IN THE MATTER OF

BROADMORE FASHIONS, INC., DAN-DEL COAT CORP., AND BERNARD DROBES AND HARRY BRODY

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

Docket 6231. Complaint, Aug. 19, 1954—Decision, Jan. 18, 1955

Order requiring two sellers in New York City to cease violating the Wool Products Labeling Act by labeling certain ladies' coats as "100% Cashmere" when they were composed entirely of sheep's wool, by failing to label wool products as required, and by failing to set forth separately on tags the fiber content of interlinings.

Mr. George Steinmetz for the Commission.
Mr. Charles M. Kagan, of New York City, for respondents.

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 January 18, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on August 31, 1954, issued its complaint herein under the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, against the above-named corporate respondents and against the respondents Bernard Drobes and Harry Brody, both individually and as officers of both of said corporations, charging them and each of them in several particulars with having violated the provisions of said Acts and of the Rules and Regulations of the Commission promulgated under said Wool Products Labeling Act. Said complaint was duly served upon each of said respondents. On September 20, 1954, all respondents filed their answer, and on October 4, 1954, pursuant to an order of the hearing examiner so authorizing, they filed their amended answer. The amended answer in substance admits all allegations of the complaint except that respondent Harry Brody denies being an officer of Dan-Del Coat Corp., and all respondents state they are without any knowledge as to whether the ladies' coats referred

to in the complaint contained any of the hair or fiber of the Cashmere or Kashmir goat as alleged therein. Respondents reserved, however, in said amended answer, their right to submit proposed findings and conclusions of law and the right to appeal under the Rules of Practice of the Commission.

A hearing was held pursuant to the notice given in the complaint, at New York, New York, on October 26, 1954, before the above-named hearing examiner, theretofore duly designated by the Commission, upon the issues presented by said complaint and amended answer. At such hearing respondents appeared by their above-named attorney of record and it was agreed between counsel supporting the complaint and all respondents by their said attorney that in lieu of the introduction of oral testimony and other evidence by the parties that the proceeding would be submitted for decision on the basis of a "Stipulation as to the Facts," upon which the hearing examiner might in his discretion proceed to make his initial decision, stating therein his findings as to the facts, including inferences to be drawn from said stipulation, and that an order might be entered by him disposing of the proceeding as to each and all of the respondents, in form and substance as set forth in the "Notice" portion of the complaint, without the filing of proposed findings and conclusions, or the presentation of oral argument. There was no waiver by respondents of their right to appeal and it was stipulated that if the proceeding should come before the Federal Trade Commission upon appeal from the hearing examiner's initial decision or by review upon the Commission's own motion, it may set aside the stipulation and remand the case to the hearing examiner for further proceedings under the complaint.

Upon the statements of counsel and upon due consideration of said stipulation by the hearing examiner, said stipulation was accepted by the hearing examiner and received in evidence, subject only to a reservation then made by counsel for respondents that later in the hearing he might also submit in evidence a photostatic copy of a certain bank resolution purporting to prove that the respondent Harry Brody had first become an officer of the respondent Dan-Del Coat Corporation on March 12, 1954. An exhibit purporting to be such bank resolution was thereafter offered in evidence on behalf of said respondent Harry Brody without objection and the same was received in evidence by the hearing examiner. This document, however, the hearing examiner finds is not in fact a bank resolution and at most is only indicative that one Gustave Daniels was the president of Dan-Del Coat Corp. on February 5, 1954, and it does not tend to prove or disprove any of the issues presented herein or in any manner

affect the agreed facts set forth in the said "Stipulation as to the Facts."

Counsel for respondents also made an argument purporting to bear upon mitigation, explaining in substance the business losses claimed to have been sustained by the respondent Dan-Del Coat Corp. prior to its dissolution in connection with the sale or resale of certain of the misbranded coats involved herein; that Brae Burn Coats, Inc., a newly organized corporation has succeeded to the business of Dan-Del Coat Corp., now dissolved, and of which new corporation the respondents Bernard Drobes and Harry Brody are the officers and formulators of policy; and that such new corporation is conducting its business in accordance with the Wool Products Labeling Act. Such matters of alleged mitigation have no bearing in this particular proceeding which is preventive in nature. The complaint herein does not allege any intent to do a wrongful act. The Wool Products Labeling Act has among its express objectives, as stated in its Title, the protection of "producers, manufacturers, distributors, and consumers from the unrevealed presence of substitutes and mixtures in spun, woven, knitted, felted or otherwise manufactured wool products." The Act makes misbranding the gist of the offense and "contemplates corrective action by the Commission regardless of whether such misbranding is based upon wilfulness, negligence, or other causes." *Smithline Coats, et al.*, 45 F. T. C. 79 (1948), opinion of Commissioner Ewin L. Davis, pp. 86, 87. And it just as clearly appears that whether the respondents here have profited or lost by the re-sale of misbranded garments after any alleged violation of the Act is immaterial to a decision in this particular proceeding on the issue of whether or not they were in fact misbranded contrary to the Act.

And now the proceeding having come on for final consideration and initial decision by the hearing examiner upon the complaint, answer, stipulation, evidence and statements and arguments of counsel made at the hearing, counsel having stipulated not to file proposed findings and conclusions, and the hearing examiner having duly considered the whole record herein, finds that this proceeding is in the interest of the public; that the complaint states in each alleged particular a cause for complaint under the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and Rules and Regulations promulgated under the later act; and that the Commission has jurisdiction of the subject matter and of each of the parties respondent. The hearing examiner therefore makes the following findings of facts as so stipulated, the conclusions drawn therefrom, and order.

FINDINGS OF FACTS

PARAGRAPH 1. The corporate respondent Broadmore Fashions, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, and respondent Bernard Drobes is president and secretary, and respondent Harry Brody is vice president and treasurer thereof. These individual respondents formulate, direct and control the acts, policies and practices of the said corporate respondent, Broadmore Fashions, Inc.; and the principal office and place of business of each said corporate and individual respondents is 237 Mercer Street, New York 12, New York.

PAR. 2. The corporate respondent, Dan-Del Coat Corp., was a corporation organized under and by virtue of the laws of the State of New York in January 1954, and thereafter continued to function as a corporate manufacturing, selling, and distributing organization until on or about September 15, 1954, at which time it filed a Certificate of Dissolution with the Department of State, State of New York, pursuant to the statutes of the State of New York, in such case made and provided.

PAR. 3. That during the existence of said corporate respondent, Dan-Del Coat Corp., the respondent Bernard Drobes acted as president, and the respondent Harry Brody, as secretary and treasurer thereof. These individual respondents, Bernard Drobes and Harry Brody formulated, directed and controlled the acts, policies and practices of said corporate respondent, Dan-Del Coat Corp., during the term of its existence, and the office and principal place of business of said respondents, including Dan-Del Coat Corp., was 286 Taaffe Place, Brooklyn, New York.

PAR. 4. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since September 1st, 1953, the said respondents, have 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 said Act, Wool products, as "wool products" are defined in said Act.

PAR. 5. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein. Among such misbranded wool products were ladies' coats labeled or tagged by respondents as consisting of "100% Cashmere," whereas, in truth and in fact, said products were composed entirely of the wool of the genus sheep.

PAR. 6. Through the use of said labels, tags and legends aforesaid, respondents represented that said wool products were manufactured from fabrics composed of the hair or fiber of the Cashmere or Kashmir goat, which representations were false and deceptive in that they did not contain any of the hair or fiber of the Cashmere or Kashmir goat, but were composed entirely of fabrics manufactured from the wool of the genus sheep.

PAR. 7. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (2) of said Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder, in that they were not stamped, tagged or labeled as to disclose the name or the registered identification number of the manufacturer thereof or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 8. Certain of said wool products were further misbranded in that the fiber content of the interlinings was not separately set forth on the stamps, tags, labels or other means of identification attached thereto.

CONCLUSIONS

The acts and practices of the respondents as above stipulated by the parties and hereinabove found to be factually true were and are in each particular in violation 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. Although the Dan-Del Coat Corp. was dissolved subsequent to the institution of this proceeding, which dissolution took place on or about September 15, 1954, for the purposes of this proceeding the order hereinafter entered should run against it and its said officers.

ORDER

It is ordered, That respondent Broadmore Fashions, Inc., a corporation; respondent Dan-Del Coat Corp., a corporation; respondents Bernard Drobes and Harry Brody, individually and as officers of said corporations; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of ladies' coats or other "wool products," as such products are defined in and are subject to the said Wool Products Labeling Act of 1939; which products contain,

purport to contain, or in any manner are represented as containing "wool," "reprocessed wool" or "reused wool," as such terms are defined in said Act, do forthwith cease and desist from misbranding said products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner;

(*a*) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total 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 percentum 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 delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as containing hair or fleece of the Cashmere or Kashmir goat.

4. Failing to separately set forth on the stamps, tags, labels or other means of identification, the true character and amount of constituent fibers of the interlinings of any such wool product.

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 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 January 18, 1955].

IN THE MATTER OF

SPIRT & COMPANY, INC., ET AL.

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

Docket 5926. Complaint, Oct. 8, 1951—Decision, Jan. 20, 1955

Order requiring a corporation in Waterbury, Conn., to cease advertising that its preparation "Lipan", the active ingredients of which were hog pancreas and vitamins B_1 and D, was a cure for psoriasis and would prevent its recurrence.

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

Mr. John J. McNally for the Commission.

Weisman & Weisman, of Waterbury, Conn., and *Mr. Lewis E. Caplan*, of New Haven, Conn., for respondents.

ORDERS AND DECISION OF THE COMMISSION

Order denying appeal of counsel supporting the complaint from initial decision and decision of the Commission and order to file report of compliance, Docket 5926, January 20, 1955, follows:

This matter came on to be heard by the Commission upon the appeal filed by counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs in support of and in opposition to said appeal, oral argument not having been requested.

The Commission having considered the appeal and the record herein and having determined that the grounds for appeal are without merit and having additionally determined that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding;

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner did, on the 20th day of January 1955, become the decision of the Commission.

It is further ordered, That the respondents, Spirt & Company, Inc., a corporation, and Louis L. Spirt, S. Burton Spirt and Thelma F. Spirt, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and

form in which they have complied with the order to cease and desist contained in the initial decision.

Commissioner Mead dissenting.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 8, 1951, issued and subsequently served its complaint in this proceeding upon the respondents Spirt & Company, Inc., a corporation, and Louis L. Spirt, S. Burton Spirt, and Thelma F. Spirt, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. 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 allegations of said 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, answer, testimony and other evidence, and proposed findings as to the facts and conclusions of law presented by counsel, 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, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Spirt & Company, Inc., is a corporation organized and existing by virtue of the laws of the State of Connecticut with its office and principal place of business located in Waterbury, Connecticut.

Respondents Louis L. Spirt, S. Burton Spirt and Thelma F. Spirt are president, treasurer and secretary, respectively, of corporate respondent. Said individuals as officers of corporate respondent formulate, direct and control its policies, acts and practices.

PAR. 2. The respondents are now, and have been for more than one year last past, engaged in the sale of a preparation containing drugs as "drug" is defined in the Federal Trade Commission Act. Said preparation is sold in both tablet and capsule form.

The designation used by respondents for their said preparation and the formula and directions for use thereof are as follows:

Designation: Lipan.

Formula: The active ingredients in each tablet or capsule are:

7½ grains of desiccated and defatted hog pancreas of triple U. S. P. strength.

500 International Units of Vitamin B_1

500 International Units of Vitamin D.

Directions:

Dosage: Two to three capsules before each meal or as recommended by the physician. Chemical research has shown that because of the special nature of the LIPAN treatment, results should be expected only after LIPAN has been taken for several weeks. Careful investigation by well known physicians has demonstrated that Psoriasis—so difficult to correct—may be effectively alleviated when LIPAN is taken consistently.

Alcohol contra-indicated: During treatment, it is essential that alcoholic beverages or alcohol in any form be avoided. (Keep bottle tightly capped.)

PAR. 3. Respondents cause said preparation, when sold, to be transported from their place of business in the State of Connecticut to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparation in commerce between and among the various States of the United States and in the District of Columbia. Their volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their business, respondents have disseminated and have caused the dissemination of advertisements concerning Lipan by the United States mails, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said product in commerce.

Among the statements and representations contained in said advertisements are the following:

(*a*) For the past several years a number of Physicians have reported amazing success in treating Psoriasis with LIPAN—a new medical wonder taken *internally*. LIPAN (registered U. S. Patent Office) is a combination of glandular substances that treat certain internal disorders which many medical men now agree to be the cause of Psoriasis. Clinical results show LIPAN successful in over 90% of the cases treated. Even stubborn lesions are alleviated to a degree almost beyond belief. *Absolutely harmless.*

(*b*) Psoriasis, as you know, is an unpredictable affliction and no one can foretell exactly how quickly response will be observed in any given case. Patient dosage with LIPAN has been found to be effectively gratifying to those who exhibit a persistent attitude. Whether your own case responds quickly to LIPAN, or whether it proves to be one of the medium or obstinate cases, we are confident that a persistent attitude and patient dosage with LIPAN will be found effective.

(c) Do not expect miracles from LIPAN but give it a thorough trial. Psoriasis does not develop overnight and it will not disappear overnight. Although this new internal medication has demonstrated remarkable ability to clear up the skin and to keep it free from lesions year after year, results are not obtained immediately. Remember, when you take LIPAN you are attacking what is now believed to be the cause of the disease, not merely treating the symptoms. Patience is necessary. Naturally, different sufferers from Psoriasis respond differently. As a general rule, it takes at least five weeks before the lesions and crusty scales begin to disappear. For obstinate cases a longer time may be needed.

Subparagraph (a) above is the text of an advertisement appearing in "Screenland" and "Personal Romances" magazines during the first half of the year 1951; subparagraph (b) is from a form letter used by respondents to acknowledge receipt of a reorder of Lipan and was sent by mail separately or enclosed in the reorder shipment; and subparagraph (c) is from the last paragraph of an advertising circular distributed by respondents to persons who asked for information regarding Lipan.

PAR. 5. Through the use of the foregoing statements and representations and others of similar import, not specifically set out herein, respondents have represented and now represent that Lipan, taken as directed, is effective for the alleviation of the lesions and scales which are the visible symptoms or manifestations of psoriasis. There is no direct representation that Lipan is an "effective treatment" for psoriasis as alleged in the complaint. However, there are statements in respondents' advertising matter which, considered in the light of the emphasis added by the format and type selection of the advertisements, would lead to the conclusion upon the part of a substantial part of the purchasing public that Lipan is a cure for psoriasis and will prevent its recurrence.

PAR. 6. The said advertisements are misleading in material respects and are false advertisements as that term is defined in the Federal Trade Commission Act, as more specifically hereinafter set forth.

The record is clear that the etiology of psoriasis is undetermined and that there is no known cure; hence, any representation, direct or implied, that respondents' product is a cure for psoriasis and will prevent its recurrence is false and misleading.

Whether or not Lipan is effective, or an "effective treatment," as used in the complaint, for psoriasis depends upon definition. Some of the medical testimony was to the effect that for a product to be an effective treatment for a disease it must be a cure for that disease, but the preponderance of the evidence is that, although as to some diseases such connotation is acceptable, yet as to ailments for which there is no known cure, the term is used by the medical profession and under-

stood quite generally as referring to an agent or treatment that brings about an amelioration of symptoms, which, in the case of psoriasis, would be a clearance of all or a substantial portion of the lesions or patches for a reasonable length of time. Cure would connote the complete removal or involution of all the skin lesions without recurrence. The preponderance of the reliable, probative and substantial evidence in this proceeding does not support the conclusion that Lipan is not, in many instances, an effective treatment for psoriasis.

