. Expressed dollar-wise, 121 purchasers in the 5 percent bracket, some of whom were in competition with other purchasers in other brackets in the sale of respondent's products, received a total of \$11,985.31 as payments from respondent; whereas only 3 customers, in the 20 percent bracket, some of whom were in competition with

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other purchasers in other brackets in the sale of respondent's products, received a total of \$107,031.61. There was thus a lack of equal proportionality between customers competing in the sale of respondent's products who received payments, and a complete absence of proportionality between those customers who received something and those competing customers who received nothing.

4. The acts and practices of the respondent in the particulars mentioned above violate subsection (d) of section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent, Elgin National Watch Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of men's and women's watches in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer, for advertising services or facilities furnished by or through such customer, unless such payment or consideration is available on proportionally equal terms to all other customers of respondent who in fact compete with the favored customer in the resale of respondent's said products.

(2) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer, for advertising services or facilities furnished by or through such customer, as a percentage or proportion of the dollar volume of purchases by such customer different from the percentage or proportion offered or granted any other customer where such customers compete in fact in the resale of said products and where such payments are based on the amount of purchases made.

(3) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale, of any products manufactured or sold by respondent, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.

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

Complaint

IN THE MATTER OF

RONELL FASHIONS, INC. ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF AN ACT OF CONGRESS APPROVED OCT. 14, 1940

Docket 5916. Complaint, Aug. 16, 1951—Decision, Mar. 17, 1952

Where a corporation and its president and secretary-treasurer, engaged in the manufacture, sale, and distribution in commerce of "wool products" as defined in the Wool Products Labeling Act, including some 500 women's top-per coats, which they made from bolt-ends, samples and other odd pieces of cloth, the actual fiber content of which they did not know—

- (a) Misbranded a substantial number of said garments as to the character and amount of the constituent fibers, including, as illustrative, three of said coats which, all labeled "100% wool", contained 37.1%, 29%, and 35.3% wool respectively, with the balance of viscose rayon; and
- (b) Misbranded certain of said products in that they did not have affixed thereto tags or labels required under the Act:

Held, That such acts and practices, under the circumstances set forth, were in violation of Secs. 3 and 4 of the Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Russell T. Porter for the Commission.

Conrad & Smith, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission 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 Ronell Fashions, Inc., a corporation, and Abraham Wolf and Hyman Ellis, individually and as officers of said corporation, have violated the provisions of said Acts and the Rules and Regulations promulgated under 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, Ronell Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its principal office and place of business is located at 241-37th Street, New York, New York.

Respondents Abraham Wolf and Hyman Ellis are President and Secretary-Treasurer, respectively, of respondent Ronell Fashions, Inc.,

and as such, formulate and execute its policies and practices. Their business address is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Act and more especially since January 1950, respondents manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale, in commerce as "commerce" is defined in the Wool Products Labeling Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of section 4 (a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the Rules and Regulations relating thereto.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of the said Act and Rules and Regulations in that they were falsely and deceptively labeled with respect to the character and amount of the constituent fibers appearing therein. Among the misbranded products aforementioned were womens coats. Such coats were labeled by the respondent as "100% wool." In truth and in fact, the coats were not 100% wool as labeled but contained substantial quantities of fibers other than wool.

PAR. 5. The Acts and practices of respondents, as herein alleged, were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 17, 1952, the initial decision in the instant matter of hearing examiner, J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission 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 on August 16, 1951, issued and subsequently served its complaint in this proceeding upon the respondents Ronell Fashions, Inc., a corporation, and Abraham Wolf and Hyman Ellis, individually and as officers of said cor-

poration, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Acts. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Ronell 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 principal office and place of business located at 241 West 37th Street, New York, New York.

Respondents Abraham Wolf and Hyman Ellis are President and Secretary-Treasurer, respectively, of respondent Ronell Fashions, Inc., and as such, formulate and execute its policies and practices. Their business address is the same as that of the corporate respondent.

PAR. 2. Since January, 1950, respondents manufactured for introduction into commerce, introduced into commerce, offered for sale, sold, transported, and distributed in commerce, as "commerce" is defined in said Federal Trade Commission Act and Wool Products Labeling Act, wool products, as "wool products" are defined in said Wool Products Labeling Act.

PAR. 3. Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of Section 4 (a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the Rules and Regulations relating thereto.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of the said Act and Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled with respect to the character and amount of the constituent fibers appearing therein. Among the misbranded products aforementioned were three women's topper coats which were labeled by the respondents as "100% wool." In truth and in fact, the coats were not 100%

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wool as labeled, but contained substantial quantities of fibers other than wool. One topper coat contained 62.9% of viscose rayon and 37.1% wool, another 71% viscose rayon and 29% wool, and the third 64.7% viscose rayon and 35.3% wool. Approximately 500 topper coats similar to these three were made by respondent corporation from bolt-ends, samples and other odd pieces of cloth which carried no markings as to wool and other fiber content. The respondents did not know the actual fiber content of the garments so made, and a substantial number of them were mislabeled. The use of such materials was discontinued by said respondent about January, 1951. Total annual production of respondent corporation was approximately 100,000 garments.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were in violation of Sections 3 and 4 of the Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Ronell Fashions, Inc., a corporation, and its officers, and Abraham Wolf and Hyman Ellis, individually, and as officers of said corporation, their respective 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 or distribution in commerce, as "commerce" is defined in the aforesaid Acts, of women's topper coats or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding said women's coats or other wool products:

1. By falsely and deceptively representing on any stamp, tag, label or other means of identification appearing on a wool product the character or amount of the constituent fibers appearing therein;

2. By failing to securely affix to or place on such products a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

- (A) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five per centum of said total

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fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five per centum or more and (5) the aggregate of all other fibers;

(B) The maximum percentage of the total weight of such wool product of any non-fibrous loading, filling or adulterating matter;

(C) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce or in the offering for sale, sale, transportation, distribution or delivering for shipment thereof in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Wool Products Labeling Act of 1939.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or of the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of March 17, 1952].

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IN THE MATTER OF

HERBST SHOE MANUFACTURING COMPANY

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5848. Complaint, Jan. 25, 1951—Decision, Mar. 18, 1952

An orthopedic shoe is one made as prescribed by an orthopedic doctor to correct a special disorder or abnormality in a particular case, and, due to the causes and nature of abnormalities of the feet, to prescribe an orthopedic shoe for an individual in many cases necessitates a thorough physical examination of the individual by an orthopedic doctor to determine the cause of the trouble, often necessitating X-rays of particular areas of the body, or keeping the individual under observation and treatment for a time.

Where a corporation engaged in the manufacture and interstate sale and distribution of shoes; through statements and representations on its shoe boxes and in advertisements in magazines of general circulation and in folders and circulars—

- (a) Represented falsely that its "Child Life" shoes were orthopedically designed, tested and approved and were truly "orthopedic shoes", and that its "College Chum Orthopedic" and "Official P. H. D. Physical Health Director" shoes correctly supported the longitudinal arch of the foot and the ankle and thereby prevented pronation and eversion and caused the foot to function normally, and were specially designed for their physical health properties; when in fact its said products were stock shoes;
- (b) Falsely represented that its "Child Life" shoes would make young feet grow strong and healthy and keep them so, would insure freedom from future foot ailments, maintain normal foot health, prevent development of abnormalities, deformities and disorders in growing feet and correct any such conditions which might manifest themselves; would promote and maintain a proper and balanced posture, prevent and correct poor posture, promote and insure proper foot growth, hold the bones of the feet in proper alignment, promote sound physical development, correct muscle strain and inrolling ankles, make crooked ankles straight and restore the arch to normal;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true, and with capacity and tendency so to do, and thereby induce purchase of substantial quantities of its said products:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. B. G. Wilson and *Mr. J. M. Doukas* for the Commission.

Nohl, Petrie & Stocking, of Milwaukee, Wis., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal

Trade Commission, having reason to believe that the Herbst Shoe Manufacturing Company, a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereof as follows:

PARAGRAPH 1. Respondent, Herbst Shoe Manufacturing Company, is a corporation organized under the laws of the State of Wisconsin with its principal place of business at 2367 North 29th Street, Milwaukee, Wisconsin.

PAR. 2. The respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution, in commerce, of shoes designated as "Child Life," "College Chums" and "Official P. H. D. Physical Health Director."

PAR. 3. Respondent causes, and has caused, said shoes, when sold, to be transported from its place of business in the State of Wisconsin to purchasers thereof located in the various other States of the United States. At all times mentioned herein respondent has maintained and now maintains a substantial volume of trade in said products among and between the various States of the United States.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of its said shoes, the respondent has made certain statements and representations concerning the nature and usefulness of said shoes by means of labels on its shoe boxes, advertisements inserted in magazines of general circulation and in folders and circulars. Among and typical of such statements and representations are the following:

Child Life Shoes—ORTHOPEDIC
TEN PERFECT TOES—TWO HEALTHY FEET
Child Life ORTHOPEDIC FINEST QUALITY

CHILD LIFE SHOES, orthopedically designed and constructed, provide ample toe room, snug firm fitting heels, proper support under the arches, and flexible freedom needed for healthy foot growth.

CHILD LIFE SHOES are *truly* orthopedic shoes, orthopedically designed and made over *truly* orthopedic lasts, combining outstanding features, a good name, tailored styling, fine shoe making and honest values.

Child Life SHOES. A DAILY TREAT FOR GROWING FEET. Designed to PROMOTE HEALTHY FOOT GROWTH. Scientific arch construction and pre-shaped insoles to KEEP FEET IN BALANCED POSTURE.

Children enjoy foot freedom and better foot control when wearing CHILD LIFE SHOES . . . perfected with approved orthopedic features that keep young feet strong and healthy.