In support of the allegations of the complaint three eminent dermatologists were presented none of whom had used respondents' product although all of them had used, separately or in combination, vitamin B_1, vitamin D and a pancreatic substance which none of them could identify as being from the same source or of the same strength as that contained in Lipan. Two of these experts, father and son, defined effective treatment as synonymous with cure, and stated that Lipan is not an effective treatment for psoriasis. Their testimony must be evaluated in terms of their definition. The other expert stated that an effective treatment should result in removal of all the lesions of the disease for a considerable period of time and, based on his clinical observations and his use of the ingredients indicated above, he would not think that Lipan would be an effective treatment.

In opposition to the allegations of the complaint, respondent Louis L. Spirt testified that he was born in 1907, that he had suffered from psoriasis since infancy, that following the use of desiccated, defatted hog pancreas for an eight month period in 1939, the psoriatic lesions which had previously covered approximately seventy-five percent of the surface of his body disappeared. For a period of about six months he then discontinued the use of this substance and the lesions returned. He then resumed the hog pancreas treatment and the lesions again cleared completely. He continued the use of hog pancreas until 1946 or 1947 when he started using Lipan. Since then he has been taking "a maintenance dose" of two capsules of Lipan daily and his skin has been free of lesions.

This testimony was supported by Spirt's personal physician, a specialist in internal medicine, who testified also that he has used and uses Lipan in his private practice and has found it an effective treatment for psoriasis, defining effective treatment as one in which from 50% to 75%, or more, of the psoriatic lesions are cleared. During a test period of from 12 to 18 months, he administered Lipan to some forty psoriatic patients and observed that beneficial results were obtained in from 60% to 65% of the cases. His belief that Lipan is an

effective treatment for psoriasis is based on his experience with his private patients and these tests.

Two dermatologists, who were equally as qualified as those presented in support of the complaint who had used Lipan in private practice and in specific tests, testified that Lipan is an effective treatment for psoriasis; one conducted his tests in Philadelphia, the other in Boston. There was no collaboration between the two. One found complete clearance of lesions or improvement in 58% of the patients tested, the other in 63%. This they believed to be ascribable to Lipan and to be significant, even though in some cases external treatments were also used.

These tests were not conducted under close controls in a technically approved scientific manner nor were all the supporting detail data produced, yet the character of the men making the tests and the further fact that each has used and is using the product in private practice lends weight to their testimony.

This case does not rest upon the determination of the scientific accuracy of the tests or upon the reported results of such tests. As against expert testimony based upon experience, general knowledge and the separate use of some or even all of the ingredients of respondents' product, expert testimony which is based upon equally valid general knowledge supported by experience gained from use of respondents' product in medical practice and in specific tests has the greater weight. But even were the evidence equally balanced the conclusion would have to be that the allegations of the complaint as to the effectiveness of Lipan are not sustained.

PAR. 7. The use by respondents of the advertisements and representations hereinabove found to be false and misleading had and has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations contained therein are true, and to induce the purchase of substantial quantities of respondents' preparation by reason of such erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondents, herein found to be false and misleading, 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 respondents Spirt & Company, Inc., a corporation, and its officers, Louis L. Spirt, S. Burton Spirt and Thelma F. Spirt, individually and as officers of said corporation, their representatives, agents and employees, 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 the preparation Lipan or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same or any other name, do forthwith cease and desist from, directly or indirectly,

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(*a*) that said preparation constitutes a cure for psoriasis, or will prevent its recurrence;

(*b*) that said preparation has value in the treatment of psoriasis except as it may afford relief of the external symptoms and manifestations of psoriasis.

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

DISSENTING OPINION OF COMMISSIONER MEAD

The Commission has denied in its entirety the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and, being of the opinion that the appeal should have been in part granted, I am noting my dissent from that action. I am convinced that certain findings of fact appearing in the initial decision are not in accord with the greater weight of the scientific evidence received in this proceeding, and I deem the order to cease and desist which is contained in the initial decision to be inappropriate to the extent that its proscriptions have been restricted by those erroneous findings of fact.

Respondents are engaged in the advertising and sale in commerce of the product Lipan, which is offered for use by persons afflicted with psoriasis. The complaint under which this proceeding was instituted

alleges that the respondents have represented in advertisements that their preparation constitutes an effective treatment or cure for that disorder and will prevent its recurrence, and that the advertisements to such effect are false advertisements within the meaning of the Federal Trade Commission Act. The initial decision rejected the views expressed by certain of the scientific witnesses called by the respondents to the effect that Lipan, when used as directed, will be effective in preventing the recurrence of psoriasis and, in that connection, found that the advertising statements in reference to product efficacy against recurrence have been false and misleading. The hearing officer properly concluded also that the preparation is not a cure for psoriasis as represented in the advertising for Lipan.

On the question of its efficacy as a treatment, three physicians, who were called by the respondents, in effect testified that their use of Lipan, in the course of clinical studies conducted by them and otherwise in their practice, warranted conclusions that the preparation is an effective treatment for psoriasis and that it affords complete or partial clearance of lesions in many cases. On the other hand, the physicians called by counsel supporting the complaint, who testified in the course of the case-in-chief, variously expressed views that Lipan is not an effective treatment for psoriasis or has no beneficial effect upon it. Among other things, the initial decision holds that, as against the expert testimony of the witnesses appearing in support of the complaint which is based on their experience and general knowledge and separate use of some or all of the ingredients contained in the respondents' preparation, the testimony of the witnesses presented by the respondents must be regarded to have the greater weight. The reasons as assigned in that decision is that the views of the latter appear based on equally valid general knowledge and supported additionally by experience gained from use of the product Lipan, both in their practice and in specific tests. The initial decision, accordingly, has held that the preponderance of the reliable and probative evidence does not support conclusions that Lipan will not in many cases constitute an effective treatment for psoriasis, and it is these evaluations as to the weight of the evidence which I regard to be erroneous.

Psoriasis, the record shows, is characterized by dense silvery scales on the body's surfaces and the lesions appearing on the skin vary in size and pattern. An interesting characteristic of this chronic disease, for which there is no known cure, is that it is subject to spontaneous cycles of remission and exacerbation varying in duration and intensity. Responsiveness to treatment from person to person and

from attack to attack on the same patient is highly variable and changes in diet, climate or other factors sometimes are accompanied by changes in the condition of the lesions.

Each Lipan tablet contains 7½ grains of desiccated and defattened hog pancreas, triple U. S. P. strength, 500 International Units of Vitamin B–1 and 500 International Units of Vitamin D. This pancreatic substance, referred to scientifically as pancreatin, is secured by the respondents through regular commercial channels and contains amylolytic and tryptic enzymes, capable respectively of converting 75 times their own weight of starch or casein (protein) under testing conditions prescribed in the United States Pharmacopeia. Triple strength apparently refers to the fact that, under U. S. P. standards, minimum enzymatic activity of one-third the foregoing rate is required in order to identify these glandular substances as pancreatin.

Two of the physicians called by the respondents orally outlined their theories as to the manner in which Lipan assertedly influences internal processes believed by them to be responsible for psoriasis in the first instance. Although their views differed in certain respects, their testimony indicates that they have subscribed to variants or facets of a theory first advanced many years ago, which hypothesized that a disturbance in the body's fat metabolism caused by some pancreatic deficiency or shortcoming is responsible for psoriasis. It is to be noted in this connection that one of these physicians, when attributing Lipan's efficacy to an ability to assist in the digestion of fats, entertained the erroneous view at the outset of his testimony that the pancreatin contained in Lipan had a "tryptic value" under which one gram would digest 75 grams of fat. Tryptic value is a scientific term used in designating the relative activity of trypsin, the enzymes assisting in the conversion of proteins, but it nowise applies to the relative activity of lipase, a fat digesting enzyme. Although pancreatin contains lipase, the latter's presence and activity do not appear to be standardized in preparations commercially available, and it is clear from the record that the pancreatic material prepared by the respondents' source of supply is no exception.

One of the foregoing doctors agreed, however, that most present day texts say the cause of psoriasis has not been fixed. The three physicians presented by counsel supporting the complaint in the course of the direct case, and another who was called by the respondents, affirm that the etiology of this disease is not known. Upon the basis of this record, there can be no question but that the great weight or concensus of informed medical opinion holds that the etiology of this disease still

awaits discovery. The only pathology, therefore, which has been heretofore established for psoriasis is one limited to skin surfaces. In the circumstances, such testimony as was directed to establishing authoritative theoretic bases in support of views that Lipan has therapeutic merit, must be regarded as entirely unconvincing.

The witnesses called by the respondents, in substantial part, base their evaluations of Lipan on observations made during the course of three series of clinical studies. Two of them, Dr. Bizzozero, who has attended respondent Louis L. Spirt and has assisted him in developing the preparation's formula and selecting its trade name, and Dr. Harris, together with another physician, jointly reported in two medical publications on clinical work conducted with two groups of patients. One group numbering 40 private patients was observed by Dr. Bizzozero, and Dr. Harris was primarily responsible for observations of the other, numbering 50. In addition to Lipan, local therapy in the form of boric acid ointment was utilized.

According to the reports, either complete regression or decided or moderate improvement occurred in 58% of the patients of the larger group and among the private cases, 77.5%. In the two series involving 90 patients, a total of 11 cases was reported to have enjoyed complete regression of symptoms and 24 others were deemed by the doctors to have experienced decided improvement. Cases differentiated as moderately improved total 25. In their earlier joint report, the doctors stated they felt that the method of treatment used should prove satisfying to the dermatologist, general practitioner, and patient. In the other report, likewise published after this proceeding was instituted, this conclusion does not appear and it states instead that, while results were encouraging, caution should be exercised in their interpretation due to the cyclical nature of this disease.

As to the third scientific witness called by the respondents, Dr. Combs' data on his clinical study relate to 48 cases. Additional patients participated who dropped out but their number is unknown, the record indicating in such connection that difficulty was encountered in inducing patients to continue treatment for extended periods of time without noting improvement. As a result of this clinical trial, he adjudged 43% of the patients to be cured and 20% as improved or fair, and he in effect stated that 37% represented failures. It was among those in a so-called A-Group of 21 patients involved in the study where the witness believed best results were achieved. Of this group, his testimony shows that approximately one-half dozen had no lesions on their last visit to the witness' office prior to his testimony. In some of the remaining cases, the doctor asserted that the lesions

cleared during the course of the study but it appears they recurred, either during the course of Lipan therapy or when it was not in use, but the witness felt the time interval before recurrence was sufficient to justify evaluations of some of them as cures.

Practically all of the patients were given conventional therapy such as radiation, local applications or other treatment in the course of the last study, and the record strongly suggests that, of those reportedly enjoying complete regression of lesions at the termination of the study, only one had not been treated with other therapy. Temporary regression or marked alleviation frequently follow use of any of various forms of radiation treatment and sometimes of other therapy, and as noted also, spontaneous cycles of remission and exacerbation are characteristic of the disorder. Assuming the accuracy of the doctor's observations and evaluations of his patients, so routinely were time-honored measures of conventional therapy afforded for some patients during the study, that doubts and reservations are fully warranted respecting its significance as an index to Lipan's attributes.

Turning now to the testimony of the dermatologists called in support of the complaint, one reported that he experimentally treated numerous cases of psoriasis with massive doses of Vitamin D and used large doses of B–1 without satisfactory response, and that results were similar with patients whose treatment consisted of desiccated pancreatic preparations in doses of 15 grains three times daily. Another based his opinions in part on his clinical experience with pancreatin, B–1 and Vitamin D separately, which were undertaken by the clinic of a large university with which he was then identified. He stated, in effect, that there were no satisfactory results and that none appeared during trial periods extending over several months with each patient when these three were administered in combination in the form of separate tablets.

The third dermatologist called in support of the complaint has engaged in clinical studies intermittently since 1939, variously using B–1, D, pancreatin and other preparations. In considerable part, his research was done during service with our Government and in its clinics, a circumstance which serves to point up the fact that psoriasis is in many respects a national problem. Illustrative of this is the interest of the Veterans Administration. Psoriatics draw as high as 30% to 60% disability payments and therapy for the disease likewise is costly. In 1941, the witness began clinical studies of pancreatic substances among a group of approximately 200 patients and used them in varying dosages without evidence of beneficial results. In connection with these, control or non-therapy groups of patients were established and simultaneously observed to assist in evaluating results. Later, in 1949, he began additional clinical trials with a substantial group of patients

using pancreatic extract, B–1 and Vitamin D in combination. The results there also were negative.

Stating that none of the witnesses called by counsel supporting the complaint had used Lipan in the course of their studies and experiments, the hearing examiner, when ruling on certain proposed findings, concluded that their testimony was based almost exclusively on theory. The circumstance that they did not use Lipan itself, however, is not controlling nor is it controlling that the record does not expressly show whether the enzymatic activity of the pancreatic extracts used by them has exceeded U. S. P. minimal standards. The record supports conclusions that pancreatin is pancreatin, so to speak, and there is no question but that the desiccated glandular products as used by the scientists called in support of the complaint and by respondents in preparing Lipan all come from regular commercial channels. The conclusion reached below that these physicians' testimonial knowledge is confined essentially to abstract theory, is manifestly erroneous.

I think also that their experience individually and in the aggregate is impressive. Their clinical work appears to have been carried on under conditions appropriate for evaluating the therapy under trial and part of it has utilized a methodology of controls tending to afford evaluations excluding the factor of spontaneous remission and exacerbation which is so characteristic of this capricious disease. Critical analysis of the record thus convinces me that the clinical evaluations of the witnesses appearing in support of the complaint have the greater weight and clearly outweigh the testimony of the respondents' witnesses, including that of the respondent Louis L. Spirt relating to his personal therapy. I, therefore, do not concur in the initial decision's view that there is inadequate record support for conclusions to the effect that Lipan will not constitute an effective treatment for psoriasis. While the record may not support a conclusion that the preparation is devoid of beneficial effects under all conditions of use, as contended by counsel supporting the complaint, the greater weight of the probative evidence does clearly show that Lipan will not be effective in clearing, even for temporary periods, all or substantial portions of the lesions of sufferers of psoriasis and that it cannot be relied upon in any manner to influence favorably the course of this disease or its symptoms. It is thus clear that the respondents' preparation will not constitute an effective treatment for psoriasis, and the hearing examiner should have so found. Not having done so, he was in error, and the Commission in failing to supply the finding is also in error. Likewise deficient is the order to cease and desist wherein future claims for product merit are not forbidden in any foregoing respect.

IN THE MATTER OF

RAY BUSCH AND PAUL MUELLER, JR., DOING BUSINESS AS NATION-WIDE SEWING MACHINE AND SUPPLY COMPANY

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

Docket 6117. Complaint, Aug. 7, 1953—Decision, Jan. 20, 1955

Order requiring partners in Chicago to disclose the country of origin conspicuously on Japan-made sewing machines and sewing machine heads they sold to retailers; to cease using the trade name "Universal" for their products; and to cease representing in advertising matter furnished to dealers a wholly fictitious price as the normal retail price.

Before *Mr. John Lewis*, hearing examiner.

Mr. William L. Taggaret and *Mr. Michael J. Vitale* for the Commission.

Mr. Daniel S. Tauman, of Chicago, Ill., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 7, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said Act. The said respondents failed to file answer to the complaint and failed to appear at the time and place fixed for hearing. At said hearing before the above-named hearing examiner, theretofore duly designated by the Commission, the attorney in support of the complaint moved that the hearing be closed without the taking of testimony and that the hearing examiner proceed, in due course, to find the facts to be as alleged in the complaint and issue an order to cease and desist in the form set forth in the "Notice" portion of said complaint. It appearing that the aforesaid "Notice" provided that the failure of respondents to file timely answer and to appear at the time and place fixed for hearing would be deemed to authorize the Commission and the hearing examiner to find the facts to be as alleged in the complaint and to issue an order in the form therein set forth, the hearing examiner granted said motion and the hearing was thereupon closed. Thereafter, the proceeding regularly came on for final consideration by the said hear-

ing examiner upon the complaint and said motion of the attorney in support of the complaint; and said hearing examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and, pursuant to Rules V and VIII of the Rules of Practice of the Commission, makes the following findings as to the facts, conclusion drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Ray Busch and Paul Mueller, Jr., were, at all times material hereto, copartners, doing business under the name of Nation-Wide Sewing Machine and Supply Company, with their office and principal place of business located at 3551 West Fullerton Avenue, Chicago, Illinois.

PAR. 2. Said respondents were, for several years last past, engaged in the sale and distribution of sewing machines, of which heads importd from Japan are a part, under the brand or trade names, "Dressmaker," "New Electric" and "Universal," 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 Illinois, to the retailers thereof located in various other States of the United States. The volume of trade in said commerce has been substantial.

PAR. 3. When the sewing machine heads were received by respondents, the words "Japan" or "Made in Japan" appeared on 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 word or 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 "Japan" or "Made in 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. Respondents placed no other marks on their imported sewing machine heads or on complete sewing machines of which said heads were a part, showing foreign origin before sale.

PAR. 4. When sewing machines or sewing machine heads are exhibited and offered for sale to the purchasing public and such products are not labeled or otherwise marked clearly showing they are of foreign origin, or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such products to be wholly or substantially of domestic origin.

There is among the members of the purchasing public a substantial number who have a decided preference for sewing machines and sewing machine heads which are manufactured in the United States over such products originating in whole or in substantial part in foreign countries, where other considerations such as style and quality are equal.

PAR. 5. Respondents have used the word "Universal" and other well known domestic names as trade or brand names for their sewing machine heads and complete sewing machines, which words were printed or embossed on the front horizontal arm of the head in large, conspicuous letters, and used said trade or brand names in their advertising matter. The word "Universal" and other well known names so used are the names, or parts of the names of, or used as trade names, marks or brands by, one or more business organizations transacting and doing business in the United States, which are and have been well and favorably known to the purchasing public and which are and have been well and long established in various industries.

PAR. 6. By using a trade or brand name such as "Universal" and other well known domestic names, respondents have represented, directly or by implication, that their product is manufactured by, or connected in some way with, the well and favorably known American firm or firms with which said names have long been associated, which is contrary to the fact.

PAR. 7. There is a preference among members of the purchasing public for products manufactured by well and favorably known and long established concerns whose identity is connected with the word "Universal" and other well known domestic names. The use of said trade or brand names by respondents on their sewing machines and heads has enhanced the belief on the part of the public that the said sewing machines are of domestic origin.

PAR. 8. Respondents, in advertising matter furnished to dealers, have made such statements as the following:

(Picturization of a portable electric sewing machine)

$169.50

For a Lifetime of Service

By and through the use of the aforementioned statement, respondents represented, that their portable electric sewing machines were customarily sold to the members of the purchasing public for the sum of $169.50.

The aforesaid representations were false, misleading and deceptive. In truth and in fact, the sum of $169.50 is greatly in excess of the amount usually and ordinarily charged for the said sewing machines by retailers and is a wholly fictitious price.

PAR. 9. Respondents, by placing in the hands of dealers their said imported sewing machine heads and completed sewing machines, of which said heads are a part, and advertising material showing a fictitious retail price for their sewing machines, have provided said dealers a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said heads and the customary retail price of their sewing machines.

PAR. 10. Respondents, in the course and conduct of their business, were, at all times material hereto, in substantial competition in commerce with the makers and sellers of domestic sewing machines and also the sellers of imported sewing machines, some of whom adequately disclose to the public that their machines or parts thereof are of foreign origin.

PAR. 11. The failure of respondents adequately to disclose on the sewing machine heads that they are manufactured in Japan and also the use of trade or brand names such as "Universal" and other prominent domestic names have 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 is manufactured by the well and favorably known firm or firms with which said trade or brand names have long been associated and to induce members of the purchasing public to purchase sewing machines, of which said heads are a part, because of this erroneous and mistaken belief. Further, the use of fictitious retail prices has the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that the fictitious prices are the amounts usually and ordinarily charged for the said sewing machines by retailers.

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

ORDER

It is ordered, That the respondents, Ray Busch and Paul Mueller, Jr., individually and as copartners, doing business as Nation-Wide Sewing Machine and Supply Company, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of 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 machines, or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such a manner that it cannot readily be hidden or obliterated.

2. Using the word "Universal," 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 words or in any other manner, that their sewing machines or sewing machine heads are made by anyone other than the actual manufacturer.

3. Placing in the hands of others a means or instrumentality by and through which the purchasing public may be misled or deceived as to the usual and customary retail price of their sewing machines.

SPECIAL CONCURRING OPINION

By MASON, *Commissioner:*

Respondents having failed to file answer to the complaint and having failed to appear at the time and place fixed for hearing, and an order of default having been entered against them, the rules of the Commission provide:

"In the 'Notice' portion of the complaint there may be set forth a provisional order to cease and desist which the Commission shall have reason to believe should issue if the facts in the record shall be found to be as alleged in the complaint. If the complaint contains such order, it shall also state that such order shall issue, unless the respondent shall file an answer within the time designated in the complaint; shall appear at the time and place so fixed; and shall show cause why the said order to cease and desist should not be entered by the Commission, * * *."

Such order, in my opinion, applies the same sanctions and responsibilities to respondents that would be assessed against them were an

adversary hearing conducted with the presentation of evidence. Default or consent orders, in my opinion, carry equal validity with all others insofar as respondents are concerned. Such orders lack, however, that substantial guidance looked for by practicing lawyers and businessmen accorded both the public and courts under the rule of *stare decisis*—the legal doctrine which "attaches great weight to decisions which have invited those who administer governmental affairs to depend on them as correct expositions of the law, and which likewise incline those who deal with governmental bodies to determine their demands and courses of action on the decisions already announced. *Noonan* v. *City of Portland*, 88 P. 2d 808, 818, 161 Or. 213." (Words and Phrases, p. 605.)

The doctrine of *stare decisis* is a rule of precedent stated in its general and simplest terms. It expresses the policy of the courts not to disturb settled points. It is not a rigid compulsion but a deference to precedent.[1]

True deference is always based on an earned respect. The settlement of issues which have not been subjected to the cleansing fire of full presentation of both sides of a controversy hardly could be expected to carry the weight of a decision based on complete advocacy of two conflicting points by the champions of each cause.

The instant order was the outcome of silence and absence on the part of the respondents, and its entry is in the public interest for the purpose of terminating the particular controversy as it affects the parties litigant.

As to consent orders, they are encouraged by limiting the sanctions to those agreed to and specifically excluding the use of the decision in any other proceedings (as for instance, consent orders often provide they cannot be used as a basis for treble damage in other actions).

I feel called upon to make these observations at this time because the general questions involved in the present decisions have been the subject of two other consent orders already entered (Docket Nos. 6013 [2] and 6064 [3]) and one contested case (Docket No. 5888 [4]) still pending before the Commission on the merits. It is to this latter that my comments are directed, for both the instant case and the pending contested case involve (amongst other things) the claim of the prosecution that the Commission should ban the term "Universal" as a marking for imported sewing machines.

[1] See *Brown* v. *Rosenbaum*, 23 N. Y. S. 2d 161 (1940).
[2] Del Mar Sewing Machine Co., 49 F. T. C. 1257.
[3] Mercury Vacuum Stores, etc., 50 F. T. C. 603.
[4] See p. 1012 of this volume.

I take it that neither the default herein nor consent of parties to the other orders above mentioned can affect the rights or waive the protection of litigants in Docket No. 5888.

Those who elect to test the legality of their business methods through adversary proceedings are entitled to their "day in court" with all of the legal and judicial protection that such a phrase implies. It is upon this basis that I concur in the above order.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter coming on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission having duly considered the entire record and being of the opinion that said initial decision is adequate and appropriate to dispose of the proceedings:

It is ordered, That the initial decision of the hearing examiner shall on January 20, 1955, become the decision of the Commission.

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

IN THE MATTER OF

VULCANIZED RUBBER AND PLASTICS COMPANY

Docket 6222. Complaint, June 25, 1954—Order, Jan. 20, 1955

Interlocutory order denying as unjustified respondent's appeal from the hearing examiner's denial of its motion for suspension of the hearings and referral of the matter to the Commission's Bureau of Industry Cooperation for authorization of a trade practice conference.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Chapman, Walsh & O'Connell, of Washington, D. C., and *Mr. Joseph Sawyer*, of New York City, for respondent.

Mr. I. Louis Wolk, of Los Angeles, Calif., for Dayton Rubber Co., amicus curiae.

Arthur, Dry & Dole, of New York City, for United States Rubber Co., amicus curiae.

OPINION OF THE COMMISSION

Per CURIAM:

This is an interlocutory appeal by the respondent from a ruling of the hearing examiner denying respondent's motion for suspension of the hearings herein and the referral of this matter to the Commission's Bureau of Industry Cooperation for the authorization of a trade practice conference. Respondent contends that its appeal is justified under Rule XX of the Commission's Rules of Practice. Oral argument on the appeal is requested by respondent.

Under the Commission's Rules of Practice interlocutory appeals from rulings of the hearing examiner may be prosecuted only when it is shown to the satisfaction of the Commission that a prompt decision of the appeal is necessary to prevent unusual expense and delay. In order to justify such an appeal it must be shown that the unusual expense and delay involved is other than that usual and necessary in an adversary proceeding.

Respondent contends that its appeal is justified under the Commission's Rules because if the issues in this proceeding could be settled by a trade practice conference the expense and delay incident to a continuation of the proceeding will be obviated. This argument obviously is based on pure speculation. The appeal, not being supported by the showing of a likelihood that trade practice conference rules covering the practices alleged to be unlawful would be promulgated, or that the respondent would comply with such rules if they were promulgated, or that the Commission, in any such event, would find

it to be in the public interest for this proceeding to be dismissed, has not been justified. Under the circumstances, oral argument on the appeal would serve no useful purpose.

An order will be entered denying respondent's appeal and the request for oral argument thereon.

Mr. Howrey did not participate.

ORDER DENYING RESPONDENT'S APPEAL FROM HEARING EXAMINER'S RULING

This matter having come on to be heard by the Commission upon respondent's appeal from a ruling of the hearing examiner denying respondent's motion for suspension of the hearings herein and the referral of this matter to the Commission's Bureau of Industry Cooperation for the authorization of a trade practice conference, and briefs of counsel in support of, and in opposition to said appeal; and

The Commission having determined, for the reasons appearing in the accompanying opinion of the Commission, that the appeal has not been justified, and that oral argument on the appeal, which was requested by the respondent, would serve no useful purpose:

It is ordered, That respondent's appeal from the hearing examiner's ruling denying respondent's motion for suspension of the hearings herein and the referral of this matter to the Commission's Bureau of Industry Cooperation, and the request for oral argument thereon be, and they hereby are, denied.

Commissioner Howrey not participating.

IN THE MATTER OF

PLASTIQ FINISHES CO.; ROBERT ERDMANN; AND ROBERT VAN WORP TRADING AS LINSEED WHITE CO. AND MARY CARTER PAINT ORGANIZATION

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

Docket 6187. Complaint, Mar. 4, 1954—Decision, Jan. 21, 1955

Consent order requiring the operators of retail stores in New York, New Jersey, and Florida, to cease representing falsely in advertising an exclusive process of preparation, the quality, comparative pricing, linseed oil content, consumer demand, and tests and approval by independent research laboratories, of their "Mary Carter" paint products.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Mr. Webster Ballinger, 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 Plastiq Finishes Co., a corporation, Robert Erdman, individually and as an officer of said corporation, and Robert Van Worp, individually and as an officer of said corporation and trading as Linseed White Co. and Mary Carter Paint Organization, 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 Plastiq Finishes Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal place of business located on Route 34, Matawan, New Jersey. A portion of its business is transacted under the name Linseed White Co. located at the same address. Said corporate respondent has various retail stores in New York and New Jersey.

The individual respondents, Robert Erdman and Robert Van Worp, are the principal officers of Plastiq Finishes Co., and formulate, direct and control the acts, policies and practices of said corporate respondent.

Respondent Robert Erdman has his principal place of business located on Route 34, Matawan, New Jersey.

Respondent Robert Van Worp has his principal place of business located at 4806 Hesperides, Drew Park, Florida. Said individual respondent trades under the name Linseed White Co. and Mary Carter Paint Organization and uses the trade name "Mary Carter" for the paint products sold by him and allows the said trade name to be used by respondent Plastiq Finishes Co., trading as Linseed White Co.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the manufacture, sale and distribution of paints sold under the name "Mary Carter."

In the course and conduct of their business, respondents cause and have caused a substantial quantity of their paints, when sold, to be transported from their aforesaid places of business in the States of New Jersey and Florida to purchasers thereof located in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their products in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of their said businesses, and for the purpose of inducing the purchase of their said products, respondents have made numerous claims and statements concerning their products in advertisements inserted in newspapers and in other advertising media circulated generally among the public.

By and through the use of the said statements appearing in said advertising matter, respondents represented, directly and by implication:

(1) That their paint products are made by an exclusive new process which mixes or prepares paint in an entirely different manner than that used by all other manufacturers of paint products.

(2) That their paint products are equal to the highest quality paint on the market.

(3) That savings of $6.00 to $8.00 on every two gallons are afforded to purchasers of respondents' paints from the prices of competitive paints of comparable quality.

(4) That their paint products are made with linseed oil and are linseed-oil paints.

(5) That they have a million or more customers.

(6) That they sell their paints at retail, at factory prices.

(7) That their paint products have been tested and approved by an independent research laboratory.

PAR. 4. The statements set out in Paragraph Three above were false, misleading and deceptive. In truth and in fact:

(1) The process employed by respondents in mixing or preparing their paint is neither new nor exclusive. On the contrary, such process has been used, and is now being used, by many paint manufacturers.

(2) Respondents' paints are not equal in quality to many other paint products on the markets.

(3) Savings, if any, in the purchase of two gallons of respondents' paint, as compared to the price of two gallons of competitive paint of comparable quality will be much less than $6.00.

(4) Respondents' paints do not contain sufficient linseed oil to properly characterize them as linseed-oil paints or as being made with linseed oil.

(5) Respondents' customers number many less than a million.

(6) Respondents do not sell their paint at factory prices.

(7) Respondents' paints have not been tested or approved by an independent research laboratory.

PAR. 5. At all times mentioned herein, respondents have been and now are in substantial competition with other corporations and with firms and individuals in the sale of paint in commerce.

PAR. 6. The use by respondents of the foregoing false and misleading representations have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said representations were true and caused a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase respondents' said products. As a result thereof, substantial trade has been unfairly diverted to respondents from their competitors. In consequence thereof, substantial injury has been and is being done to respondents' competitors in commerce.

PAR. 7. 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 and deceptive acts and practices 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 January 21, 1955, 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

The complaint in this matter charges respondents with certain violations of the Federal Trade Commission Act. A stipulation has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the answer heretofore filed by respondents is withdrawn, together with their motion to dispose of the proceeding by means of a stipulation and agreement to cease and desist, and that the complaint and present stipulation shall constitute the entire record in the proceeding; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, respondents specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the complaint may be used in construing the terms of the order; and that the order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission.