Child Life SHOES A DAILY TREAT FOR GROWING FEET. CHILD LIFE SPECIAL FEATURES. Orthopedically designed, scientifically tested and approved, CHILD LIFE SHOES maintain normal foot health and promote proper

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foot growth. **BETTER FEET AND PROPER POSTURE. CHILD LIFE SHOES** are scientifically built to provide better fit and balanced posture.

Child Life SHOES. Tan and brown orthopedic saddle. Thoroughly tested orthopedic lasts. Orthopedically designed coordinated patterns. * * * Wedged Thomas orthopedic heels.

Child Life SHOES. BUILT IN arch construction giving balanced foot support. **ORTHOPEDIC** design throughout—to protect your child's foot health.

Child Life ORTHOPEDIC SHOES. These twenty styles . . . all orthopedically designed and orthopedically constructed. * * * Exclusive Orthopedic Lasts.

Keep your youngster's feet strong and healthy in **CHILD LIFE SHOES. * * *** Keep young feet strong and healthy. * * * **WHEN ANKLES ROLL IN . . .** Foot care Should Begin (Pictures of two sets of feet showing ankles rolling in and ankles straight). * * * **ORTHOPEDICALLY DESIGNED AND CONSTRUCTED** to Make Young Feet Grow Strong and Healthy. * * * Everything your child needs for future foot health. * * * Amazingly comfortable with special features to promote balanced posture. * * * Assuring proper posture and healthy foot growth.

Amazingly helpful to young growing feet.

In-rolling ankles mean muscle strain, resulting poor posture. This can be corrected with correct shoes.

Stop Future Foot Ills by Foot Care Now. Most adults suffer from some sort of foot trouble. The greatest percentage of this is caused by improper footwear during formative years. * * *

* * * **CHILD LIFE** shoes help nature give your child healthy feet by assuring scientific assistance * * *

The Orthopedic Lasts over which **CHILD LIFE SHOES** are made provide room for every toe to lie naturally; to hold the 52 bones of the feet in proper alignment, promote healthful foot growth, correct posture and sound physical development.

SEE HOW CHILD LIFE Shoes straighten the ankles and restore the arch to normal.

COLLEGE CHUMS ORTHOPEDIC.

OFFICIAL P. H. D. PHYSICAL HEALTH DIRECTOR "SHOES"

At this point the longitudinal arch is supported correctly to prevent pronation and eversion. Control the arch * properly and the foot functions normally.

(*Referring to the longitudinal arch.)

PAR. 5. Through the use of the word "orthopedic" to describe its "Child Life" and "College Chum" shoes, and the word "orthopedically" to describe certain characteristics thereof, respondent represented, directly and by implication, that said shoes are especially designed and constructed to, and will, prevent and correct deformities, diseases and disorders of the feet; and through the use of the name "Official P. H. D. Physical Health Director" has represented, directly and by implication, that the shoes so designated are affirmatively conducive to the health of the feet.

PAR. 6. The said representations are false and misleading. In truth and in fact "Child Life" and "College Chum" shoes are stock shoes and are not so constructed as to, and will not, prevent or correct

deformities, diseases or disorders of the feet. "Physical Health Director" shoes cannot be relied upon to beneficially affect the health of the feet.

PAR. 7. Through the use of the statements and claims hereinabove set forth, and others similar thereto not specifically set out herein, respondent has represented, directly and by implication, with respect to its "Child Life" shoes:

That said shoes will make young feet grow strong and healthy, will keep growing feet strong and healthy and will insure freedom from future foot ills, will maintain normal foot health, prevent the development of abnormalities, deformities, diseases and disorders in growing feet and correct any abnormality, deformity, disease or disorder which may manifest itself in growing feet; will promote and maintain a proper and balanced posture and prevent and correct poor posture, and will promote and insure proper foot growth, that said shoes will hold the bones of the feet in proper alignment, promote sound physical development, correct muscle strain, in-rolling ankles and make crooked ankles straight, control the longitudinal arch of the feet and restore it to normal, will prevent and correct pronation and eversion of the feet and ankles, and assure normal foot function; that support under the arches of the feet of children is necessary and that said shoes will furnish it properly.

PAR. 8. The aforesaid statements and representations are false and misleading. In truth and in fact, the use of respondent's shoes will not make young feet grow strong and healthy, will not keep growing feet strong and healthy or insure freedom from future foot ills, will not maintain normal foot health or prevent the development of abnormalities, deformities, diseases and disorders in growing feet or correct any abnormality, deformity, disease or disorder which may manifest itself in growing feet. They will not promote or maintain a proper and balanced posture or prevent or correct poor posture, and will not promote or insure proper foot growth. Said shoes will not hold the bones of the feet in proper alignment or promote sound physical development. They will not correct muscular strain, in-rolling ankles or make crooked ankles straight. Said shoes will not control the longitudinal arch of the feet or restore it to normal or prevent or correct pronation or eversion of the feet and ankles or assure normal foot function. Support under the arches of the feet of children is usually not necessary, and in those instances in which support becomes necessary, respondent's shoes cannot be relied upon to furnish the support needed to meet the particular requirements of the individual case.

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PAR. 9. The use by the respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes, has had and now has the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's product.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 18, 1952, the initial decision in the instant matter of hearing examiner Webster Ballinger, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WEBSTER BALLINGER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1951, issued and subsequently served its complaint in this proceeding upon respondent, Herbst Shoe Manufacturing Company, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. The corporate respondent answered and after reasonable notice, hearings were held, at which no representative of the respondent appeared, the testimony and other evidence submitted and received consisting of that offered in support of the allegations of the complaint before the above-named hearing examiner theretofore duly designated by the Commission, which said evidence was duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, requested findings, conclusion and form of order submitted by counsel for the complaint, oral argument being waived; and said hearing examiner, having duly considered the record herein, finds this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Herbst Shoe Manufacturing Company, is a corporation organized under the laws of the State of Wisconsin, with its principal place of business located at 2367 North 29th Street, Milwaukee, Wisconsin.

PAR. 2. The respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution, in commerce, of shoes designated as "Child Life," "College Chums," and "Official P. H. D. Physical Health Director."

PAR. 3. The respondent causes, and has caused, said shoes, when sold, to be transported from its place of business in the State of Wisconsin, to purchasers thereof located in various other States of the United States. At all times mentioned herein respondent has maintained and now maintains a substantial volume of trade in said products among and between the various States of the United States.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of its said shoes, the respondent has made certain statements and representations concerning the nature, usefulness and health-contributing properties of said shoes by means of labels on its shoe boxes, advertisements inserted in magazines of general circulation and in folders and circulars. Among and typical of such statements and representations are:

Child Life Shoes—ORTHOPEdic.

TEN PERFECT TOES—TWO HEALTHY FEET.

Child Life ORTHOPEdic FINEST QUALITY.

CHILD LIFE SHOES, orthopedically designed and constructed, provide ample toe room, snug firm fitting heels, proper support under the arches, and flexible freedom needed for healthy foot growth.

CHILD LIFE SHOES are *truly* orthopedic shoes, orthopedically designed and made over *truly* orthopedic lasts, combining outstanding features, a good name, tailored styling, fine shoe making and honest values.

Child Life SHOES—A DAILY TREAT FOR GROWING FEET. Designed to PROMOTE HEALTHY FOOT GROWTH. Scientific arch construction and pre-shaped insoles to KEEP FEET IN BALANCED POSTURE.

Children enjoy foot freedom and better foot control when wearing CHILD LIFE SHOES . . . perfected with approved orthopedic features that keep young feet strong and healthy.

Child Life SHOES—A DAILY TREAT FOR GROWING FEET. CHILD LIFE SPECIAL FEATURES. Orthopedically designed, scientifically tested and approved, CHILD LIFE SHOES maintain normal foot health and promote proper foot growth. BETTER FEET AND POSTURE. CHILD LIFE SHOES are scientifically built to provide better fit and balanced posture.

Child Life SHOES. Tan and brown orthopedic saddle. Thoroughly tested orthopedic lasts. Orthopedically designed coordinated patterns. * * * Wedged Thomas orthopedic heels.

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Child Life SHOES. BUILT IN arch construction giving balanced foot support. ORTHOPEDIC design throughout—to protect your child's foot health.

Child Life ORTHOPEDIC SHOES. These twenty styles * * * all orthopedically designed and orthopedically constructed. * * * Exclusive Orthopedic Lasts.

Keep your youngster's feet strong and healthy in CHILD LIFE SHOES. * * * Keep young feet strong and healthy. * * * WHEN ANKLES ROLL IN . . . Foot care Should Begin (Pictures of two sets of feet showing ankles rolling in and ankles straight). * * * ORTHOPEDICALLY DESIGNED AND CONSTRUCTED to Make Young Feet Grow Strong and Healthy. * * * Everything your child needs for future foot health. * * * Amazingly comfortable with special features to promote balanced posture. * * * Assuring proper posture and healthy foot growth.

Amazingly helpful to young growing feet.

In-rolling ankles mean muscle strain, resulting poor posture. This can be corrected with correct shoes.

Stop Future Foot Ills by Foot Care Now, Most adults suffer from some sort of foot troubles. The greatest percentage of this is caused by improper footwear during formative years. * * *

* * * CHILD LIFE shoes help nature give your child healthy feet by assuring scientific assistance. * * *

The Orthopedic Lasts over which CHILD LIFE SHOES are made provide room for every toe to lie naturally; to hold the 52 bones of the feet in proper alignment, promote healthful foot growth, correct posture and sound physical development.

SEE HOW CHILD LIFE Shoes straighten the ankles and restore the arch to normal.

COLLEGE CHUMS ORTHOPEDIC.

OFFICIAL P. H. D. PHYSICAL HEALTH DIRECTOR "SHOES."

At this point the longitudinal arch is supported correctly to prevent pronation and eversion. Control the arch* properly and the foot functions normally.

(*Referring to the longitudinal arch.)