It is further stipulated that respondent Robert Erdmann (referred to in the complaint as Robert Erdman) severed his official connection with the corporate respondent, Plastiq Finishes Co., on October 7, 1954, selling and conveying his entire stock in the corporation to respondent Robert Van Worp.

It appearing that the proceeding is in the public interest, the stipulation is hereby accepted and made a part of the record and the following order issued:

ORDER

It is ordered, That the respondents, Plastiq Finishes Co., a corporation, and its officers, and Robert Erdmann, individually, and Robert Van Worp, individually and as an officer of said corporation and also trading as Linseed White Co. and Mary Carter Paint Organization, and respondents' representatives, agents and employees, 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 their paint products designated "Mary Carter" or any other paint product of substantially similar

composition, whether sold under said name or any other name, do forthwith cease and desist from representing, directly or by implication:

1. That their paint products are made by an exclusive or new process or are made in a different manner from that used by other manufacturers of paint products.

2. That their paint products are equal to the highest quality paints on the market unless such be a fact.

3. That savings of $6.00 to $8.00 are afforded to purchasers of two gallons of respondents' paints in comparison with the prices charged by others selling paints of comparable quality, or otherwise misrepresenting the amount of savings afforded to purchasers of their paint products.

4. That their products are linseed oil paints unless and until such is a fact.

5. That they have a million customers or any other number of customers in excess of the actual number.

6. That the prices at which they sell their paint products at retail are factory prices.

7. That their paint products have been tested and approved by an independent research laboratory, unless and until such is a fact.

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 January 21, 1955].

IN THE MATTER OF

FREDERICK CLUTHE TRADING AS CHARLES CLUTHE & SONS; AND CHARLES CLUTHE & SONS

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

Docket 3512. Modified Order, Jan. 25, 1955

Order reopening proceeding in which findings and order originally issued April 10, 1939, 28 F. T. C. 1390, and modifying Paragraph Four of said Findings and said Cease and Desist Order to permit respondent to advertise that the "Cluthe Truss" could give certain relief from reducible inguinal ruptures.

Mr. Charles S. Cox and *Mr. William M. King* for the Commission.
Miller & Chevalier, of Washington, D. C., for respondents.

ORDER REOPENING PROCEEDING AND GRANTING MOTION FOR MODIFICATION OF FINDINGS AS TO THE FACTS AND OF ORDER TO CEASE AND DESIST

This matter coming on to be heard upon motion of the Director, Bureau of Litigation, filed August 26, 1954, to reopen the proceeding and to modify the findings as to the facts and order to cease and desist, and upon answer filed by respondents interposing no objection to the granting of such motion; and

The Commission having duly considered the matter and having determined, for the reasons set forth in the accompanying opinion, that the request for modification of Paragraph 4 of the findings as to the facts and for modification of the order to cease and desist should be granted and that the proceeding accordingly should be reopened for that purpose:

It is ordered, That said motion to reopen should be, and it hereby is, granted.

It is further ordered, That Paragraph 4 of the findings as to the facts originally entered herein be modified to read as follows:

"PAR. 4. The representations thus made by the respondents are false and misleading. In truth and in fact, the use of said device (a) will not overcome rupture troubles; (b) will not fit all ruptures, but can be expected to fit most reducible inguinal ruptures; (c) will not cure ruptures; (d) will not provide an effective treatment for ruptures; (e) will not end rupture worries; (f) will not prevent the intestines from passing through all forms of ruptures, but will prevent the intestines from passing through most reducible inguinal ruptures; (g) will not enable a ruptured person to engage safely in severe forms of

exercise or strain; (h) will seal a rupture only in the sense that, while worn, it will prevent the protrusion of the intestines through most reducible inguinal ruptures; (i) will not eliminate the necessity of an operation for rupture, for the reason that ruptured persons face the possibility that their ruptures may become strangulated, in which event, an operation is necessary as a life-saving measure. Elastic and spring trusses can be adapted for use on the human body," [1]

It is further ordered, That the order to cease and desist herein be modified to read as follows:

"*It is ordered*, That the respondent Frederick Cluthe, individually and trading as Charles Cluthe & Sons, or under any other name or names, his representatives, agents and employees, and the respondent Charles Cluthe & Sons, a corporation, its representatives, officers, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a truss now designated as the 'Cluthe Truss,' or any other truss of substantially the same design, style and workmanship, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

"(*a*) That the use of such truss will prevent the intestines from passing through the rupture, unless such representation be expressly limited to reducible inguinal ruptures;

"(*b*) That the use of such truss will enable ruptured persons to engage safely in severe forms of exercise or strain;

"(*c*) That the use of such truss will seal a rupture except in the sense that, while worn, it will prevent the protrusion of the intestines through reducible inguinal ruptures;

"(*d*) That the use of such truss will end rupture worries.[2]

"*It is further ordered*, That the respondent Frederick Cluthe, in-

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[1] Paragraph Four in the original findings (28 F. T. C. 1397) read: "PAR. 4. The representations thus made by the respondents are false and misleading. In truth and in fact, said product is not a new kind of truss and invention; will not overcome rupture troubles; will not fit and cure the rupture; is not a way of obtaining sure results in the treatment of a rupture; will not end rupture worries; will not make one secure against all likelihood of having his intestines pass through the rupture; will not enable a ruptured person to engage safely in the most severe form of exercise and strain. Elastic or spring trusses can be adapted for use on the human body. Respondents' truss will not seal the rupture opening and will not save or eliminate the necessity of an operation for rupture."

[2] The specific prohibitions in the order as originally entered against respondent Cluthe, individually, etc., and corporate respondent Charles Cluthe & Sons, etc., required said respondents to cease and desist from representing, etc.:

"(a) By the use of the term 'guaranteed to hold,' or any other term or terms of similar import and meaning, or in any other manner, that the use of such truss will prevent the intestines from passing through the rupture.

"(b) That the use of such truss will enable ruptured persons to engage safely in severe forms of exercise and physical effort.

"(c) That such truss will seal a rupture."

dividually and trading as Charles Cluthe & Sons, or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a truss now designated as the 'Cluthe Truss,' or any other truss of substantially the same design, style and workmanship, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

"(*a*) That such truss is a new kind of truss or invention;

"(*b*) That the use of such truss is an effective treatment for ruptures;

"(*c*) That elastic or spring trusses are not adaptable for use on the human body;

"(*d*) That such truss will fit ruptures, unless such representation is expressly limited to reducible inguinal ruptures;

"(*e*) That the use of such truss will cure a rupture;

"(*f*) That the necessity for an operation for ruptures will be eliminated by reason of the use of such truss.[3]

"*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."

OPINION OF THE COMMISSION

By MASON, Commissioner:

The Federal Trade Commission on April 10, 1939, made its findings as to the facts and conclusion and issued its order to cease and desist herein upon the basis of an amended complaint and answer thereto admitting all material allegations of fact set forth in the amended complaint. Said order became final by operation of law.

This matter is now before the Commission upon motion of the Director, Bureau of Litigation, "TO REOPEN THE ABOVE PROCEEDING AND

[3] The specific prohibition in the order as originally entered against respondent Cluthe, individually, etc., required said respondent to cease and desist from representing, etc.:

"(*a*) That such truss is a new kind of truss or invention.

"(*b*) That a ruptured person using such truss will be assured of beneficial results by reason of the use thereof.

"(*c*) That elastic or spring trusses are not adaptable for use on the human body.

"(*d*) That such truss will fit ruptures.

"(*e*) By the use of the term 'overcome rupture troubles', or any other term or terms of similar import and meaning, or in any other manner, that the use of such truss will cure a rupture.

"(*f*) That the necessity for an operation for rupture will be eliminated by reason of the use of such truss."

TO MODIFY THE FINDINGS AS TO THE FACTS AND ORDER TO CEASE AND DESIST" and supporting affidavit.

Said motion recites it to be in the public interest that this proceeding be reopened and the findings as to the facts and the order to cease and desist be modified, as moved in said motion, so as to recite and conform to the actual properties of respondents' said device.

Respondents by their counsel filed an answer to said motion stating they would have no objection to its being granted.

Section 5 (b) of the Federal Trade Commission Act, as amended, provides, among other things, that "after the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require."

The motion under consideration here states that the findings as to the facts are not in accord with the true facts in that they fail to recognize certain values possessed by respondents' device and by reason thereof the order to cease and desist based upon said findings is too restrictive and deprives respondents from claiming values for their device which they should be permitted to claim and which their competitors may rightfully claim for their devices and that it is in the public interest that the findings be modified to state the truth and the order be modified accordingly.

The motion is supported by the affidavit of Frederick B. Brandt, M. D. Affiant states in his affidavit that he is a duly licensed and practicing physician and surgeon in the District of Columbia; that he graduated from the University of Maryland in 1943 and has been engaged in the private practice of surgery from July 1950 and the date of the affidavit; that he has been a Diplomate of the American Board of Surgery since 1951 and a Fellow of the American College of Surgeons since 1952; that he is a member of the active attending surgical staff of Garfield Hospital and is an instructor in anatomy and surgery at the Georgetown School of Medicine, both in the District of Columbia. Undoubtedly, Dr. Brandt is one especially qualified to make the affidavit.

He states that he has examined respondents' truss and sets out various things the truss will and will not accomplish in line with the claims made which were involved in the original proceeding. A comparison of the affidavit with the findings as to the facts clearly points out in

what respects the findings as to the facts are not correct, in the opinion of the affiant.

Section 5 (b), quoted above, contemplates reopening of proceedings, in circumstances similar to those present here, only "after notice and opportunity for hearing." The motion here was served upon respondents without a rule to show cause. However, as previously indicated, respondents subsequently by their counsel filed an answer in which it is stated that they have no objection to the granting of the motion. Any procedural defect in the proceeding that may have existed prior to the filing of this answer may be considered to be cured.

Our approval of the situation here, however, should not be considered as a precedent in future similar proceedings. The Commission expects the procedural requirements of Section 5 (b) of the Federal Trade Commission Act and its directives implementing the same to be strictly observed with due regard to the requirement as to notice and opportunity for hearing.

As indicated, the motion before us is uncontested. The supporting affidavit gives the Commission an adequate factual basis, in the absence of any contest, which it may properly consider as determinative of the factual matters involved. The fact that the original order to cease and desist herein is more restrictive than those in subsequent cases is an uncontroverted fact. Cf. *Dobbs Truss Co., Inc.*, Docket 5808, issued April 3, 1952.[1] It follows that respondents are thus placed at a competitive disadvantage. It is clear, therefore, that there is sufficient public interest to justify the Commission in granting the motion in the manner and form as prayed. We accordingly are granting the motion.

[1] 48 F. T. C. 1090.

IN THE MATTER OF

UNION CIRCULATION CO., INC., ET AL.

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

Docket 5978. Complaint, Apr. 15, 1952—Decision, Jan. 25, 1955

Order requiring four corporations and a partnership, located in three States, engaged in obtaining magazine subscriptions through door-to-door solicitation pursuant to authority granted them by publishers, doing a combined business of some $15 million annually and constituting a substantial portion of the industry in the United States, to cease cooperating in a "no-switching" agreement under which they agreed not to employ parties who had previously been actively engaged for themselves or others in soliciting magazine subscriptions, and ceased and limited their efforts to obtain magazine subscriptions for publishers unless the publishers refused or discontinued authority to solicit subscriptions for their magazines to agencies employing sales representatives formerly connected with other subscription agencies.

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

Mr. Lynn C. Paulson and *Mr. T. Harold Scott* for the Commission.

Mr. Benjamin Kirschstein and *Mr. Gilbert H. Weil*, of New York City, for Union Circulation Co., Inc., and along with—

Mr. Mortimer M. Lerner, of New York City, for National Circulation Co., Inc., and Periodical Sales Co., Inc.;

Mr. William N. Kenefick, of Michigan City, Ind., and *Mr. F. Kenneth Dempsey*, of South Bend, Ind., for Publishers Continental Sales Corp.;

Mr. A. Walter Socolow, of New York City, for Leo E. Light and Roy C. Hodge.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges respondents, all of whom are engaged in the door-to-door solicitation of magazine subscriptions, with violation of the Federal Trade Commission Act through the making of agreements that they will not employ as sales representatives persons who during the previous year have been connected in a similar capacity with other subscription agencies. Certain other related practices are also attacked in the complaint. After answers had been filed by respondents, extended hearings were held at which evidence both in support of and in opposition to the charges in the complaint was received, such evidence being duly recorded and filed in the office of the Commission. Upon conclusion of the reception of

evidence, briefs were filed and the matter argued orally by counsel, the filing of proposed findings and conclusions being waived. The matter is now presented for final consideration on the merits.

2. (*a*) Respondent Union Circulation Company, Inc. (hereinafter frequently referred to as Union), 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 at 5 Columbus Circle, New York, New York.

(*b*) Respondent National Circulating Company, Inc. (hereinafter frequently referred to as National), 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 at 1270 Sixth Avenue, New York, New York.

(*c*) Respondent Periodical Sales Company, Inc. (hereinafter frequently referred to as Periodical), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1104 South Wabash Avenue, Chicago, Illinois. This company is in practical effect a subsidiary of respondent National, its controlling stock interest being owned by the principal stockholders of the latter corporation.

(*d*) Respondent Publishers Continental Sales Corporation (hereinafter frequently referred to as Continental), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business at 413 Franklin Street, Michigan City, Indiana.

(*e*) Respondents Leo E. Light and Roy C. Hodge are individuals doing business as copartners under the trade name National Literary Association, with their principal office and place of business at 14 Deming Street, Terre Haute, Indiana.

3. As heretofore indicated, respondents are engaged in the business of selling subscriptions for magazines. Upon obtaining authorization from publishers to solicit subscriptions for their magazines, respondents send their own sales agents into the field and solicit subscriptions for such magazines by means of door-to-door calls upon members of the public located in many different cities and towns throughout the United States. The subscriptions thus obtained, together with the amounts of money paid therefor, are transmitted to respondents by their respective agents and are in turn transmitted by respondents from their respective places of business to the publishers of the various magazines, many of whom are located in States of the United States other than that in which the respondent obtaining the subscription

is located. Respondents are thus engaged in commerce as that term is defined in the Federal Trade Commission Act.

4. In the course and conduct of their respective businesses, respondents are in competition with one another and with others engaged in the sale and transmitting of magazine subscriptions in commerce as defined above.

5. (*a*) The field selling of magazine subscriptions; that is, sales made by door-to-door solicitation, accounts for the second largest block of subscriptions obtained by magazine publishers, being exceeded only by the sales made by the publishers themselves by means of direct mail advertising and through department stores. Field selling is the source of millions of magazine subscriptions annually, the amounts paid by the public for the subscriptions running into many millions of dollars. Respondents are among the leaders in this field and constitute a very substantial and influential segment of the industry.

(*b*) Like magazine field selling agencies generally, respondents operate through crews of solicitors, each crew being headed and supervised by a "crew manager" or "crew operator." The crew managers frequently recruit their own crews of solicitors. While the crew manager himself may occasionally solicit subscriptions through door-to-door calls upon the public, most of this work is done by the crew members or solicitors. At the close of each day the solicitor turns in his subscriptions and the money collected therefor to the crew manager, who transmits the subscriptions and money to the agency. The crews range in size from a few solicitors to as many as forty or even more. A large agency may have as many as 100 crews in operation at the same time. The agencies, crew managers and solicitors are all compensated on a commission basis, the magazine publisher paying the agency a commission on each subscription obtained and the agency in turn settling with the crew managers and solicitors on the basis of the number of subscriptions turned in by them.

6. (*a*) One of the most serious problems which has plagued the magazine field selling industry from its inception has been that of improper selling practices on the part of solicitors. These practices have included, among others, fake sympathy appeals, as, for example, that the solicitor is a disabled war veteran; misrepresentations as to the magazines or its subscription price; high pressure and even offensive and abusive sales methods; and failure to turn in subscriptions obtained and embezzling of money paid by subscribers. Frequently, crew managers have also been at serious fault, not only in the use themselves of objectionable sales methods but also in encouraging the use of such methods by their crews, in failing to exercise proper super-

vision and discipline over their solicitors, and in failing to remit to the agency subscription moneys turned over to them by solicitors. These improper practices have at times become so flagrant that numerous cities and towns have adopted ordinances either prohibiting entirely or drastically restricting door-to-door selling in their respective communities.

(b) These conditions have been of serious concern not only to magazine field selling agencies but to publishers as well. For when field selling of magazines falls into disrepute the publisher suffers not only loss of subscriptions but also serious damage to the reputation of his publication. A member of the public who has been a victim of objectionable sales practices by a magazine salesman is likely to lay the blame squarely at the door of the magazine itself.

(*c*) By 1940 the situation had become so serious that the publishers decided to undertake corrective measures. Through the Magazine Publishers Association (formerly the National Association of Magazine Publishers), an organization comprising the leading publishers of magazines in the United States, the publishers, with the cooperation of the subscription agencies, set up what is known as the Central Registry of Magazine Subscription Solicitors, usually referred to simply as Central Registry. As implied by its name, one of the principal purposes of Central Registry was to provide an instrumentality for identifying and registering persons engaged in the field selling of magazine subscriptions. The affairs of the Registry are managed by a board known as the Central Registry Board, which is composed of ten members, five of whom represent the publishers and five the subscription agencies. Articles of agreement, including standards of fair selling practices, were adopted. Each subscription agency participating in the plan files with the Registry, cards showing the name and distinguishing characteristics of each of its solicitors. These cards are signed by the solicitors themselves and include a statement to the effect that the solicitor will abide by Central Registry's standards of fair selling practices.

(*d*) Subscription agency members of the Registry also agree to be bound by the standards of fair practices, and each obligates itself to make good any misappropriation of subscription money paid by a member of the public to any of its solicitors and not turned in by the solicitor. That is, the agency remits to the publisher the amount paid by the subscriber, regardless of whether the agency is able to collect from the solicitor. A cash deposit or surety bond is posted by each agency to guarantee the fulfillment of this obligation. All of the respondents have been members of Central Registry for many years,

and representatives of one or more of the respondents have at all times been members of Central Registry Board.

(*e*) There is close cooperation by Central Registry with the National Better Business Bureau, as well as with local Better Business Bureaus, Chambers of Commerce, municipal officers and police departments. Under the plan of operation, when a crew manager takes his crew to a town to solicit subscriptions, he first contacts the local Better Business Bureau and probably some of the other organizations and officers and identifies himself and his crew. Complaints received by local Better Business Bureaus from members of the public in connection with magazine subscription selling are forwarded to the National Better Business Bureau in New York City, which in turn transmits them to Central Registry. If it is found that the subscription agency involved is a member of the Registry and that the complaint is well founded, disciplinary action is taken by the Registry against the agency. Such action may range from an admonition or reprimand to the imposition of a substantial monetary penalty.

7. Closely related to the problem of objectionable sales practices is that of the changing or shifting by solictors and crew managers from one subscription agency to another, commonly known in the trade as "switching." There appear to be two principal reasons for this relationship. First, because the "switcher," the crew manager or solicitor who changes frequently from one subscription agency to another, is usually the transient, drifter type of individual, less stable and less responsible then the crew manager or solicitor who is content to remain with one agency. Second, because the switcher is almost invariably less amenable to supervision and discipline on the part of his agency. If a crew manager or solicitor feels that he can with little or no difficulty switch to another agency any time he wishes, he is likely to regard with indifference efforts by his agency to bring him to task for improper selling practices. Experience has also shown that the switcher is almost invariably short in his accounts with his agency (for subscription moneys collected by him but not turned in). While usually in cases of switching, the initiative is taken by the crew manager or solicitor, not infrequently instances occur in which a subscription agency will itself approach a crew manager or solicitor of another agency and undertake to get him to switch his employment.

8. (*a*) As far back as 1934, concerted efforts were being made by subscription agencies to deal with the matter of switching. At that time eight agencies, including respondents National, Periodical and Union, entered into written "standards of practice," one of the primary purposes of which was:

To prevent the switching of representatives of one two-pay agency to another two-pay agency when the means and methods used by any two-pay agency and/or representative would constitute unfair practice or unfair competition against any other two-pay agency and /or where the switching of such representative from one two-pay agency to another two-pay agency would violate or tend to violate any of the purposes and provisions of this Standards of Practice or would prevent or tend to prevent the enforcing and carrying out of any of the purposes and provisions of this Standards of practice. (Com. Ex. 21–B).

(The expression "two-pay agency" refers to the method of payment. Under this method the subscriber pays to the solicitor only a part, usually one-half, of the subscription price, the remainder being subsequently remitted by the subscriber to the agency. Originally, all of the respondents were two-pay agencies but during recent years all have tended toward the "one-pay" plan, under which the full subscription price of the magazine is collected by the solicitor at the time the subscription is obtained."

(*b*) Next came the formation in 1940 of Central Registry, which has already been described. While some of the subscription agency members of Central Registry, including respondents, have at times sought to induce it to take action with respect to the switching problem, Central Registry has consistently declined to do so, taking the position that this was a matter for the agencies to handle among themselves.

(*c*) In December 1947 there was organized what was known as the National Association of Subscription Agencies, Inc., a New York membership corporation. All of the respondents were members of the Association. The evidence is inconclusive as to whether any standards of practice were actually adopted. While a draft purporting to represent standards of practice was received in evidence, it appears very doubtful in the light of subsequent testimony that the draft is authentic. The testimony does show, however, that more than one draft was prepared and that all of them contained provisions relating to switching, although the exact nature of the provisions is undisclosed. It appears that the principal interests of the Association lay in other directions (such as the combating of municipal ordinances prohibiting or restricting door-to-door selling), the switching problem not being so acute at that particular time. In any event, the Association was short-lived. For various reasons respondent National Literary Association, one of the principal financial backers of the Association, became dissatisfied and withdrew and by June, 1948 the Association had ceased to function.

(*d*) The next attempt at formal organization was through an association known as the Association of Subscription Agencies, Inc., or-

ganized in August, 1949, as a New York membership corporation. All of respondents were charter members of the Association. Among the officers were representatives of respondents National and National Literary Association. One of the principal objectives of the Association was that of dealing with the switching problem. While standards of practice appear never to have been actually adopted by the Association, a draft was prepared, which was printed and sent to all members and prospective members for their consideration. The draft appears to have represented at least the views of all of the respondents as to the standards which should be adopted. Respondents were largely responsible for the forming of the Association, each having contributed $1,000.00 towards its initial expenses, and it is difficult to believe that any draft unacceptable to any of them would have been printed and circulated as a proposal. Under the title "Switching" the draft contained, among other provisions, the following:

> No Association member or contracting managers or crew operators thereof shall directly or indirectly negotiate with, endeavor to entice away, or authorize any contracting managers or crew operators or solicitors clearing through another member without the prior written consent of such member. (Com. Ex. 124, p. 16)

(*e*) Like its predecessor association (National Association of Subscription Agencies, Inc.), this association was short-lived, ceasing to function about six months after its organization. The principal reason for its demise appears to have been the resignation of its executive head, Frank Ware. Ware had been chosen by respondents for the position because of his standing in the magazine circulation field, he having had experience both as an executive in the Magazine Publishers Association and as circulation manager for certain leading publications. Ware testified that he accepted the post with the Association with the understanding that the organization would include all subscription agencies, small as well as large, but that soon after the Association was organized he found that this was not to be the case, and that he therefore resigned.

9. (*a*) There is direct, uncontradicted testimony by a former official of respondent Continental that in 1945 that company entered into no-switching agreements with all of the other respondent companies except Periodical (Periodical not being contacted because some of its sales personnel had switched to Continental, and as a result there was some bad feeling between the two companies). These agreements, which were verbal, were to the effect that none of the companies would employ crew managers or solicitors of the others unless such individuals had been separated from their former agency for a period of one

year. The testimony of this witness is to the further effect that agreements of this nature were common among subscription agencies at that time, that they were a general practice in the industry.

(*b*) There is other evidence in the record showing the existence of no-switching agreements among respondents and between respondents or some of them and other subscription agencies. For example, respondent Continental on December 17, 1948, issued to its crew managers a bulletin reading in part as follows:

> During the past ninety days, our attention has been called to several violations of the Standard of Practice, where managers have employed agents of other companies. This is a direct violation of our agreement with associate agencies, and must be stopped immediately! An agent of another company definitely cannot be employed by our managers, unless such agent has been out of the business one year, and then only if his record and financial status is clean with his previous agency. (Com. Ex. 67)

And respondent Union on March 23, 1949, issued a bulletin to its field force stating in part:

> Union has a gentlemen's agreement with most field selling agencies (and National Literary League is included) to the effect that none of these agencies will enroll, or permit any of their managers or solicitors to enroll, a manager or solicitor who has been enrolled with another agency unless it can be definitely established by checking with the Central Registry Bureau records, that at least one year has elapsed since the person in question was active with the other agency. (Com. Ex. 74)

(*c*) During recent years there has been a definite trend in the industry toward the use of "bilateral" no switching agreements rather than general agreements. As implied by the term, the bilateral agreements are executed by pairs of agencies, each party agreeing not to switch the other's employees. Agreements of this type executed by each of respondents Continental and Periodical with another agency (not a respondent), probably in 1950, stated the following as one of the purposes of the agreement:

> To prevent and eliminate the switching of, or inducing representatives of the respective agencies to violate their contracts or working arrangements with, or enticing away any representatives from their respective agencies.

And contained, among other provisions, the following:

> It is understood and agreed that no representative, contract-manager, crew operator, or solicitor, shall directly or indirectly negotiate with, endeavor to entice away, or authorize any representatives, contracting managers, crew operators or solicitors of the other agency. * * *
>
> It is further understood and agreed that the aforementioned terms and conditions do not obtain in any case (1) where the individual has not been engaged in the magazine business for at least one year, or (2) where the individual has not been engaged with either agency for at least one year, (3) except where the one year absence or inactivity has been occasioned by draft into military services or similar war contributions. (Com. Ex. 253–B)

(*d*) All of the no-switching agreements now in use in the industry, whether verbal or written, general or bilateral, appear to contain a one-year limitation provision; that is, the agreements have no application in the case of a crew manager or solicitor who has not been in the employ of another agency during the previous year. The existence of this limitation in the agreements is recognized in the complaint.

10. In view of the evidence heretofore detailed, as well as other evidence in the record, it is concluded that no-switching agreements and understandings exist among the respondents and between various respondents and other subscription agencies. In fact, there appears to be no real issue on this point, respondents frankly conceding, at least insofar as the bilateral undertakings are concerned, that such agreements do exist.

11. (*a*) Next presented is the vital issue of the validity of the agreements, that is, whether they are lawful or unlawful. On the one hand, there is the serious question whether parties may legally enter into an agreement which affects the employment rights or opportunities of persons not parties to the agreement (crew managers and solicitors), and particularly is this a serious question when it is recognized that such agreements might conceivably affect in some cases crew managers and solicitors who have not been guilty of improper selling practices.

(*b*) On the other hand, there is unquestionably a definite relationship between the improper and fraudulent selling practices which have been prevelant in the industry and the matter of switching. This relationship is established not only by testimony of the Secretary of Central Registry but by that of publishers and of representatives of the National Better Business Bureau. The no-switching agreements, while undoubtedly motivated to some extent by considerations of self-interest on the part of respondents, appear to represent a genuine effort by respondents to clear up their industry and redeem it from disrepute. Apparently, respondents have concluded from their experience that no-switching agreements represent the most effective way of dealing with the principal evil in the industry, that of misrepresentation and fraud on the part of field selling representatives.

(*c*) It seems clear that the agreements, unlike price-fixing agreements, are not inherently or per se illegal. Rather, the answer to the question of their legality depends upon such considerations as the circumstances under which the agreements were made, their intent or purpose, their reasonableness, and their effect. The first two of these considerations have already been discussed. As to the reasonableness and effect of the agreements, both in relation to crew managers and

solicitors and in relation to competition in the industry, the following factors appear to be pertinent.

(*d*) In the first place, the agreements, which now are usually bilateral in form, are binding only upon the particular agencies entering into them. While such agreements are common in the industry, they are by no means industry-wide or all inclusive. Apparently, there are numerous agencies which do not enter into them, and these agencies are free to employ representatives of other agencies just as though there were no such agreements existent in the industry. (The question whether reprisals have been attempted by respondents against such agencies will be discussed hereinafter.) Likewise, crew managers and solicitors are free to seek and accept employment from such agencies.

(*e*) Next, it appears to be within the contemplation of agencies entering into the agreements that occasions may arise in which crew managers and solicitors will wish for valid reasons to transfer from one agency to another, and that such transfers can be effected with the consent of the first agency. While this phase of the matter was not developed extensively during the hearings, there is some evidence on the point. In the standards of practice proposed for the Association of Subscription Agencies, Inc., and which apparently represented the views of respondents, the principal provision relating to switching (heretofore quoted in part in connection with another point) read:

> No Association member or contracting managers or crew operators thereof shall directly or indirectly negotiate with, endeavor to entice away, or authorize any contracting managers or crew operators or solicitors clearing through another member without the prior written consent of such member. "Consent" as used in the preceding sentence shall refer in the case of a member organized in the form of a corporation to the consent of an officer thereof, and in the case of a member organized in the form of a sole proprietorship or a partnership, the consent of the proprietor or of a partner, as the case may be. **(Com. Ex. 124, p. 16)**

And a letter passing between respondent Union and another agency (not a respondent) on October 5, 1948, contains the following:

> Confirming our telephone conversation of today, effective immediately I enter into a "gentlemen's agreement" whereby I will not put any of your people to work and you in turn will not put any of our people to work without a prior agreement between the two of us.
>
> It is naturally understood if one of my men makes application to you or if one of your men makes application to me, if they have a release from the other, we are perfectly free to go ahead and give them a proposition. (Com. Ex. 72)

(*f*) Viewing the record as a whole, it seems fairly clear that the agreements are not intended to prevent the worthy crew manager or

solicitor in the ordinary course of business from transferring from one employer to another, but are intended to prevent the dishonest or irresponsible employee from switching from agency to agency and continuing his objectionable practices. No instance is disclosed of hardship having been suffered by any worthy employee as a result of the agreements.

(*g*) Of particular importance is the one-year limitation provision in the agreements. The inclusion of this provision goes far toward rendering the agreements reasonable. Pertinent in this connection is the decision of the Commission in the *Motion Picture Advertising Service Company* case, 47 F. T. C., 378, 344 U. S. 392, in which it was held that the exclusive dealing contract there involved was not unlawful if limited to a period of one year.

(*h*) Finally, there is the question of where the predominant public interest lies. The agreements (not to be confused with certain other actions of respondents referred to later) are not shown to have affected competition in the magazine field selling industry. Assuming, however, that the agreements might to some slight extent adversely affect competition and worthy field selling representatives, the agreements have unquestionably resulted in substantial benefit to the public in reducing fraudulent and other objectionable practices in the sale of magazine subscriptions. Prudence would seem to dictate the exercise of caution in undertaking to prohibit the use of an instrumentality which appears to represent a reasonable attempt at self-regulation by members of an industry, and which has contributed substantially toward protection of the public against imposition and fraud.