PAR. 5. By said advertising matter respondent, directly and by implication, represented to the public:

(a) That its shoes described as "Child Life" shoes are orthopedically designed, tested and approved and are "truly orthopedic shoes."

(b) That its shoes described as "College Chum Orthopedic" and "Official P. H. D. Physical Health Director" shoes correctly support the longitudinal arch of the foot and the ankle, thereby preventing pronation and eversion, cause the foot to function normally and are specially designed for their physical health properties.

(c) That its "Child Life" shoes will make young feet grow strong and healthy, will keep growing feet strong and healthy and will insure freedom from future foot ills, will maintain normal foot health, prevent the development of abnormalities, deformities and disorders in growing feet and correct any abnormality, deformity or disorder which may manifest itself in growing feet; will promote and maintain a proper and balanced posture, prevent and correct poor posture,

and will promote and insure proper foot growth; that said shoes will hold the bones of the feet in proper alignment, promote sound physical development, correct muscle strain and in-rolling ankles, make crooked ankles straight and restore the arch to normal.

PAR. 6. Respondent's said representations are false and misleading in that:

(a) Its "Child Life" and "College Chum" shoes are stock shoes and are not orthopedically designed, tested and approved. An orthopedic shoe is one made as prescribed by an orthopedic doctor to correct a special disorder or abnormality in a particular case. No two feet may have like abnormalities. An individual may have one abnormality in or on one foot and an entirely different abnormality in or on the other foot. Abnormalities of the feet often result from systemic causes requiring medical treatment, or abnormalities in the lower extremities, such as bowlegs, knock-knees, sway-back and other conditions sometimes requiring surgery. To prescribe an orthopedic shoe for an individual in many cases necessitates a thorough physical examination of the individual by an orthopedic doctor to determine the cause of the trouble which often necessitates X-rays of particular areas of the body, or keeping the individual under observation and treatment for a time.

(b) Its "College Chum Orthopedic" shoes will not control the longitudinal arch of the foot and restore it to normal, nor will they prevent pronation of the feet and ankles or prevent eversion of the feet and ankles, nor will the wearing of said shoes insure normal foot function.

(c) Its "Child Life" shoes will not make young feet grow strong and healthy, will not keep growing feet strong and healthy and will not insure freedom from future foot ills, will not maintain normal foot health, prevent the development of abnormalities, deformities and disorders in growing feet and will not arrest or correct any abnormality, deformity or disorder which may manifest itself in growing feet; will not promote and maintain a proper and balanced posture, prevent and correct poor posture, and will not promote and insure proper foot growth; that said shoes will not hold the bones of the feet in proper alignment, promote sound physical development, correct muscle strain and in-rolling ankles, make crooked ankles straight and restore the arch to normal.

PAR. 7. The use by the respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes has had and now has the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and repre-

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sentations are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's products.

CONCLUSION

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

ORDER

It is ordered, That the respondent, Herbst Shoe Manufacturing Company, a corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's shoes designated "Child Life," "College Chums" and "Official P. H. D. Physical Health Director," or any other shoe of similar construction or performing similar functions irrespective of the designation applied thereto, do forthwith cease and desist from:

(1) Using the word "Orthopedic" with respect to "Child Life" and "College Chum" shoes, alone or in combination with any other word or words, to describe or designate said shoes, or using any other word or words in any manner to represent, directly or by implication, that respondent's shoes will prevent or correct deformities or disorders of the feet.

(2) Using the words "Official P. H. D. Physical Health Director" with respect to shoes designated "Official P. H. D.," alone or in combination with any other word or words, to describe or designate said shoes, or using any other words in any manner to represent, directly or by implication, that respondent's shoes so designated are affirmatively conducive to the health of the feet.

(3) Representing, directly or by implication, that the use of respondent's shoes with respect to "Child Life" will make young feet grow strong and healthy or will keep growing feet strong and healthy or insure freedom from future foot ills or will maintain normal foot health or prevent the development of abnormalities, deformities and disorders in growing feet or correct any abnormality, deformity or disorder which may manifest itself in growing feet.

(4) Representing, directly or by implication, that the use of "Child Life" shoes will promote or maintain a proper and balanced posture or prevent or correct poor posture or promote or insure proper foot growth.

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(5) Representing, directly or by implication, that the use of "Child Life" shoes will hold the bones of the feet in proper alignment or promote sound physical development.

(6) Representing, directly or by implication, that the use of "Child Life" shoes will correct muscle strain or in-rolling ankles, make crooked ankles straight or restore the arch to normal.

(7) Representing, directly or by implication, that the use of shoes designated "Child Life," "College Chums" or "Official P. H. D. Physical Health Director" will control the longitudinal arch of the foot or restore it to normal or prevent or correct pronation or eversion of the feet and ankles or insure normal foot function.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of March 18, 1952].

IN THE MATTER OF
BASIC VEGETABLE PRODUCTS, INC. ET AL.

COMPLAINT, CONSENT SETTLEMENT, FINDINGS, AND ORDERS IN REGARD TO
THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED
SEPT. 26, 1914

Docket 5939. Complaint, Dec. 13, 1951—Decision, Mar. 18, 1952

Where two dehydrators and processors of onions and garlic with dominant positions in said industry in the United States and two other important corporate factors in dehydrating and processing onions, all of which were engaged in the packing, distribution, offer and sale of onion powder, garlic powder, onion flakes and garlic flakes, and also in processing various other forms for use by food packers, processors and others as seasoning agents; which by virtue of their aggregate production and sales volumes had the power to and, as below set forth, did exercise actual control of the market prices thereof; were in competition with one another except for the restraints herein concerned; and, confronted by the fact that production of dehydrated onion flakes had exceeded national consumption thereof, disseminated advice among themselves not to cut prices below the going market prices for said products;

Acted unlawfully to suppress competition by entering into and carrying out an understanding and planned common course of action between and among themselves and with others with respect to their pricing practices, and pursuant thereto—

- (1) Exchanged information concerning prices, terms and conditions of sale, trade discounts and volume discounts, and made known among themselves their bid quotations in connection with particular transactions;
- (2) Attempted to and to a large extent did fix, stabilize and maintain uniform prices, uniform terms and conditions of sale, and uniform trade and volume discounts;
- (3) Held formal and informal conferences and meetings at which were discussed prices, terms and conditions of sale, trade discounts and volume discounts to be adopted by them; and
- (4) Entered into agreements and other arrangements for competing sellers to fix, stabilize, maintain, and make uniform resale prices, terms and conditions of sale of said products, adopted and maintained methods and policies of merchandising to effectuate such resale price maintenance agreements;

Held, That said combination and agreements, acts and practices, in one or more of which each respondent participated, were all and singularly unfair and to the prejudice of the public and against public policy because of their dangerous tendency unduly to hinder competition and create monopoly, and because they oppressively restricted the activities of competing sellers, including distributors and jobbers, and otherwise restrain competition in the sale in commerce of the products concerned; and constituted unfair methods of competition and unfair or deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.
Mr. Leslie S. Miller for the Commission.

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Complaint

Mr. Robert E. Freer, of Washington, D. C., and *Mr. Arthur B. Dunne*, of San Francisco, Calif., for Basic Vegetable Products, Inc.

Gibson, Dunn & Crutcher, of Los Angeles, Calif., for Gentry, Inc.

Mr. Donald B. Fowler, of Turlock, Calif., for Puccinelli Packing Co.

Mr. L. E. Haight, of Boise, Idaho, for J. R. Simplot Co.

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 parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated section 5 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 as follows:

PARAGRAPH 1. Respondent Basic Vegetable Products, Inc., is a California corporation, incorporated June 11, 1945, and has its office and principal place of business at 315 Montgomery Street, San Francisco, California.

Respondent Gentry, Incorporated, is a California corporation, incorporated January 19, 1946, and has its office and principal place of business at 837 North Spring Street, Los Angeles, California.

Respondent Puccinelli Packing Company is a California corporation, incorporated May 1, 1946, and has its office and principal place of business in Turlock, California.

Respondent J. R. Simplot Company is an Idaho corporation, incorporated February 28, 1946, and has its office and principal place of business in the Idaho National Bank Building, North 10th Street and West Idaho Street, Boise, Idaho.

PAR. 2. Respondents are engaged in the dehydration and processing of either onions or garlic or both, which are packed, distributed, offered for sale, sold and shipped as onion powder, garlic powder, onion flakes, garlic flakes, and also onions and garlic in various and divers other forms for use by food packers, processors, and others as seasoning or flavoring agents.

PAR. 3. Respondents, in the regular course and conduct of their business, sell and ship, or cause to be sold and shipped, either directly or through distributors or jobbers, the said products which they dehydrate and process, from their respective places of business to purchasers located in the various States of the United States other than the State of origin, and also into the District of Columbia, and during the time herein referred to, have carried on and engaged in, and do

now carry on and engage in, commerce, as the term "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents Basic Vegetable Products, Inc., and Gentry, Incorporated, are two of the principal dehydrators and processors of onions and garlic in the United States, and said respondents occupy positions of dominance in the onion and garlic dehydrating and processing industry.

Respondents Puccinelli Packing Company and J. R. Simplot Company are important factors in the dehydrating and processing of onions.

When the production of dehydrated or processed onions, and the sales volume thereof, of all four respondents are taken into account and considered together, the aggregate is such that all four respondents have the power to control, and as a result of the acts, practices, methods and policies hereinafter set forth, have exercised actual control of the market prices of the onion products referred to in Paragraph 2 herein.

When the production of dehydrated or processed garlic, and the sales volume thereof, of respondents Basic Vegetable Products, Inc., and Gentry, Incorporated, are taken into account and considered together, the aggregate is such that these two respondents have the power to control, and as a result of the acts, practices, methods and policies hereinafter set forth, have exercised actual control of the market prices of the garlic products referred to in Paragraph 2 herein.