(*i*) For the reasons indicated, it is concluded that the agreements are not unlawful and should not be prohibited. This is not to say generally that agreements not to employ are valid, or that an agreement of this type which otherwise would be illegal can be saved from that status merely by the inclusion of a one-year limitation provision. The conclusion here expressed applies to the present agreements only, and because of the particular circumstances and considerations indicated.

12. (*a*) Next presented is the question whether respondents have jointly sought, through coercive measures, to impose on publishers and other subscription agencies their views as to switching; specifically, whether respondents have concertedly ceased or limited, or threatened to cease or limit, their efforts to obtain subscriptions for publishers who permit subscriptions for their magazines to be solicited by subscription agencies who engage in switching practices. Of importance here is the case of a subscription agency known as Federal Readers Guild.

(*b*) Federal Readers Guild was organized in 1947 by an individual named Rupert E. McLoughlin. McLoughlin was Assistant Executive Secretary of the Magazine Publishers Association from 1938 to 1944, when he left to join two other individuals, Walter Lake and Harold Hopkins, in the formation of respondent Publishers Continental Sales Corporation. Prior to their connection with Continental, Lake and Hopkins had been crew managers for respondent Periodical, and when they changed to Continental they took with them their crews.

(*c*) Some two years after Continental was organized, serious difficulties and ill feeling arose between McLoughlin on the one hand and Lake and Hopkins on the other, and as a result McLoughlin sold his interest in the business to the other two and left to form a new agency, Federal Readers Guild, which was organized early in 1947. Upon the formation of Federal Readers Guild, several crew managers with their crews switched to that agency from Continental, and later others did likewise. While it appears that from the time McLoughlin formed Federal Readers Guild, some efforts were made by Lake and Hopkins toward trying to induce publishers not to do business with that agency, it was not until June, 1949, that serious and concerted efforts toward that end were made by respondents generally.

(*d*) Shortly before that time, two other crew managers and their crews had come to Federal Readers Guild from other agencies. One of these managers, Robert Nace, came from Continental; the other, John J. Pryor, came from Periodical. Both had been large and successful crew operators and their change to Federal Readers Guild increased that agency's sales force by approximately one hundred persons. Upon coming to Federal Readers Guild, Nace and Pryor acquired capital stocks in the company and became officers in it.

(*e*) A few days later, respondent Leo E. Light of National Literary Association invited McLoughlin, Nace and Pryor to a conference which was held one afternoon in a hotel room in New York City. All three accepted the invitation and attended. In addition to Light and these three, there was present Richard Harrington, Manager of National Literary Association. The conference lasted more than two hours and was devoted almost entirely to a discussion of the switch of Nace and Pryor from Continental and Periodical, the prospects of their returning to those agencies, and the consequences which might be expected to follow if they did not return. According to the testimony of McLoughlin, which is uncontradicted, Light stated in substance that the venture (Nace's and Pryor's working with Federal Readers Guild) could not and would not succeed; that Nace's and

Pryor's crews would be interfered with and broken up; that the respondent companies would have all of the publishers "cancel out" on Federal Readers Guild, that is, cancel their authorization to Federal Readers Guild to solicit subscriptions for them; and that a meeting was to be held that evening by representatives of all of the respondents to discuss means and methods for accomplishing those results.

(*f*) While there is no testimony that this meeting was actually held, the reasonable inference is that it was held, in view of Light's statement to McLoughlin with respect to the meeting and the failure of Light and the other respondents to testify on the point. In any event, it is certain that during the two or three weeks immediately following the date of the afternoon conference, some fifteen publishers representing some twenty publications (several of them leading magazines) did cancel Federal Readers Guild's authorization to solicit subscriptions for them. Some of the publishers gave various reasons for their action, others gave no reason at all. It seems clear, however, that in most instances the action was due to pressure and coersion exercised by respondents; that is threats by respondents to discontinue sales efforts for the publishers. There is positive testimony from a representative of publishers, Charles H. Wilson, that in several conferences between himself and representatives of respondents Continental and National (which would appear also to include respondent Periodical, as it is in effect a subsidiary of National), he was told that unless he cancelled the authority of Federal Readers Guild to sell his magazines, these respondents would discontinue their efforts to obtain subscriptions for him. Wilson was one of those cancelling Federal Readers Guild's authorization.

(*g*) Also of significance is a letter written by Hopkins of Continental to the Subscription Manager of Fawcett Publications, reading in part as follows (While this letter is dated October 26, *1948* rather than 1949, this is evidently a typographical error):

> Ted, I wasn't able to make myself too clear on the McLoughlin situation, except to say that we have had very good cooperation from about 15 solid publishers in cancelling the man out, as he has been a real ulcer in our side, due to the fact that we are not able to discipline managers as they always have the threat that they will go to work for McLoughlin. However, I expect to be in New York soon, and I will personally cover this with you. I do not expect you to be in the middle, but I do feel that you should cooperate with us to the best interests of the industry, the same as most of the others, and the ones that havn't, we will eventually get to yet, as soon as we have the opportunity to present our side of the picture. (Com. Ex. 135)

(*h*) It is urged by respondents that the Federal Readers Guild incident does not represent joint or concerted action on the part of

the respondents generally, but only indicates activity by the two agencies (Continental and Periodical) which had sustained injury as a result of McLoughlin's switching practices, and that respondent Light of National Literary Association in arranging for the conference and making the statements in question was attempting to serve merely in the role of peacemaker between these two agencies and Federal Readers Guild. This theory is rejected as improbable in the face of the existing facts and circumstances. The presence at the conference not only of Light but of Harrington, Manager of National Literary Association, which apparently had lost no personnel to Federal Readers Guild; the warnings or threats voiced by Light at the conference; his statement with respect to the contemplated meeting to be held that evening by representatives of all of the respondents; the absence of any testimony by either Light or Harrington contradicting McLoughlin's testimony as to what transpired at the conference; the failure of respondents to disavow Light's threats or to deny that the meeting announced by him was actually held; the numerous cancellations from publishers following closely after the date of the conference and of the announced meeting; the testimony of Wilson; and the letter from Continental to Fawcett Publications, all, considered together and against the background of the no-switching agreements, indicate joint and concerted action on the part of respondents, pursuant to an agreement or understanding among them.

(*i*) Respondents' actions in this instance were wrongful and oppressive. And unquestionably such actions have the tendency and capacity substantially to restrain competition in the field selling of magazine subscriptions. A subscription agency cannot exist without authorization from publishers to solicit subscriptions for their magazines, and it cannot obtain or retain such authorization if publishers are to be coerced into withholding or withdrawing it. Moreover, apart from the manner of competition, respondents' actions constitute unfair acts and practices. As heretofore pointed out, respondents are within their rights in entering into no-switching agreements. They do not, however, have the right to seek, through coercive measures, to impose their agreements and views as to switching upon other subscription agencies or upon publishers. It is not the agreements, but the abuse of them, which is injurious to competition and inimical to the public interest.

(*j*) While other instances of alleged coercion by respondents against publishers and subscription agencies are urged by counsel supporting the complaint, it is concluded that such alleged instances are not supported by substantial evidence.

13. The complaint further charges in substance that respondents have sought merely by efforts at persuasion, unmixed with any element of coercion, to influence or induce publishers to withhold or withdraw their authorization from subscription agencies who engage in switching. No violation of law is seen in such activities. The no-switching agreements not being unlawful, no sound reason appears why respondents may not legally seek merely through persuasion to convince publishers of the evils attending switching and to induce them in the exercise of their own independent judgment not to do business with subscription agencies engaging in that practice. It is when the line is crossed between mere efforts at persuasion on the one hand, and threats and coercion on the other, that the element of illegality enters.

14. The same principle is applicable to the charge in the complaint that respondents have supplied information and instructions to their respective employees with respect to the no-switching agreements. The agreements being lawful, no valid reason appears why respondents may not properly inform and instruct their employees in regard to them.

15. (*a*) Finally, the complaint charges that respondents have used and attempted to use trade associations and central registries of employees and agents in effectuating their no-switching agreements. Insofar as the two trade associations are concerned (National Association of Subscription Agencies, Inc. and Association of Subscription Agencies, Inc.), both were very short-lived, and little or no real use of them was made or attempted by respondents.

(*b*) As for Central Registry, that organization has consistently declined to attempt to deal with the switching problem, taking the position that the matter is one for the subscription agencies to handle among themselves. Moreover, at no time have any attempts on the part of respondents to enlist the aid of the Registry included any suggestion or demand that coercive methods be employed, either against subscription agencies or publishers. The most direct appeal was in the form of a joint memorandum addressed to the Central Registry Board by all of the respondents on April 22, 1949. After reviewing the objectionable selling practices prevalent among some subscription agencies, the memorandum concluded:

> The agency practices which we have described above can not be rectified by the agencies. These practices, however, would not last very long if each publisher in the exercise of his individual discretion would decline to have his publications sold by an agency which engaged in switching operations, or authorized crew operators after their authority had been terminated by other agencies for dishonesty or improper selling practices.

It is our opinion that if the Central Registry Board is to curb improper selling practices by attacking them at their source, it can no longer choose to characterize the above practices purely inter-agency matters, and must recognize that agencies which engage in them, since they exist only by reason of the willingness of publishers to do business with them, are the responsibilities of the publishers.

While legal obstacles may exist, we do not believe that they will prove insuperable, since every business has the right to protect itself against trade abuses by the taking of reasonable measures. We are confident that the Central Registry Board can devise measures for coping with the above agency practices and we know that if it declines to attack those basic causes, the symptoms of improper selling practices will continue substantially as before.

Let me wind this up by saying—can we count on your support to help us do the job you want done? (Com. Exs. 25–E, 25–F)

(*c*) This would appear to constitute nothing more than an appeal or plea to the publishers. It was merely an attempt at persuasion, involving no element of coercion. No affirmative action on the memorandum was taken by the Board. Apparently the memorandum was read at a meeting of the Board but otherwise wholly disregarded. Nor is there any indication that action was taken by any individual publisher as a result of the memorandum.

(*d*) The only other matter relating to respondents' connection with Central Registry which requires consideration, is whether respondents have sought wrongfully to bar other subscription agencies from membership in the Registry. There appears to have been only one instance in which an application for membership in the Registry was rejected, and in that case the applying agency was operated by two individuals who had recently served as crew managers for respondent Periodical and had been dismissed by that agency for bad selling practices. Their violations had, in fact, been of such serious nature that a substantial monetary penalty had been assessed against Periodical by the Central Registry Board. At the meeting of the Board at which the application was rejected, nine Board members were present, five of them being representatives of publishers and four being representatives of subscription agencies, including respondents National, Continental and National Literary Association. The action of the Board was unanimous. No element of unfairness or arbitrary action is seen in this incident. On the contrary, the rejection of the application appears to have been fully warranted.

(*e*) One or two instances are disclosed in which there was delay on the part of the Central Registry Board in passing upon applications for membership. The delays, however, appear to have been due not to any arbitrary attitude on the part of respondents or the Board, but to the necessity of securing additional information regarding the applicant.

CONCLUSIONS

It is concluded:

1. The proceeding is in the public interest.

2. Respondents' no-switching agreements are not unlawful.

3. Respondents in one instance have jointly and concertedly, and pursuant to mutual agreement or understanding, threatened to discontinue their efforts to obtain subscriptions for the magazines of certain publishers, unless such publishers withdrew authorization to solicit subscriptions for their magazines from a subscription agency which had employed sales representatives formerly connected with other subscription agencies. Because of such threats, a substantial number of such publishers did cancel such agency's authorization to solicit subscriptions for their magazines. Such actions on the part of respondents have the tendency and capacity substantially to restrain and injure competition in the sale of magazine subscriptions, are to the prejudice of respondents' competitors and the public, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

4. The other charges in the complaint have not been sustained.

ORDER

It is ordered, That the respondents, Union Circulation Company, Inc., National Circulating Company, Inc., Periodical Sales Company, Inc., Publishers Continental Sales Corporation, corporations, and their officers, and Leo E. Light and Roy C. Hodge, individually and as copartners doing business as National Literary Association, and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distribution of magazine subscriptions in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents or between any of said respondents and others not parties hereto, to do any of the following acts or things:

1. Entering into, carrying out, enforcing or giving effect to any agreement not to employ parties who have previously been actively engaged for themselves or for others in the business of soliciting magazine subscriptions.

2. Ceasing or limiting, or threatening to cease or limit, their efforts to obtain subscriptions for magazines for publishers unless such publishers refuse or discontinue authority to solicit subscriptions for their magazines to subscription agencies employing sales representatives formerly connected with other subscription agencies.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The complaint under Section 5 of the Federal Trade Commission Act charges respondents with the use of unfair methods of competition in two principal particulars, first, in a planned common course of action in the matter of "no-switching" agreements in the securing of magazine subscriptions and, second, in a common course of action in attempting to persuade and influence magazine publishers to withhold their business from subscription agencies not entering into such agreements. The hearing examiner found in favor of respondents as to the first charge and in favor of counsel supporting the complaint as to the second. Both sides appeal.

Respondents are engaged in the business of selling subscriptions for magazines by door-to-door solicitation. They operate through crews which travel from place to place. A crew may have from a few to 40 or more solicitors, together with a crew manager. Respondents contract directly with the "dealer," "contractor" or crew manager who, in turn, usually engages the solicitors and supervises their work. The solicitors, the managers and the agencies are all paid on a commission basis based on the number of subscriptions secured. The solicitors collect part or all of the subscription money and the proper amounts are remitted through the crew managers and the agencies to the publishers.

The business of publishing and selling magazines is an extensive one. Selling of subscriptions is important to the publishers for several reasons, among them being that advertising rates are based on current circulation. Among the various methods of securing subscriptions, door-to-door solicitation ranks second in importance and accounts annually for millions of subscriptions running into millions of dollars. The respondents have 3,000 solicitors and do a total annual business in subscriptions of $15 million. The hearing examiner found that "respondents are among the leaders in this field and constitute a very substantial and influential segment of the industry."

There is considerable evidence in the record concerning the history and operation of the no-switching agreements. As found by the hearing examiner as far back as 1934, concerted efforts were being made

by subscription agencies to deal with the matter of switching and the problems which it created. At that time, eight agencies, including three of the respondents, entered into written "Standards of Practice" which attempted, among other things, to deal with the problems of switching. In 1940, the Central Registry was formed which will be described later. In December, 1947, the National Association of Subscription Agencies, Inc. was organized, in which each of the respondents was a member. This organization had ceased to function by 1948. In August, 1949, the Association of Subscription Agencies, Inc. was formed. All of the respondents were charter members, and representatives of two of them were officials of the Association. The hearing examiner found that "respondents were largely responsible for the forming of the Association, each having contributed $1,000 toward its initial expenses and it is difficult to believe that any draft unacceptable to any of them would have been printed and circulated as a proposal." The "draft" referred to was a draft of proposed Standards of Practice printed and sent to all members and prospective members for their consideration. Under the title "Switching," the draft contained the following:

> No Association member or contracting managers or crew operators thereof shall directly or indirectly negotiate with, endeavor to entice away, or authorize any contracting managers or crew operators or solicitors clearing through another member without the prior written consent of such member.

This organization ceased to function after six months, principally because of the resignation of its executive head. His reason for resigning was that he accepted the position with the understanding that the organization would include all subscription agencies small as well as large, but that soon after the Association was organized, he found this was not to be the case.