The production of dehydrated onion flakes exceeds, or in the past has exceeded, by four to five times the national consumption thereof, and this situation has created a pricing problem which has resulted in advice being disseminated among the said four respondents not to cut prices below the going market prices for said product.

PAR. 5. In the course and conduct of their selling, offering for sale, and shipping in commerce said dehydrated and processed products referred to in Paragraph 2 herein, respondents, except for the agreement and understanding hereinafter alleged and the restraints resulting therefrom, would have been in the past and would be now in competition with each other.

PAR. 6. For more than five years last past respondents have been and are engaged in unfair methods of competition and unfair acts and practices in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they have acted, and are still acting unlawfully to thwart, frustrate, hinder, suppress, and prevent competition by cooperating, combining, conspiring, agreeing, and entering into and carrying out an understanding and planned common course of action between and among themselves and others with respect to prices,

discounts, terms and conditions of sale, and other pricing practices, in connection with the offering for sale, sale and distribution in commerce of the products referred to in Paragraph 2 herein.

PAR. 7. Pursuant to, in furtherance of, and in order to make effective the purposes and objectives of the aforesaid cooperation, combination, conspiracy, agreement, understanding and planned common course of action, respondents have formulated, adopted, performed and put into effect, among other things, the following acts, practices, methods and policies by virtue of the fact that some of the respondents have acted with respect to each of the particulars hereinafter set forth and by virtue of the further fact that each respondent participated in one or more of such overt acts and practices:

1. Exchanged and still do exchange information concerning prices, terms and conditions of sale, trade discounts and volume discounts, and made known and still do make known among respondents their bid quotations with respect thereto in connection with particular transactions.

2. Attempted to fix, stabilize and maintain uniform prices, and to a large extent have fixed, stabilized and maintained uniform prices.

3. Attempted to fix, stabilize and maintain uniform terms and conditions of sale, and to a large extent have fixed, stabilized, and maintained uniform terms and conditions of sale.

4. Attempted to fix, stabilize, and maintain uniform trade discounts and volume discounts and to a large extent have fixed, stabilized, and maintained uniform trade discounts and volume discounts.

5. Held both formal and informal conferences, meetings and visitations at which discussions took place concerning prices, terms and conditions of sale, trade discounts and volume discounts to be adopted by said respondents in selling the aforesaid products.

6. Entered into agreements and other arrangements for competing sellers to fix, stabilize, maintain, and make uniform resale prices, terms and conditions of said products, and stabilized, adopted, and maintained systems, plans, methods and policies of merchandising in effectuation of such resale price maintenance agreements.

PAR. 8. The combination, conspiracy and the agreements, understandings, acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged are all and singularly unfair to the prejudice of the public and against public policy because of their dangerous tendency unduly to hinder competition and create monopoly, and because they have oppressively restricted the activities of competing sellers, including distributors and jobbers, and otherwise restrained competition in the sale in commerce of the products referred to in Paragraph 2 herein; constitute unfair methods of competition

and unfair or deceptive acts or practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 13, 1951, issued and subsequently served its complaint on the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition and unfair or deceptive acts or practices in commerce, in violation of section 5 of the Federal Trade Commission Act.

The respondents desiring that this proceeding be disposed of by the Consent Settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement hereinafter set forth, and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this Consent Settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

¹The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on March 18, 1952, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Basic Vegetable Products, Inc., is a California corporation, incorporated June 11, 1945, and has its office and principal place of business at 315 Montgomery Street, San Francisco, California.

Respondent Gentry, Incorporated, is a California corporation, incorporated January 19, 1946, and has its office and principal place of business at 887 North Spring Street, Los Angeles, California.

Respondent Puccinelli Packing Company is a California corporation, incorporated May 1, 1946, and has its office and principal place of business in Turlock, California.

Respondent J. R. Simplot Company is an Idaho corporation, and has its office and principal place of business in the Continental Bank Building, Boise, Idaho. The office and principal place of business of said respondent was formerly in the Idaho National Bank Building, North 10th Street and West Idaho Street, Boise, Idaho.

PAR. 2. Respondents are and at all times referred to in the complaint were engaged in the dehydration and processing of either onions or garlic or both, which are packed, distributed, offered for sale, sold and shipped as onion powder, garlic powder, onion flakes, garlic flakes, and also onions and garlic in various and diverse other processed forms for use by food packers, processors, and others as seasoning or flavoring agents.

PAR. 3. Respondents, in the regular course and conduct of their business, sell and ship, or cause to be sold and shipped either directly or through distributors or jobbers, the said products which they dehydrate and process, from their respective places of business to purchasers located in the various States of the United States other than the State of origin, and also into the District of Columbia, and during the time herein referred to, have carried on and engaged in, and do now carry on and engage in, commerce, as the term "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents Basic Vegetable Products, Inc., and Gentry, Incorporated, are two of the principal dehydrators and processors of onions and garlic in the United States, and said respondents occupy positions of dominance in the onion and garlic dehydrating and processing industry.

Respondents Puccinelli Packing Company and J. R. Simplot Company are important factors in the dehydrating and processing of onions.

When the production of dehydrated or processed onions, and the sales volume thereof, of all four respondents are taken into account

and considered together, the aggregate is such that all four respondents have the power to control, and as a result of the acts, practices, methods and policies hereinafter found and set forth, have exercised actual control of the market prices of the onion products referred to in Paragraph 2 herein.

When the production of dehydrated or processed garlic, and the sales volume thereof, of respondents Basic Vegetable Products, Inc., and Gentry, Incorporated, are taken into account and considered together, the aggregate is such that these two respondents have the power to control, and as a result of the acts, practices, methods and policies hereinafter found and set forth, have exercised actual control of the market prices of the garlic products referred to in Paragraph 2 herein.

The production of dehydrated onion flakes has exceeded the national consumption thereof, and this situation has created a pricing problem which has resulted in advice being disseminated among the said four respondents not to cut prices below the going market prices for said products.

PAR. 5. In the course and conduct of their selling, offering for sale, and shipping in commerce said dehydrated and processed products referred to in Paragraph 2 herein, respondents, except for the agreement and understanding hereinafter found and the restraints resulting therefrom, would have been in the past and would be now in competition with each other.

PAR. 6. For more than five years last past respondents have been and are engaged in unfair methods of competition and unfair acts and practices in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they have acted, and are still acting unlawfully to thwart, frustrate, hinder, suppress, and prevent competition by cooperating, combining, conspiring, agreeing, and entering into and carrying out an understanding and planned common course of action between and among themselves and others with respect to prices, discounts, terms and conditions of sale, and other pricing practices, in connection with the offering for sale, sale and distribution in commerce of the products referred to in Paragraph 2 herein.

PAR. 7. Pursuant to, in furtherance of, and in order to make effective the purposes and objectives of the aforesaid cooperation, combination, conspiracy, agreement, understanding and planned common course of action, respondents have formulated, adopted, performed and put into effect, among other things, the following acts, practices, methods and policies by virtue of the fact that some of the respondents have acted with respect to each of the particulars hereinafter found

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and set forth and by virtue of the further fact that each respondent participated in one or more of such overt acts and practices:

1. Exchanged and still do exchange information concerning prices, terms and conditions of sale, trade discounts and volume discounts, and made known and still do make known among respondents their bid quotations with respect thereto in connection with particular transactions.

2. Attempted to fix, stabilize and maintain uniform prices, and to a large extent have fixed, stabilized and maintained uniform prices.

3. Attempted to fix, stabilize and maintain uniform terms and conditions of sale, and to a large extent have fixed, stabilized and maintained uniform terms and conditions of sale.

4. Attempted to fix, stabilize and maintain uniform trade discounts and volume discounts and to a large extent have fixed, stabilized and maintained uniform trade discounts and volume discounts.

5. Held both formal and informal conferences, meetings and visitations at which discussions took place concerning prices, terms and conditions of sale, trade discounts and volume discounts to be adopted by said respondents in selling the aforesaid products.

6. Entered into agreements and other arrangements for competing sellers to fix, stabilize, maintain, and make uniform resale prices, terms and conditions of sale of said products, and stabilized, adopted and maintained systems, plans, methods and policies of merchandising in effectuation of such resale price maintenance agreements.

PAR. 8. The combination, conspiracy and the agreements, understandings, acts, practices, pricing methods, systems, devices and policies as hereinbefore found are all and singularly unfair and to the prejudice of the public and against public policy because of their dangerous tendency unduly to hinder competition and create monopoly, and because they have oppressively restricted the activities of competing sellers, including distributors and jobbers, and otherwise restrained competition in the sale in commerce of the products referred to in Paragraph 2 herein; constitute unfair methods of competition and unfair or deceptive acts or practices in commerce within the meaning of section 5 of the Federal Trade Commission Act, as amended.

CONCLUSION

The acts and practices of respondents, as hereinabove found and set forth, are all to the prejudice of the public and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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ORDER TO CEASE AND DESIST

It is ordered, That respondents Basic Vegetable Products, Inc., Gentry, Incorporated, Puccinelli Packing Company and J. R. Simplot Company, corporations, their officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of dehydrated or processed onion powder, garlic powder, onion flakes or garlic flakes, or onions or garlic in any other processed forms, in interstate commerce, do forthwith cease and desist from doing, performing, continuing, cooperating, participating or engaging in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of said respondents, or between any one or more of said respondents and another or others not parties hereto, to do or perform any of the following acts or practices:

1. Exchanging, distributing or relaying by any method or means information in any form as to prices, terms and conditions of sale, trade discounts or volume discounts where the purpose or effect thereof is to fix, stabilize, or maintain prices, terms and conditions of sale, trade discounts or volume discounts.