In recent years, there has been a trend toward bilateral (that is, agreements between two agencies) rather than a general contract for the industry. The separate agreements made by two of the respondents with a third agency (not a respondent) are typical. These agreements stated as one of the purposes:

> To prevent and eliminate the switching of, or inducing representatives of the respective agencies to violate their contracts or working arrangements with, or enticing away any representatives from their respective agencies.

And contained, among other provisions, the following:

> It is understood and agreed that no representative, contracting manager, crew operator, or solicitor, shall directly or indirectly negotiate with, endeavor to entice away, or authorize any representatives, contracting managers, crew operators or solicitors of the other agency. * * *

It is further understood and agreed that the aforementioned terms and conditions do not obtain in any case (1) where the individual has not been engaged in the magazine business for at least one year, or (2) where the individual has not been engaged with either agency for at least one year, (3) except where the one year absence or inactivity has been occasioned by draft into military services or similar war contributions.

Counsel supporting the complaint argue that the no-switching agreements are boycotts affecting third parties, and are therefore unreasonable and illegal per se.

The hearing examiner held that the agreements, unlike price fixing agreements, are not inherently or per se illegal. He concluded the answer to the question of illegality depended upon the reasonableness of the agreements under all the circumstances.

Sugar Institute, Inc., et al. v. *U. S.*, (1936) 297 U. S. 553, was a suit brought under the Sherman Act to dissolve a trade association and to restrain it and its members from engaging in a conspiracy in restraint of interstate and foreign commerce. The court said:

The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Company* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Company*, 221 U. S. 106. They are aimed at contracts and combinations which "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade." *Nash* v. *United States*, 229 U. S. 373, 376. *United States* v. *Linseed Oil Co.*, 262 U. S. 371,, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis.

On the question of the reasonableness of these particular agreements, the following should be considered.

(1) The written contracts themselves are vague and capable of several constructions. In so far as the contracts prohibit an agency from inducing a representative of the other agency to violate his contract or working agreements with that other agency, they state only the duty that every person has not to induce another to break his contract. However, the use of the words "switching" and "authorization," together with the one year limitation, indicate that the agreements were meant to have a broader application than would be involved in the mere urging to violate a legal contract. The meaning of the contracts, their general purpose, and the manner in which they operated are shown by various memoranda and letters and other statements of respondents.

"Switching" has to do with the transfer of personnel from one agency to another. There is considerable dispute in the record as to

what the term actually means, and the application of the no-switching rule seems to vary in different agencies. For example, it might include situations (1) where a person had been enticed away in violation of his contract, (2) where he had been enticed away but not in violation of his contract, or (3) where he had left voluntarily and found work with another agency. Leaving to set up, or joining a new agency apparently is not switching. However, even there, the no-switching program would operate. A solicitor or crew manager leaving an agency to form a new one must get authorizations to take subscriptions. He may get these direct from the publisher or from other agencies which have been authorized by publishers. That is, some agencies follow the practice of accepting subscriptions taken by other agencies and sending them in under their own name. No-switching agreements would prohibit "authorizing" a new agency unless the personnel were exempted under the one year limitation.

It is clear that the agreements would affect the employment rights of persons not parties to the agreements and could affect the rights of solicitors and crew managers who had been guilty of no bad selling practices. It is also true that the restriction would not apply to *anyone* who had been out of the business for one year with the exception of those whose year's absence or inactivity had been occasioned by draft into the military service or similar war contributions.

A letter of October 5, 1948 by one respondent to another agency (not a respondent) throws some light on the actual operation of the plan.

> Confirming our telephone conversation of today, effective immediately I enter into a "gentlemen's agreement" whereby I will not put any of your people to work and you in turn will not put any of our people to work without a prior agreement between the two of us.
>
> It is naturally understood if one of my men makes application to you or if one of your men makes application to me, if they have a release from the other, we are perfectly free to go ahead and give them a proposition.

(2) The agreements were in part at least an attempt to remedy certain evils that had grown up in the business of door-to-door solicitation for subscriptions. These evils were described in the findings of the hearing examiner as follows:

> 6. (*a*) One of the most serious problems which has plagued the magazine field selling industry from its inception has been that of improper selling practices on the part of solicitors. These practices have included, among others, fake sympathy appeals, as, for example, that the solicitor is a disabled war veteran; misrepresentations as to the magazines or its subscription price; high pressure and even offensive and abusive sales methods; and failure to turn in subscriptions obtained and embezzling of money paid by subscribers. Frequently, crew managers have also been at serious fault, not only in the use themselves of ob-

jectionable sales methods but also in encouraging the use of such methods by their crews, in failing to exercise proper supervision and discipline over their solicitors, and in failing to remit to the agency subscription moneys turned over to them by solicitors. These improper practices have at times become so flagrant that numerous cities and towns have adopted ordinances either prohibiting entirely or drastically restricting door-to-door selling in their respective communities.

(*b*) These conditions have been of serious concern not only to magazine field selling agencies but to publishers as well. For when field selling of magazines falls into disrepute the publisher suffers not only loss of subscriptions but also serious damage to the reputation of his publication. A member of the public who has been a victim of objectionable sales practices by a magazine salesman is likely to lay the blame squarely at the door of the magazine itself.

It also appears that each subscription agency which was a member of the Central Registry obligated itself to make good to the publisher any misappropriation of subscription money paid to any of its solicitors and not turned in by him.

The agencies were very properly interested in attempting to remedy the evils existing in their industry. Nevertheless, even if adopted solely for that purpose, the remedy sought to be applied must be reasonable.

(3) The no-switching agreements were partly the result of other motives than the desire to remedy evils in the business. The hearing examiner recognized this in the following finding:

The no-switching agreements, while undoubtedly motivated to some extent by considerations of self-interest on the part of respondents, appear to represent a genuine effort by respondents to clear up their industry and redeem it from disrepute.

There is evidence that the agreements were designed to accomplish (1) the elimination of certain selling practices distasteful to the public, (2) making easier the collection of debts owed the agency by its solicitors or crew managers, and (3) the preservation of crews built up by the agencies.

An official of Central Registry, in which respondents were members, had the following to report about a meeting held by the organization on June 27, 1949:

Discussion of "Switching."

18. There was, as usually happens in these meetings, some discussion of switching. The usual points were made (1) that the crew manager who could be switched to any agency selling the same, or nearly the same magazines, could be switched away; (2) that there was no additional business produced for publishers, if the same solicitors continued to sell the same subscriptions but the subscriptions reached the publishers from a different agency; (3) that the only sound way for an agency to build a business was to develop its own soliciting personnel; (4) that in cases in which an agency put pressure upon a crew manager

who had indicated a tendency not to adhere fully to the CR Standards of Practice, such crew manager might be invited to associate himself with a competing agency with the express or implied promise that he would not be held as strictly in line; and (5) that in a business like subscription field selling through traveling crews, there is a tendency for managers of crews to endeavor to form agencies without any real understanding of the problem of (a) agency management or (b) agency finances.

Two of respondents wrote a letter saying in part as follows:

This agency has always been opposed to the switching or enrollment of people who have had previous experience in the subscription field.

On another occasion, two of the respondents sent out identical bulletins containing the following statements:

We feel quite certain that you will welcome this clarification of our policy as it is distinctly to your advantage to know that the people you contract with and develop at considerable effort and expense are not suddenly to be pirated away.

There is, also, correspondence in the record indicating that certain of the respondents urged that certain solicitors who had switched be returned to their former agency.

It appears that the building and maintaining of an effective agency is a difficult matter and that publishers are interested in dealing with financially responsible agencies which are able to carry out their commitments with the degree of promptness that the circulation situation sometimes requires. The losing of trained personnel to other agencies, or through the formation of new ones, may seriously impair an agency's ability to carry out its contracts with the publishers. Hence, the agency is interested in maintaining its force intact. This is one of the reasons for the objection of many to the transfer of their personnel.

(4) There is dispute in the evidence as to the effectiveness and necessity of the no-switching agreements in remedying the evils of the industry.

In 1940, through the joint efforts of certain publishers and agencies, the Central Registry of Magazine Subscription Solicitors was created. Its affairs are managed by a Central Registry Board consisting of five members from the publishers and five from the agencies. Standards of fair selling practices have been adopted. Each member agency files with the Registry, cards showing the names, identification and other information concerning its solicitors and crew managers. This information is available to the members of the organization. Each of the respondents is a member, together with many others. The Register contains the names of some 15,000 or 20,000 solicitors and managers.

If agencies are anxious to avoid engaging a switcher with a bad record, or are willing to engage one with a good record, it would seem

that the Central Registry has the machinery for providing them with that information.

Central Registry cooperates with the National and local Better Business Bureaus and with local Chambers of Commerce and public officials in an effort to police soliciting for magazine subscriptions. Complaints received locally are sent to the National Better Business Bureau for transmission to the Central Registry. The Central Registry has authority to discipline member agencies for violation of the Standards of Practice. This cooperative program, so far as the National Better Business Bureau is concerned, began in 1946 and was well organized by 1948. Under the program, soliciting crews are encouraged to register with local authorities or organizations. Citizens are requested to make complaint of any improper selling practices which are handled through local facilities or forwarded to the Central Registry. In any event, the Central Registry is kept advised of the complaints, together with the individual against whom made. The program has been quite successful. Complaints, which at the beginning were about 1,000 per month, have now been reduced to about 230. John J. Burke, in charge of this matter for the National Better Business Bureau, testified that the complaints having a connection with switching were a small percent of the total, but often involved the more serious complaints.

Several witnesses, including representatives of the Central Registry and the National Better Business Bureau, testified that there is a relation between the bad practices in the industry and the switching by personnel from one agency to another. Cases are cited of individuals reported for these practices who later show up with other agencies and continue the same practices. The hearing examiner also found that the relationship does exist.

It is no doubt true that bad practices and switching are often traceable to a common cause, to wit, the unsatisfactory and unstable employee. There is evidence that other factors sometimes enter in. For example, Harold M. O'Hanlon, Secretary of the Central Registry, testified that the only reason for making a manager or solicitor want to change his connection would be either financial inducements or inducements of greater leniency in selling practices. It also appears that conditions in the agency also have a bearing. Frank Ware, also engaged in the subscription business, testified that the agencies most hurt by switching are the ones with the lowest commission rebates to managers and the agency with the lowest ethical standards is generally the agency that has the men who are most likely to switch and can be more easily enticed away than is the case with an organization which has strong principles of business conduct.

It is argued that the "no-switching" rule makes the solicitor more amenable to discipline. That is, he will be less likely to engage in bad practices if he knows his opportunity for re-employment in another agency is subject to the one year provision. There is no real evidence (aside from opinions of various witnesses) of the actual effect of the rule on the elimination of bad selling practices. Mr. O'Hanlon testified that taking into account the number of crews operated by respondents, the complaints concerning them were about on a par with the general field.

The hearing examiner said: "It appears to be within the contemplation of agencies entering into the agreements that occasions may arise in which crew managers and solicitors will wish for valid reasons to transfer from one agency to another, and that such transfers can be effected with the consent of the first agency."

However, the various memoranda circulated by respondents do not express the thought that exceptions are to be made in behalf of the worthy crew manager or solicitor. Statements are to the effect that employment will depend on proof that one year has elapsed since previous employment with another agency. It is true, of course, that the agencies might consent to the re-employment regardless of the rule.

In the absence of a contract to the contrary, every individual has the legal right to attempt to better his condition by seeking other employment or by going into business for himself. In the absence of any element of inducing another to violate a contract, every agency has the right to offer better pay or better working conditions, even though the result may be the transfer of personnel from competitors. These rights should not be contingent on the decision of a former employer, no matter how fairly and impartially he may attempt to render such decision. Somewhat similar attempts to provide extra-judicial tribunals for the elimination and punishment of the violations of rules has been condemned by the courts. See *Fashion Originators Guild of America, Inc.* v. *FTC*, (1941) 312 U. S. 457.

The hearing examiner also said:

> Viewing the record as a whole, it seems fairly clear that the agreements are not intended to prevent the worthy crew manager or solicitor in the ordinary course of business from transferring from one employer to another, but are intended to prevent the dishonest or irresponsible employee from switching from agency to agency and continuing his objectionable practices. No instance is disclosed of hardship having been suffered by any worthy employee as a result of the agreements.

We think the record does show injury in the sense of actual restraint of commerce in the Federal Readers Guild matter. In recruiting its

crews that new organization had ignored the no-switching rule. Because of that, a representative of one respondent, apparently acting with the approval of all, threatened to break up the new crews and did in fact succeed in having certain publishers withdraw their business from the Federal Readers Guild. There is also evidence that the no-switching rule made the forming of new agencies more difficult.

Another evil in the industry arises from the fact that personnel who switched were often in debt to the former agencies for sums advanced or for subscription money collected. The collection of this debt might be easier if the employee were prevented from switching. One witness, Frank Ware, gives that as a reason for the no-switching rule. He further testified that in his experience, the amounts due could be collected by ordinary legal process and that the no-switching rule was unnecessary.

(5) The agreements contain a one year limitation, which the hearing examiner, on the authority of *FTC* v. *Motion Picture Advertising Service Company, Inc.*, 314 U. S. 392, concluded "goes far toward rendering the agreements reasonable."

In the above case, respondent produced and distributed advertising motion picture film. It had exclusive contracts with 40% of the theaters exhibiting such film in the area in which it operated. Respondent and three other similar agencies against whom separate charges were filed, had exclusive contracts running from 1 to 5 years with 75% of the theaters in the United States exhibiting advertising film. The court held that because of the exigencies of the situation and the practical requirements of the business, the exclusive contracts were beneficial to the distributors and preferred by the theater owners. The order of the Commission limiting such exclusive contracts to one year was held to be proper.

The situation there was not similar to the one we have here. A contract between the distributors whereby each agreed not to furnish film for one year to a theater operator who had for any reason renounced his exclusive dealing contract would be more like the contract sought to be upheld in this case.

The contracts between respondents and their representatives were all terminable on notice, the maximum time being 30 days. They contained no provision that the representative would not enter into competition for a stated period after the contract had terminated. The contract between a respondent and its representative contemplated that either could terminate the working agreement between them by giving 30 days' notice, with no restriction thereafter as to the representative's course of conduct. Nevertheless, the contract between respondents to

which the representative was not a party, would prohibit his employment for a year unless the first agency consented thereto.

(6) As found by the hearing examiner, the agreements "are binding only upon the particular agencies entering into them. While such agreements are common in the industry, they are by no means industry-wide or all inclusive. Apparently, there are numerous agencies which do not enter into them, and these agencies are free to employ representatives of other agencies just as though there were no such agreements existent in the industry. * * * Likewise, crew managers and solicitors are free to seek and accept employment from such agencies."

Nevertheless, it appears that the respondents are among the leaders in the field and constitute a very substantial and influential segment of the industry.

There is evidence of no-switching agreements between certain of the respondents and other agencies, not named as respondents. Furthermore, it appears that the respondents were active in attempting to have the practice adopted by other agencies and attempting to have it recognized and enforced by the Central Registry.

In *FTC* v. *Motion Picture Advertising Company, Inc.*, 344 U. S. 392 at page 394, the court said:

> It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *FTC* v. *Beechnut Company*, 257 U. S. 441),—to stop in their incipiency, acts and practices which, when full blown, would violate those acts (see *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457), as well as to condemn as "unfair methods of competition" existing violation of them. (See *FTC* v. *Cement Institute*, 333 U. S. 683).