2. Fixing, establishing or maintaining prices.

3. Fixing, establishing or maintaining terms and conditions of sale.

4. Fixing, establishing or maintaining trade discounts or volume discounts.

5. Fixing, establishing or maintaining any arrangement for resale prices, terms or conditions of sale.

6. Exchanging, distributing or relaying among the respondents or any of them or through any medium or central agency information concerning prices charged particular customers or information concerning sales or shipments when the identity of the manufacturer, seller or purchaser can be determined or disclosed through such information and which has the purpose or effect of aiding in securing compliance with the prices, terms or conditions of sale as announced by anyone or more of the respondents.

It is further ordered, That the said respondents, separately or collectively, in connection with the offering for sale, sale and distribution of the said products, do forthwith cease and desist from doing, performing, continuing, participating or engaging in, or carrying out any agreement, arrangement, act or practice providing for the establishment or maintenance of resale prices on any commodity herein involved between themselves or between other producers or between wholesalers or between brokers or between factors or between retailers

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or between persons, firms, or corporations in competition with each other.

Provided, however, that nothing contained herein shall be construed to prohibit any of the respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are permitted under the provisions of the Miller-Tydings Act.

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

(sgd) Basic Vegetable Products, Inc.,
BASIC VEGETABLE PRODUCTS, INC.,

By (sgd) J. H. HUME,

Title: *Vice President.*

Date: 2/26/52.

(sgd) Gentry, Inc.,
GENTRY, INCORPORATED,

By (sgd) GEO. E. CLAUSEN,

Title: *President.*

Date: March 1, 1952.

(sgd) Puccinelli Packing Co.,
PUCCINELLI PACKING COMPANY,

By (sgd) R. L. PUCCINELLI,

Title: *President.*

Date: 2/28/1952.

(sgd) J. R. Simplot Company,
J. R. SIMPLOT COMPANY,

By (sgd) ROBERT I. TROXELL,

Title: *Executive Vice President.*

Date: March 3, 1952.

The foregoing Consent Settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 18th day of March 1952.

IN THE MATTER OF
MOTOOL MACHINE COMPANY, INC. ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5896. Complaint, June 27, 1951—Decision, Mar. 20, 1952

When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public, not marked or not adequately marked showing that they are of foreign origin, or if foreign markings are covered or otherwise concealed, such public understands and believes the articles to be wholly of domestic origin.

There is among the members of the purchasing public a substantial number who have a decided preference for products, including sewing machine heads, originating in the United States, over products originating in whole or in part in foreign countries.

Where two corporations with a common address, and their two responsible officers and an employee, engaged in the competitive interstate sale and distribution of sewing machine heads imported from Japan, and of complete sewing machines of which said heads were a part, in process of completing which by attachment of a motor the words "Made in Occupied Japan" or "Japan" were covered and no longer visible—

- (a) Failed adequately to disclose on said heads upon the front of some of which there appeared a medallion bearing in small and indistinct words the legend "Made in Occupied Japan" or "Japan" that said products were there made, with the result of placing in the hands of dealers a means to deceive the purchasing public as to their place of origin;
- (b) Falsely represented, through adoption and use of the word "American" as a trade or brand name for said machine heads, and the stamping or printing thereof on the front horizontal arm of the head in large and conspicuous letters, that said products were made in the United States;

With tendency and capacity to lead members of the purchasing public into the erroneous belief that their said products were of domestic origin, and thereby into the purchase of quantities of sewing machines of which said heads were a part, because of such mistaken belief; whereby substantial trade in commerce was unfairly diverted to them from their competitors and substantial injury done to competition in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and their competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. William L. Taggart for the Commission.
Mr. David Lench, of New York City, for respondents.

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 Motool Machine Company, Inc., a corporation, Eval Machine Company, Inc., also a corporation, and Israel Sharenow, Alexander Sharenow, and Evelyn Pakarow, individually and as officers of said corporations, 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. Respondents Motool Machine Company, Inc., and Eval Machine Company, Inc., are corporations organized and existing under and by virtue of the laws of the State of New York with their offices and principal place of business located at 59 East 12th Street, New York, New York. Respondents Israel Sharenow, Alexander Sharenow, and Evelyn Pakarow are President, Treasurer and Secretary, respectively, of said corporate respondents and acting as such officers, formulate, direct and control the policies, acts and practices of said corporations. The address of the individual respondents is the same as that of the corporate respondents.

PAR. 2. Respondents are now and have been for several years last past engaged in the sale of sewing machine heads imported from Japan and completed sewing machines of which said heads are a part. In the course and conduct of their business respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machine heads are purchased by respondents, the words "Made in Occupied Japan" or "Japan" appear on the back of the vertical arm. Before the heads are sold to the purchasing public as a part of a complete sewing machine, it is necessary to attach a motor to the head in the process of which the aforesaid words are covered by the motor so that they are not visible. In some instances said heads, when received by respondents, are marked with a medallion placed on the front of the vertical arm upon which the words "Made in Occupied Japan" or "Japan" appear. These words are, however, so small and indistinct that they do not constitute adequate notice to the public that the heads are imported.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are not adequately marked showing that they are of foreign origin or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 5. There is among the members of the purchasing public a substantial number who have a decided preference of products originating in the United States over products originating in whole or in part in foreign countries, including sewing machine heads.

PAR. 6. Respondents have adopted and use the word "American" as a trade or brand name for the said machine heads and the word is stamped as an impression or printed on the front horizontal arm of the head in large conspicuous letters. The use of the trade name "American" serves as a representation that said product is manufactured in the United States, which is contrary to fact.

PAR. 7. Respondents, by placing in the hands of dealers their sewing machine heads and completed sewing machines, provide said dealers with a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said product.

PAR. 8. Respondents, in the course and conduct of their business, are in substantial competition in commerce with the makers and sellers of domestic machines and also with sellers of imported machines, some of whom adequately inform the public as to the source of origin of their said product.

PAR. 9. The failure of respondents to adequately disclose on the sewing machine heads that they are manufactured in Japan and the use of the word "American" as a trade or brand name has the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said product is of domestic origin, and into the purchase of quantities of sewing machines of which said heads are a part, because of such erroneous and mistaken belief. As a result substantial trade, in commerce, has been unfairly diverted to respondents from their competitors and substantial injury has been done and is being done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of the Compliance", dated March 20, 1952, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1951, issued and subsequently served its complaint in the above-entitled proceeding upon the respondents Motool Machine Company, Inc., a corporation, Eval Machine Company, Inc., also a corporation, and Israel Sharenow, Alexander Sharenow, and Evelyn Pakarow, individually and as officers of said corporations, charging them with unfair and deceptive acts and practices in commerce in violation of said Act. On August 22, 1951, respondents filed their answer to said complaint. On October 29, 1951, at a hearing held in New York, New York, counsel for the respondents and counsel in support of the complaint entered into an oral stipulation on the record, wherein counsel for the respondents admitted certain allegations of the complaint to be true; made further admissions regarding the potential testimony of witnesses who could be produced in support of certain other allegations of the complaint; and made qualifying statements in regard to other allegations of the complaint. On November 1, 1951, a letter dated October 30, 1951, from counsel for the respondents, supplementing the previous stipulation was duly incorporated into the record. Thereafter the proceeding regularly came on for final consideration by the above-named hearing examiner theretofore duly designated by the Commission upon said complaint and answer thereto, stipulation on the record, written supplement thereto, no proposed findings or conclusions having been submitted; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PAR. 1. Respondents Motool Machine Company, Inc. and Eval Machine Company, Inc. are corporations organized and existing under

and by virtue of the laws of the State of New York, with their offices and principal place of business located at 59 East 12th Street, New York, New York. Respondents Alexander Sharenow, Evelyn Pakarow, and Israel Sharenow, individuals, are President, Secretary and Treasurer, and an employee, respectively, of said corporate respondents, and, acting in such capacity, have formulated, directed and controlled the policies, acts and practices of said corporations. The address of the individual respondents is the same as that of the corporate respondents.

PAR. 2. Respondents have been for several years last past engaged in the sale of sewing machine heads imported from Japan and completed sewing machines of which said heads were a part. In the course and conduct of their business respondents have caused their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States, and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in 1950 in the buying and selling of sewing machine heads amounted to approximately 6,000 such heads, which is substantial trade in commerce.

PAR. 3. When the sewing machine heads were purchased by respondents, the words "Made in Occupied Japan" or "Japan" appeared on the back of the vertical arm. Before the heads were sold to the purchasing public as a part of a complete sewing machine, it was necessary to attach a motor to the head, in the process of which the aforesaid words were covered by the motor so that they were not visible. In some instances said heads, when received by respondents, were marked with a medallion placed on the front of the vertical arm upon which the words "Made in Occupied Japan" or "Japan" appeared. These words were, however, so small and indistinct that they did not constitute adequate notice to the public that the heads were imported.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public, and such articles are not marked or are not adequately marked showing that they are of foreign origin, or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 5. There are, among the members of the purchasing public, a substantial number who have a decided preference for products, including sewing machine heads, originating in the United States, over products originating in whole or in part in foreign countries.

PAR. 6. Respondents have adopted and used the word "American" as a trade or brand name for the said machine heads, and the word

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was stamped as an impression or printed on the front horizontal arm of the head in large conspicuous letters. The use of the trade name "American" served as a representation that said product was manufactured in the United States, which was contrary to fact.

PAR. 7. Respondents, by placing in the hands of dealers their sewing machine heads and completed sewing machines, have provided said dealers with a means and instrumentality whereby they might mislead and deceive the purchasing public as to the place of origin of said products.

PAR. 8. Respondents, in the course and conduct of their business, were in substantial competition in commerce with the makers and sellers of domestic machines and also with sellers of imported machines, some of whom adequately informed the public as to the source of origin of their said product.

PAR. 9. The failure of respondents adequately to disclose on the sewing machine heads that they were manufactured in Japan and the use of the word "American" as a trade or brand name has had the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said product was of domestic origin, and into the purchase of quantities of sewing machines of which said heads were a part, because of such erroneous and mistaken belief. As a result, substantial trade, in commerce, has been unfairly diverted to respondents from their competitors, and substantial injury has been done to competition in commerce.

CONCLUSION

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

ORDER

It is ordered, That the respondents, Motool Machine Company, Inc., and Eval Machine Company, Inc., corporations, and their officers, and Alexander Sharenow and Evelyn Pakarow, individually and as officers, and Israel Sharenow, individually and as an employee, of said corporations, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in

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the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign made sewing machine heads, or sewing machines of which foreign made heads are a part, without clearly and conspicuously disclosing on the heads, in such a manner that it will not be hidden or obliterated, the country of origin thereof;

2. Using the word "American," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machines or sewing machine heads; or representing through the use of any other word or in any other manner that sewing machines or sewing machine heads manufactured in a foreign country are manufactured in the United States.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 and manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of March 20, 1952].

Syllabus

IN THE MATTER OF
AMERICAN BUSINESS COUNSELORS, INC., ETC. ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5910. Complaint, Aug. 7, 1951—Decision, Mar. 20, 1952

While it may be true, as insisted in the instant case, that the expression "blue ribbon" has come into general acceptance as a symbol of quality, which simply denotes excellence, and not that a product has been adjudged highest in a competitive contest, such a position does not appear tenable where the expression is not used merely as the trade name of a product or in a general way to connote quality, but is used along with such expressions as "awarded the blue ribbon for excellence", and others indicative of highest recognition in a competitive contest with other similar products.

Where a corporation which formerly traded under the name "American Bakers Council", and thereafter as "Independent Bakers Council of America", and its president, engaged in acting as commercial counselors and in the competitive interstate sale of merchandising programs, including advertising and promotional material, to wholesale bakers engaged in the competitive sale of bread—

- (a) Falsely represented the size of their business and the extent of their operations in certain of their advertising material, through referring to their "Midwest Offices" at a Chicago address, and to their "Eastern Offices" at a New York one.

The facts being that while they utilized an independent business or secretarial service at each of said addresses for the purpose of forwarding mail, receiving telephone calls and supplying temporary office facilities to their traveling salesmen, they had never maintained an office of their own in either of said cities; and

Where said corporation and its president, in selling to wholesale bakers, usually to only one in each town, their said sales program, which included suggested advertising for use in newspapers and radio continuities, suggested news stories for use by the local paper, the supplying of "blue ribbon" bands to be placed on the loaves of bread and blue ribbons to be worn by the bakery's salesmen or routemen, and a large blue ribbon to be awarded the baker in a public presentation, usually made by them under the name "American Bakers Council of America", with as much publicity as possible—

- (b) Represented and supplied to others the means of representing that competitive contests were conducted by them or at their instance to determine the relative quality or merit of products of different bakeries, and that a particular product had been awarded a prize or other distinction in such a competitive contest, through such statements in said advertisements, in which a blue ribbon was depicted, as "[name] BREAD CO. WINS FIRST PRIZE AWARD as the *finest* White Bread in the United States FROM AMERICAN BAKERS COUNCIL * * *", and through such statements, following discontinuance of use of the words "FIRST PRIZE", and emphasis upon the award of the "blue ribbon", as "[name] FINE BREAD Awarded the

BLUE RIBBON for Excellence—one of the *finest* White Breads in the United States! FIRST IN FRESHNESS—FLAVOR—QUALITY—UNIFORMITY—CLEANLINESS and VALUE”, together with a depiction of a blue ribbon upon which appeared “Awarded the BLUE RIBBON for EXCELLENCE of FRESHNESS, FLAVOR, QUALITY * * * by INDEPENDENT BAKERS COUNCIL of America”;

The facts being that, while respondents had arrangements with certain testing laboratories under which the laboratory examined or tested the breads of their customers, any bread meeting certain minimum standards was eligible for the so-called blue ribbon award; and there had never been any competitive contest;

With tendency and capacity to mislead and deceive a substantial number of wholesale bakers and retail dealers and a substantial portion of the purchasing public with respect to their business status and their customers' products, and as a result, to cause such wholesale bakers to purchase their sales program, and such retail dealers and members of the public to purchase the products of their customers; and with result of placing in the hands of others an instrumentality whereby they were enabled to mislead and deceive retail dealers and the purchasing public; whereby substantial trade was diverted unfairly to them from their competitors, and to their customers from competitors of such customers;

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and of their competitors, and the competitors of their customers, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

As regards the use by respondents of the word “council” in their trade names as misleadingly representing or implying that such organizations were nationwide trade associations of wholesale bakers: it appeared that in view of the facts involved, the use of the word “council” was not unwarranted, since the name “American Bakers Council” was used for only a few months, and as respects the name “Independent Bakers Council of America”, that each wholesale baking concern purchasing their sales promotion plan automatically becomes a member of the council and is represented by an officer on the council's advisory board, and that membership in the organization entitled the member to other services besides use of the merchandising plan, including counsel on matters of advertising, packaging, production, etc.

As respects the charge that respondents by referring to the “American Bakers Council” or the “Independent Bakers Council of America” as a “Division”, falsely represented that their business was a large organization with divisions or branches for different industries: it appeared that while respondents' operation had until shortly theretofore been confined to the baking industry, respondents were entering into other fields as well and that such had been their intention from the beginning; and, such being the fact, that the representation in question could not be regarded as wholly without factual basis.

As regards the charge that respondents falsely represented that their organization was twenty-seven years old, the record disclosed that said statement appeared only once in a Texas newspaper with respect to a local bakery and was due to error or inadvertance on the part of the local baker or newspaper reporter, that the material was not supplied by respondent, and that the

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use of the statement was without their knowledge or consent; and such charge held not sustained.

As respects the charge that respondents, through referring to the testing of bread in "our laboratory facilities" represented that such facilities were actually owned, maintained and operated by them: it appeared that such facilities were those of certain independent testing laboratories which, pursuant to respondents' arrangements, examined bread submitted to them by respondents; and that respondents' reference to their laboratory facilities did not necessarily mean that they themselves actually owned or operated laboratories, and did have an arrangement with reputable testing laboratories for said purpose constituted sufficient factual basis for the use of the challenged phrase, it appearing immaterial and without public interest as a practical matter whether the testing was done in laboratories owned by them or in those owned and operated by others but doing the testing under contract with them.

Before *Mr. William L. Pack*, hearing examiner.

Mr. William L. Pencke for the Commission.

Mr. Ronald Walker and *Tuttle & Tuttle*, of Los Angeles, Calif., for respondents.

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 American Business Counselors, Inc., a corporation, and William Donald Dunkle, individually and as president 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, American Business Counselors, Inc., is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business at 672 South Lafayette Park Place, Los Angeles, California.

Respondent William Donald Dunkle is president of said corporation and as such formulates, controls and directs the policies and practices of said corporate respondent and is responsible for the operation and management thereof. Said individual respondent also traded as American Bakers Council and presently trades and does business under the name of Independent Bakers Council of America; his principal office and place of business in said several capacities is the same as that of the corporate respondent.

PAR. 2. Said respondents are now, and for several months last past have been, engaged in acting as commercial counselors, and in the business of advertising, promotion and the sale of merchandising

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programs, including promotional material consisting of circulars, prize award ribbons, certificates, radio and newspaper releases and other advertising and display matter to wholesale bakers. Respondents cause all of said promotion material, when sold, to be transported from their said place of business in California to the purchasers thereof located in the several States of the United States other than the State of California. There has been at all times mentioned herein a course of trade in the sale of said advertising material so sold and distributed by respondents in commerce and said course of trade has been and is substantial.

In the sale and distribution of said advertising promotion plan and material, respondents are in competition with other corporations, partnerships and individuals engaged in the sale and distribution of similar commodities in commerce between and among the various States of the United States. Respondents' customers and others engaged in the wholesale bread baking business, and selling in turn to retailers of bread, are also in competition in commerce with each other.

PAR. 3. In the course and conduct of their business, respondents solicit the purchase of their said advertising program by wholesale bakers through circular letters, leaflets and broadsides, in which, among others, the following statements and representations are made:

Western Offices, 672 Lafayette Park Place, Los Angeles 5, California; Mid West Offices, 30 West Washington Street, Chicago, Illinois; Eastern Offices, 15 Park Row, New York City, New York

ABC Bulletin Issued from Western Offices American Business Counselors Incorporated

American Bakers Council

A Division of American Business Counselors, Inc.

Independent Bakers Council of America

ABC Bakery Division of American Business Counselors, Inc.

Your local newspaper will carry publicity stories on your award . . . Your route salesmen will wear ribbons in gold and blue acclaiming that they handle **FIRST PRIZE WINNING WHITE BREAD . . .**

Your grocers will wear gold and blue ribbons acclaiming to all that **THEY HANDLE THE FINEST WHITE BREAD IN THE UNITED STATES . . .**

Your loaf will be scored in our laboratory facilities . . .

. . . Radio station spot announcements spread the word of your winning the first prize award over the air . . .

. . . your **FIRST PRIZE WHITE BREAD . . .** each loaf may carry . . . a **BAND** in brilliant color in which is reproduced your **FIRST PRIZE AWARD EMBLEM**

PAR. 4. By means of the statements and representations set forth in Paragraph Three hereof, and others of similar import not herein specifically set out, respondents represent and imply that they maintain branch offices in Chicago and New York; that American Bakers Council and Independent Bakers Council of America are nation-wide trade

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associations of Wholesale bakers; that American Business Counselors, Inc. is a large business organization, maintaining divisions or branches of various industries, including the baking industry; that contests are held by said organizations, resulting in first prize and blue ribbon awards; and that such awards will be publicized in local newspapers and through radio announcements; that the salesmen of respondents' wholesale customers and the grocers who purchase bread from said wholesalers will be supplied with blue and gold ribbons showing that first prize was awarded to said wholesale baker for the finest white bread in the United States; and that the bread submitted by said wholesale bakers is tested and scored in laboratory facilities maintained by respondents.

PAR. 5. To purchasers of said merchandising and sales promotion plan respondents furnish membership certificates, blue ribbons, blank forms of broadsides, form letters, suggested newspaper publicity stories and radio continuities to be used by said purchasers and their retail customers in advertising their respective brands of white bread. Typical but not all-inclusive of the statements and representations made in said promotional material are the following:

Certificate of Membership

----- Elected to membership in Independent Bakers Council of America. The above named firm and individual shall be entitled to receive the full benefits of membership

FIRST PRIZE WINNER
AWARDED FIRST PRIZE
FINEST WHITE BREAD
IN THE UNITED STATES

TRY THIS PRIZE WINNING LOAF
FRESH AT YOUR GROCERS

NAME BREAD CO. WINS
FIRST PRIZE AWARD

QUALITY BAKERY WINS FIRST PRIZE AWARD FOR BAKING ONE OF
THE FINEST LOAVES OF WHITE BREAD IN THE UNITED STATES

We are justly proud that ----- bread has been selected
for this honor in our community

EXPERTS KNOW BEST! They choose NAME BREAD.

HOUSEWIVES! . . . Do you know that (-----) has jus been awarded
bread
the BLUE RIBBON as one of the FINEST white breads in the whole United
States --? INDEPENDENT BAKERS COUNCIL OF AMERICA, a national
organization of baking authorities, and *they* should know

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The Independent Bakers Council of America, after testing it in their laboratory facilities, awarded (-----) a BLUE RIBBON For Six Points of Excellence.
bread

Awarded the BLUE RIBBON for Excellence of Freshness Flavor Quality Uniformity Cleanliness Value by Independent Bakers Council of America.

No wonder ----- was awarded the BLUE RIBBON for quality.
bread

It's the perfect white bread and discriminating local housewives have known that for years.

Ask for the Bread with the Blue Ribbon on It!

Suggested letter to grocers (to me mimeographed or multigraphed on letterhead of baking company) :

To our grocer friends :

“This exploitation campaign will be broad in scope and grocery outlets will be supplied with original and distinctive devices that are bound to bring your store a flood of new business and keep your cash register ringing.

“Our problem includes a series of large and impressive ads in the newspapers, a consistent rotation of radio announcements and miscellaneous store display materials. Your clerks will be supplied with handsome gold embossed silk ribbons which will call attention to the BLUE RIBBON AWARD.”

From a suggested form letter “on the letterhead of local newspaper:”

“ However, white bread being the principal source of food energy gives a deep and important significance to the fact that the Independent Bakers Council of America saw fit to award the quality blue ribbon to (name of bakery) for producing one of the finest white breads baked in the United States. . . . We are assured by the management of the (name of bakery) that this powerful newspaper advertising campaign will be carried on to bring this blue ribbon quality award forcibly to the minds of our readers who are YOUR CUSTOMERS

From the Lubbock, Texas, Morning Avalanche of September 27, 1950 under a picture showing, among others, respondent Dunkle holding a large award ribbon :

“ the award was made to the local company last night for producing the loaf of bread judged best by the ABC from thousands sent in from all parts of the nation by competing bakers. . . . This is the first time in the twenty-seven year history of the ABC that a Texas Bakery has won the award.

The Independent Bakers Council of America put ----- through a rigid
(bread)
test before it was awarded the blue ribbon for six points of excellence . . .

PAR. 6. By means of the foregoing statements and representations and many others to the same effect not herein specifically set out, respondents represent and imply that the wholesale bakers who purchase said sales promotion plan are members of a national organization of their industry; that the bread of each of the purchasers of respondents' merchandising plan is bread which has won or which has been awarded first prize in competitive contests as the finest or

one of the finest white breads in the United States, or which has been awarded the Blue Ribbon of Excellence for freshness, flavor, quality, uniformity, cleanliness, and value; that the awards are made by experts of The Independent Bakers Council, a national organization of baking authorities, on the basis of rigid tests performed by them in their laboratory facilities on thousands of loaves of bread submitted from all parts of the United States; that said organization has been in existence for over 27 years, and that housewives have known for years that bread awarded the Blue Ribbon is the perfect white bread; that the advertising and exploitation program by said wholesale bakers is extensive, including many forms of advertising media and that their retail customers will be supplied with a variety of display materials and blue silk ribbons, all pointing to the Blue Ribbon Award, and resulting in vastly increased sales.

PAR. 7. All of the statements, representations and implications set forth and described in Paragraphs Three to Six hereof are false, deceptive and misleading. In truth and in fact respondents maintain no Midwestern offices in Chicago or Eastern offices in New York and the addresses listed for said cities are merely the offices of commercial mail and telephone services. Neither said American Bakers Council nor said Independent Bakers Council of America is a national trade organization of wholesale bakers actively engaged in promoting the welfare and common interests of the members of such organizations. Both designations are employed by respondent William D. Dunkle as trade names in connection with said sales promotion scheme; American Business Counselors, Inc. is a corporate device, operated and managed entirely by respondent Dunkle, and does not maintain any divisions or branches of the baking or any other industry; and said corporate and trade names are used by respondent Dunkle conjointly to further the impression that said business is a large and substantial organization consisting of a number of independent divisions. Respondents' so-called awards of first prizes, blue ribbons and other distinctions are not the result of contests or prize competitions participated in by many wholesale bakers, but on the contrary constitute a scheme to increase the sale of bread, and the dissemination of circulars, broadsides, newspaper stories and radio announcements of said purported awards and the display of blue ribbons in various ways are all part of said scheme to mislead the public into the belief that said prizes and awards are the result of competitive tests conducted by an impartial organization of experts. Respondents maintain no laboratory facilities for the testing and scoring of bread, but employ an independent laboratory to test and score bread submitted by purchasers of their said sales promotion plan, and said tests are

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wholly meaningless and of no significance for the reasons that they do not constitute a basis for any award, are not conducted to determine the superiority of any one product of competing bakers and the bread tested does not show that degree of excellence as to the six points listed in the various advertising media which would justify any prizes or Blue Ribbons as the finest or one of the finest white breads in the United States. Moreover, the bread produced by virtually all independent wholesale bakers of the United States shows little variation in quality or other characteristics for the reason that all of them use approximately the same formula or recipe. Independent Bakers Council of America has not been in existence for twenty-seven years, in fact this trade name has been in use for less than one year and neither Independent Bakers Council of America nor Bakers Council of America is a council as that term is generally understood. While it is true, as represented by respondents in their suggested advertising literature, that the exploitation campaign is a successful means of increasing sales, such increase is due to the fact that the purchasing public accepts the false and misleading representations as to prize awards as true. There are many members of the purchasing public who prefer to purchase merchandise which has been awarded prizes for excellence by trade organizations or independent laboratories and investigators. Said newspaper articles, radio continuities and other media of publicity purporting to give the details of the Blue Ribbon and Prize awards are in fact prepared by respondents in advance in the form of blanks which are filled in with the respective names, addresses and other data of respondents' customers, and constitute a part of the advertising promotion plan sold to them by respondents as aforesaid.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive practices, statements and representations as hereinabove set forth has had and now has the tendency and capacity to and does mislead and deceive the purchasing public into the erroneous and mistaken belief that such statements and representations are true and as a result thereof a substantial number of the purchasing public were and are induced to buy the products of respondents' customers. By said acts and practices respondents also place in the hands of purchasers of their said sales promotion plan a means and instrumentality whereby they may and do deceive the purchasing public as to the true facts in regard to said Blue Ribbon and Prize Awards. As a further consequence of the aforesaid acts and practices of respondents, trade has been diverted unfairly, to respondents from their competitors and to the customers of respondents from their competitors.

PAR. 9. The aforesaid acts and practices of respondents as herein

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alleged are all to the prejudice and injury of the public and respondents' competitors and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 20, 1952, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 7, 1951, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner on the complaint, answer, testimony and other evidence, and oral argument of counsel (the filing of proposed findings and conclusions having been waived); and the hearing examiner, having duly considered the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent American Business Counselors, Inc., is a corporation organized, existing and doing business under the laws of the State of Delaware, with its office and place of business located at 672 South Lafayette Park Place, Los Angeles, California. Respondent William Donald Dunkle is president of the corporation and formulates, controls and directs its policies and practices and is responsible for its operation and management. Respondents have also

traded under the name American Bakers Council and are now doing business under the name Independent Bakers Council of America. Respondents are engaged in the business of acting as commercial counselors and in the sale of merchandising programs, including advertising and promotional material, such programs and material being sold largely to wholesale bakers.

PAR. 2. Respondents cause and have caused their merchandising programs and advertising and promotional material, when sold, to be transported from their place of business in the State of California to purchasers located in various other States of the United States. Respondents maintain and have maintained a course of trade in their products in commerce among and between various States of the United States.

PAR. 3. In the sale and distribution of their products, respondents are and have been in substantial competition with other corporations and individuals and with partnerships engaged in the sale and distribution of similar products in commerce among and between various States of the United States. Respondents' customers are also in competition in such commerce with others engaged in the wholesale sale of bread.

PAR. 4. This proceeding involves certain representations made by respondents in advertising material distributed by them among prospective purchasers of their merchandising programs, and in promotional and advertising material supplied purchasers for use by such purchasers in carrying out the merchandising program and advertising the purchaser's product to the public. The first issue raised by the complaint is whether respondents, by referring to certain purported branch offices maintained by them, have misrepresented the size of their business and the extent of its operations. In certain of their advertising material, respondents have referred to their "Mid West Offices, 30 West Washington Street, Chicago, Illinois" and their "Eastern Offices, 15 Park Row, New York City, New York." Actually, while respondents have utilized an independent business or secretarial service at each of these addresses for the purpose of forwarding mail, receiving telephone calls and supplying temporary office facilities to respondents' traveling salesmen, respondents have never maintained an office of their own in either of these cities. It is therefore concluded that respondents' references to their so-called branch offices were unwarranted and misleading.

PAR. 5. The next issue involves the use by respondents of the word "Council" in their trade names, American Bakers Council and Independent Bakers Council of America, the complaint charging that such use of the word represents or implies that such organizations are

nation-wide trade associations of wholesaler bakers. The name American Bakers Council was used by respondents for only a few months or until January 1951 when, after certain correspondence with the trade organization known as American Bakers Association, the name was discontinued by respondents and the name Independent Bakers Council of America adopted in its stead. Under respondents' plan of operation, each wholesale baking concern purchasing respondents' sales promotion plan automatically becomes a member of the Council and a certificate of membership is issued to it. An officer of each company is made a member of the Council's Advisory Board. At the time of the hearing in the present proceedings (in September 1951), the membership of the Council numbered some 72 wholesale baking concerns located in some 26 different States of the United States. While up to that time no meeting of the Council's membership had been held, preparations were being made for a meeting in Chicago during the following month and an announcement of the meeting had already been sent to the membership. Membership in the organization entitles the member, in addition to the use of the merchandising plan, to other services of the organization, such as news bulletins pertaining to the baking industry, counsel on matters of advertising, packaging, production, accounting, sanitation, etc. In view of these facts, the examiner is of the opinion that the use by respondents of the word "Council" as a part of the name of their organization is not unwarranted.

PAR. 6. The complaint next charges that by referring to the American Bakers Council or the Independent Bakers Council of America as a "Division" of their business, respondents have represented, contrary to fact, that their business is a large organization, with divisions or branches for different industries. While it is true that until recently respondents' operations have been confined to the baking industry, respondents are now entering other fields as well and this appears to have been their intention from the beginning of the organization. In the circumstances it appears that the representation in question cannot be regarded as wholly without factual basis.

PAR. 7. A further charge in the complaint is that respondents have falsely represented that their organization is 27 years old. The record discloses that this statement appeared only once, in a news article in a Texas newspaper with respect to a local bakery, and that the statement was due to error or inadvertence on the part of the local baker or the newspaper reporter. The material for the article (insofar as the matter of age is concerned) was not supplied by respondents and the use of the statement in question was without their knowledge or consent. It is therefore concluded that this charge in the complaint has not been sustained.

PAR. 8. In some of their advertising, respondents refer to the testing of bread in "our laboratory facilities." The complaint challenges the use of this language, charging that it constitutes a representation that the laboratory facilities referred to are actually owned, maintained and operated by respondents. The facilities referred to are, in fact, those of certain independent testing laboratories which, pursuant to arrangements made with them by respondents, examine bread submitted to them by respondents for that purpose. In the examiner's opinion the reference by respondents to their laboratory facilities does not necessarily mean that respondents themselves actually own or operate laboratories. The fact that respondents do have an arrangement with reputable testing laboratories for the testing of bread would appear to be sufficient factual basis for the use of the statement in question. As a practical matter it would appear to be immaterial and without public interest whether the testing is done in laboratories owned by respondents or in laboratories owned and operated by others but doing the testing under contract with respondents.

PAR. 9. By far the most serious issue raised by the complaint is whether respondents have represented and placed in the hands of others the means of representing that bread produced and sold by various baking concerns purchasing respondents' sales program has been awarded a prize or recognition in a competitive contest with other breads, when in fact, the complaint charges, no such contest has been held. Respondents' sales program is sold to wholesale bakers, usually only one in each town or city, and includes, among other things, suggested advertising for use in newspapers and radio continuities and also suggested news stories for use by the local paper. Respondents also supply "blue ribbon" bands to be placed on the loaves of bread, as well as blue ribbons to be worn by the bakery's salesmen or routemen. In addition, respondents supply a large blue ribbon to be awarded the baker in a public presentation, the presentation usually being made by respondents under the name American Bakers Council or Independent Bakers Council of America. In connection with the presentation, as much publicity as possible is sought, particularly in the local newspaper. In all of this advertising and publicity, emphasis is placed on the purported fact that the baker has been awarded a "first prize" or "blue ribbon." Typical of statements appearing in the earlier advertising (1950) are the following:

(NAME) BREAD CO. WINS
FIRST PRIZE AWARD
as the *finest* White Bread
in the United States!
FROM
AMERICAN BAKERS COUNCIL
National Organization of Baking Authorities

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Included in the advertisement was a picture of a blue ribbon, on which the following appeared:

FIRST
PRIZE
WINNER
Awarded
FIRST
PRIZE
FINEST
WHITE
BREAD
IN THE
UNITED
STATES
AMERICAN
BAKERS
COUNCIL

Beginning in January 1951 use of the words "first prize" was discontinued and emphasis placed upon the award of the "blue ribbon." These later advertisements have read substantially as follows:

(NAME) FINE BREAD
Awarded the
BLUE RIBBON for Excellence
one of the *finest* White Breads
in the United States!
FIRST IN
FRESHNESS—FLAVOR
QUALITY—UNIFORMITY
CLEANLINESS and VALUE

We are justly proud that (Name)
Fine Bread has been selected
for this honor in our community.
We have received this valued
citation for the FRESHNESS . . .
FLAVOR . . . QUALITY . . . UNIFORMITY
. . . CLEANLINESS . . . AND GOOD VALUE
OF our loaf. We pledge ourselves
to merit this BLUE RIBBON AWARD
always.

(Name) Fine Bread has been tested
and scored by the laboratory facilities
of the INDEPENDENT BAKERS COUNCIL
of AMERICA and met their quality
standards. (Name of town) house-
wives are invited to taste test
this fine bread . . . and enjoy the
loaf that has earned the BLUE
RIBBON AWARD.

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On the blue ribbon pictured in the advertisement has appeared the following:

Awarded
the
BLUE
RIBBON
for
EXCELLENCE
of
FRESHNESS
FLAVOR
QUALITY
UNIFORMITY
CLEANLINESS
VALUE
by
INDEPENDENT
BAKERS COUNCIL
of America

Actually, there has never been at any time, either under the old advertising or the new, any competitive contest. As stated above in connection with the issue as to laboratory facilities, respondents have arrangements with certain testing laboratories under which the laboratory examines or tests the breads of respondents' customers. The various breads sent to the laboratories from time to time are graded or scored by the laboratory with respect to certain characteristics, such as grain, texture, character and color of crust, taste, aroma, etc., and any bread meeting certain minimum standards is eligible for the so-called blue ribbon award. While respondents state that they do not accept a contract from a prospective purchaser of their sales plan until after his bread has been found satisfactory, and that in several instances customers have been required to submit additional samples of their bread when the first sample was found not to be satisfactory, the record further shows that in no case has a prospective customer been rejected or his bread denied the blue ribbon award. It appears clear from the record that any baker producing a reasonably good bread can obtain the award.

Respondents readily concede that the earlier advertising, in which reference was made to a "first prize," was misleading as representing or implying a competitive contest. It is urged, however, that this is not the case as to the later advertising, in which no reference is made to a "first prize" but only to the awarding of a blue ribbon for excellence. Respondents insist that the expression "blue ribbon" has come into general acceptance as a symbol of quality, that it simply connotes

good or high quality or excellence, not that the article or product has been adjudged highest in a competitive contest.

While in certain circumstances this might well be true, the position appears not to be tenable in the situation here presented. Here the expression "blue ribbon" is not used merely as the trade name of a product nor in any general way to connote quality. Rather, the advertising states expressly that the bread has been "awarded the blue ribbon for excellence" as "one of the finest white breads in the United States"; that the bread is "first in freshness, flavor, quality, uniformity, cleanliness and value"; and that "We are justly proud that (Name) Fine Bread has been selected for this honor in our community. We have received this valued citation for the freshness, flavor, quality, uniformity, cleanliness and good value of our loaf. We pledge ourselves to merit this blue ribbon award always." It is difficult to believe that the general public, upon reading such an advertisement, could have any impression other than that the bread in question had received highest recognition in a competitive contest with other breads in that community. Insofar as the effect upon the public is concerned, it would appear to make little difference whether the advertisement refers specifically to a "first prize" or to the award of a "blue ribbon." It is therefore concluded that respondents' advertising is unwarranted and misleading.

PAR. 10. Respondents' acts and practices, as described in Paragraphs Four and Nine, have the tendency and capacity to mislead and deceive a substantial number of wholesale bakers and retail dealers and a substantial portion of the purchasing public with respect to respondents' business status and with respect to the products of respondents' customers, and the tendency and capacity to cause such wholesale bakers to purchase respondents' sales program and to cause such retail dealers and members of the public to purchase the products of respondents' customers as a result of the erroneous and mistaken belief so engendered. Respondents acts and practices serve also to place in the hands of others an instrumentality whereby they are enabled to mislead and deceive retail dealers and the purchasing public. In consequence, substantial trade has been diverted unfairly to respondents from their competitors and to the customers of respondents from the competitors of such customers.

CONCLUSION

The acts and practices of respondents, as hereinabove set out, are all to the prejudice of the public and of respondents' competitors and the competitors of respondents' customers, and constitute unfair methods of competition and unfair and deceptive acts and practices in

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commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, American Business Counselors, Inc., a corporation, and its officers, and William Donald Dunkle, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' merchandising plans or programs and of advertising and promotional material in connection therewith, do forthwith cease and desist from:

(1) Representing, directly or by implication, that an office is maintained by respondents in any city other than that in which an office or place of business is in fact maintained, occupied and used by respondents.

(2) Representing or supplying to others the means of representing, directly or by implication, that competitive contests are conducted by, or at the instance of respondents to determine the relative quality or merit of products of different bakeries, or that any particular product has been awarded a prize or other distinction in a competitive contest conducted by or at the instance of respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of March 20, 1952].