It is true that because of the exigencies of a particular situation, or because of the practical requirements of a certain business, some restraint on the freedom of contract may often be proper. In all such cases, however, courts have insisted that the restraint shall be limited to those which are reasonable under the circumstances.

The relationship between the agencies and their representatives was not strictly that of employer and employee. The contracts therefore were not technically the ordinary contract of hiring. Nevertheless, they did have to do largely with personal services. The restraints imposed were on the means of earning a livelihood.

Anderson v. *Ship Owners Association of the Pacific Coast* (1926), 272 U. S. 359, was a suit under the Sherman Act by a seaman, in behalf of himself and others, for an injunction and damages against respondents for maintaining a combination in restraint of trade. Members of the respondent association controlled substantially all American registered merchant vessels on the Pacific Coast. Under the rules of

the association, every seaman desiring employment must register at the office of the association and wait his turn for employment with any member. The association would designate the place, and the kind of job which the seaman would be offered.

The court pointed out that by entering into this combination the members had surrendered to the association their control over employment and held that the direct and necessary consequence was to interfere with the right of freedom of trade. "Restraint of commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint."

Agreements, ancillary to contracts for sale of property or for employment, often are in partial restraint of trade. However, even these contracts, to which the person being restrained is a party, will not be enforced unless the restraint is reasonable. Restrictive covenants in contracts of hiring are tested by standards of reasonableness, but such covenants are not viewed by the court with the same indulgence and a smaller scope of restraint is permitted. 17 C. J. S. Contracts Section 254.

In *Arthur Murray Dance Studios* v. *Witter* (1952) Ohio, 105 N. E. 2nd 685, the court in declaring a contract illegal pointed out that the restraint must not be greater than necessary to protect the employer in some legitimate interest, must not be unduly harsh and oppressive to the employee, and must not be injurious to the public. A restraint restricting the exercise of a gainful occupation is "cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld."

Is is our conclusion that the no-switching agreements are, under all the circumstances, an unreasonable restraint and constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act. Because of this conclusion, we find it unnecessary to pass on other questions raised by counsel supporting the complaint.

Although the hearing examiner held that the no-switching agreements were legal, he nevertheless held that the acts of respondents in attempting by coercion to impose that policy upon the publishers was illegal.

The facts pertaining to this branch of the case are set out in the initial decision. They may be summarized briefly as follows:

Rupert E. McLoughlin, about 1944, left the Magazine Publishers Association and joined Walter Lake and Harold Hopkins in the formation of respondent, Publishers Continental Sales Corporation.

Two years later, because of difficulties between the three above named, McLoughlin left and organized the Federal Readers Guild. Thereafter, several crew managers with their crews switched to the Federal Readers Guild. Among the crew managers so switching were Robert Nace from Continental Sales Corporation and John J. Pryor from Periodical Sales Company. A few days later, a meeting was held which was attended by McLoughlin, Nace and Pryor, and also by Leo E. Light of respondent, National Literary Association, and Richard Harrington, Manager of National Literary Association. McLoughlin testified, without contradiction, that Light threatened to have all the publishers "cancel out" Federal Readers Guild and that a meeting with representatives of all the respondents would be held that evening to discuss ways and means to accomplish that purpose. There is no evidence whether the meeting was or was not held. Later, several publishers did cancel their authorizations with Federal Readers Guild.

There is also further evidence tending to corroborate the conclusion arrived at by the hearing examiner. We think he decided this phase of the case correctly.

Accordingly, the appeal of counsel supporting the complaint is granted. The appeal of respondents is denied. It is further directed that an order be issued in accordance with this opinion.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon the appeals of counsel supporting the complaint and of the respondents from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the written opinion of the Commission issued herewith, that the appeal of counsel supporting the complaint should be granted to the extent indicated in the opinion; that the appeal of the respondents should be denied; and that the hearing examiner's initial decision should be modified to the extent and in the manner indicated in the opinion;

It is ordered, That the appeal of counsel supporting the complaint from the hearing examiner's initial decision be, and it hereby is, granted to the extent indicated in the accompanying opinion of the Commission.

It is further ordered, That the appeal of the respondents from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That the findings as to the facts and conclusions in the hearing examiner's initial decision be, and they hereby are, modified to the extent and in the manner indicated in the accom-

panying opinion of the Commission and that the order in said initial decision be, and it hereby is, modified to read as follows:

It is ordered, That the respondents, Union Circulation Company, Inc., National Circulating Company, Inc., Periodical Sales Company, Inc., Publishers Continental Sales Corporation, corporations, and their officers, and Leo E. Light and Roy C. Hodge, individually and as copartners doing business as National Literary Association, and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distibution of magazine subscriptions in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents or between any of said respondents and others not parties hereto, to do any of the following acts or things:

1. Entering into, carrying out, enforcing or giving effect to any agreement not to employ parties who have previously been actively engaged for themselves or for others in the business of soliciting magazine subscriptions.

2. Ceasing or limiting, or threatening to cease or limit, their efforts to obtain subscriptions for magazines for publishers unless such publishers refuse or discontinue authority to solicit subscriptions for their magazines to subscription agencies employing sales representatives formerly connected with other subscription agencies.

It is further ordered, That the findings as to the facts and conclusions in the hearing examiner's initial decision, as modified herein, be, and they hereby are, adopted as part of the Commission's decision.

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.

IN THE MATTER OF

STANDARD DISTRIBUTORS, INC., ET AL.

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

Docket 5580. Modified Order, Jan. 27, 1955

Order modifying prohibitions issued June 13, 1952, 48 F. T. C. 1435, 1447, of false representations with respect to free offers, so as to permit respondents, in the event of their changing their selling practices, to take advantage of the "free goods policy', as set forth in the subsequently announced *Walter J. Black* opinion and decision, Docket 5571, Sept. 11, 1953, 50 F. T. C. 225.

Before *Mr. Frank Hier*, hearing examiner.

Mr. John M. Russell and *Mr. William L. Pencke* for the Commission.

Anderson & Roche, of Chicago, Ill., for Standard Distributors, Inc., LeRoy S. Bimstein and A. J. Noreus.

MODIFIED ORDER TO CEASE AND DESIST

This matter having come before the Commission upon respondents' petition for an amended order to cease and desist, and upon the answer of counsel supporting the complaint in opposition thereto; and

The Commission, having determined that its order to cease and desist issued on June 13, 1952, should be modified for the reasons and in the manner set out in its accompanying opinion, hereby issues its modified order to cease and desist as follows:

It is ordered, That the respondent, Standard Distributors, Inc., a corporation, and its officers, and the respondent, LeRoy S. Bimstein, individually and as an officer of said corporation, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribuiton in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the New Standard Encyclopedia and its supplement, World Progress, edited and published by Standard Education Society, or of any other book or books, do forthwith cease and desist from:

(1) Representing, directly or by implication:

(*a*) That the New Standard Encyclopedia is a new encyclopedia;

(*b*) That one may obtain a set of the New Standard Encyclopedia or a reduction in the price thereof merely by writing a letter of recommendation therefor or an opinion thereon;

(*c*) That any of the books sold by respondents may be obtained by any means other than by payment of the full purchase price; or that purchasers of a combination of books pay only for a part thereof:

(1) Unless all the conditons, obligations, or other prerequisites to the receipt and retention of the books claimed to be free or reduced in price shall be clearly and conspicuously explained or set forth at the offset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; and

(2) Unless, with respect to the books required to be purchased in order to obtain the books claimed to be free or reduced in price, the offerer neither (a) increases the ordinary and usual price; nor (b) reduces the quality; nor (c) reduces the number or size of the books required to be purchased;

(*d*) That the price at which any book or combination of books is offered is less than the price at which it will be offered later, contrary to the fact;

(*e*) That the quality of the binding, printing, paper or illustrations of any book, as delivered, will be equal in such respects to samples thereof exhibited to prospective purchasers, contrary to the fact;

(2) Exhibiting to prosective purchasers samples of the binding, printing, paper or illustrations of such encyclopedia, supplement or any other book, which are superior in quality to the binding, printing, paper or illustrations of such books as delivered to purchasers thereof.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to the respondents, David Tuttle and A. J. Noreus.

It is further ordered, That the respondents, Standard Distributors, Inc., and LeRoy S. Bimstein, 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 modified order.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The respondents have filed a petition asking for the modification of the order entered herein and also asking that the order be vacated as to respondent LeRoy S. Bimstein.

The complaint, which was issued August 30, 1948, charged unfair and deceptive acts and practices in commerce contrary to the Federal Trade Commission Act in the sale of encyclopedias. After a trial on the merits, the Commission, on June 13, 1952, issued its findings as to the facts and conclusions. The findings so far as material here were as follows:

"PARAGRAPH SEVEN:

(*b*) Corporate respondent does not give free, or at a nominal price, the encyclopedia or any other book on the sole condition that the prospect will furnish it a letter of recommendation or of opinion thereof. No prospect or purchaser receives anything free from the corporate respondent—if he buys anything, he pays for everything he gets.

(*c*) No purchaser from corporate respondent secures the encyclopedia free by buying the supplement, or otherwise, but each purchaser buys and pays for all the books enumerated in the purchase contract, including the encyclopedia."

The order of the Commission directed, among other things, that respondents Standard Distributors, Inc., and LeRoy S. Bimstein should cease and desist from:

"(1) Representing, directly or by implication:

* * * * * * *

(*b*) That one may obtain a set of the New Standard Encyclopedia or a reduction in the price thereof merely by writing a letter of recommendation therefor or an opinion thereon; *or that any of the books sold by the respondents may be obtained by any means other than by payment of the full purchase price;*

(*c*) *That purchasers of a combination of books pay only for a part thereof;*

* * * * * * *

Representations by the respondents to the contrary were found to be false and misleading.

Thereafter an appeal was taken by respondents to the U. S. Court of Appeals for the Second Circuit which, on February 26, 1954, denied the appeal. Respondents then filed a petition for a rehearing claiming, among other things, that the decision of the Commission was not in accord with the new policy of the Commission as set forth in the matter of *Walter J. Black, Inc.* v. *FTC.* The court entered the following order:

> The petition for rehearing is denied. Petitioners may, if so advised, apply to the Federal Trade Commission for the amendment of its order, notwithstanding our affirmance of it to bring it into conformity with the general policy of the Commission announced in re *Walter J. Black* v. *FTC*, decided on September 18, 1953.

The Black case had to do with the practice of advertising as "free" an article given to a purchaser, without additional cost, on condition that he buy some other article. In an opinion issued September 11, 1953, the Commission modified its previous policy and held that an

article could be advertised as "free" even though given only in connection with the sale of another article where all the conditions, obligations, etc. were clearly and conspicuously explained at the outset so as to prevent misunderstanding, and when the price of the article sold was not increased over the ordinary and usual price, nor the quantity, quality, or size of such article reduced.

It is clear that the so-called "free goods" policy of the Commission (either before or after the Black decision) had no connection with the practices of respondent which were the occasion for the order against them. Respondents gave nothing free. Their contract and their instructions to their salesmen clearly so indicated. The order was entered against them because their salesmen, acting contrary to direction but in the apparent scope of their authority, did falsely represent that books were being given to a selected few either free or at a reduced price.

However, assuming that respondents should change their selling practices to take advantage of the rule laid down in the Black case, would any part of the order prevent them from doing so? For example, respondents might decide to offer for sale a ten-volume set of the New Standard Encyclopedia at the regular price and give in addition thereto without further cost the Quarterly Loose Leaf Extension Service Supplement, or a Webster's Unabridged Dictionary. Such an offer would contemplate that the Supplement or the Dictionary may be received by means other than by paying the full purchase price for that particular article. Of course, payment of the regular price for the encyclopedia would be required.

The offer outlined above could be made under the Black decision if compliance were had with the conditions laid down therein. The question is would such an offer be contrary to that part of the order which provides as follows:

"(1) Representing, directly or by implication:

* * * * * * *

(*b*) * * * or that any of the books sold by the respondents may be obtained by any means other than by payment or the full purchase price;

(*c*) That purchasers of a combination of books pay only for a part thereof."

We think the order might be construed to prohibit the making of the above offer and would put respondents at a competitive disadvantage with competitors who were free to take advantage of the new "free" policy.

Respondents' request is that the last clause of (1) (b) (the portion underlined) and all of (c) be stricken. However, we think the order will be brought into conformity with the present law if (b) and (c) are modified to read as follows:

(*b*) That one may obtain a set of the New Standard Encyclopedia or a reduction in the price thereof merely by writing a letter of recommendation therefor or an opinion thereon.

(*c*) That any of the books sold by respondents may be obtained by any means other than by payment of the full purchase price; or that purchasers of a combination of books pay only for a part thereof:

(1) Unless all the conditions, obligations, or other prerequisites to the receipt and retention of the books claimed to be free or reduced in price shall be clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; and

(2) Unless, with respect to the books required to be purchased in order to obtain the books claimed to be free or reduced in price, the offerer neither (*a*) increases the ordinary and usual price; nor (*b*) reduces the quality; nor (*c*) reduces the number or size of the books required to be purchased.

All other relief demanded in respondents' petition is denied. The order is hereby modified as above indicated and it is directed that a proper modified order be issued.

IN THE MATTER OF

COMMERCIAL TRAVELERS INSURANCE COMPANY

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

Docket 6241. Complaint, Oct. 14, 1954—Decision, Jan. 27, 1955

Consent order requiring an insurance company in Salt Lake City, Utah, to cease falsely advertising the coverage and benefits of its accident and health policies.

Before *Mr. William L. Pack* and *Mr. Abner E. Lipscomb*, hearing examiners.

Mr. Andrew C. Goodhope and *Mr. Robert R. Sills* for the Commission.

Riter, Cowan, Finlinson & Allen, of Salt Lake City, Utah, and *Mr. Ralph E. Becker*, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Commercial Travelers Insurance Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Commercial Travelers Insurance Company is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Utah with its office and principal place of business at 32 Exchange Place, Salt Lake City, Utah.

PAR. 2. Respondent is now, and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States other than the State of Utah, in which states the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said

insurance policies in commerce between and among the several States of the United States.

Such policies have become known in the insurance trade and are sometimes referred to by respondent as "accident and health policies" or "accident and sickness policies."

Generally, such a policy provides that in consideration of a stated sum of money, sometimes referred to as a premium, and other considerations, respondent promises to indemnify the insured or policyholder in the event of injury to or the sickness of the insured in accordance with the various terms and conditions of such policy by paying cash benefits for losses resulting from accidental injury, disease or sickness.

Respondent, during the two years last past, has sold a variety of such policies, among which were the following:

1. Premium Reduction Disability Policy identified by the respondent as Form R41.

2. Family Medical or Surgical Policy identified by the respondent as Form MES40.

3. Hospital and Surgical Expense Policy identified by the respondent as Form HAS–39.

4. Hospital and Surgical Expense Policy identified by the respondent as Form HAS–46.

5. President's Bonus Policy identified by the respondent as Form PB.

6. Accident Policy identified by the respondent as Form ACH37.

7. Ten-Year Bonus Policy identified by the respondent as Form TYB–2M.

8. Expansion Refund Disability Policy identified by the respondent as Form ERD–2M.

9. Employees Income Plan identified by the respondent as Form EIP44–5M.

10. Creditors Group Disability Insurance identified by the respondent as Form 34.

11. Creditors Group Life Insurance identified by the respondent as Form 66.

PAR. 3. Respondent is licensed, as provided by the state law, to engage in the business of insurance, as heretofore generally decribed, in the States of Utah, Nevada, Arizona, Idaho, Wyoming, Colorado, Oregon, Washington, Montana, South Dakota, and New Mexico. Respondent is not now, and for more than two years last past has not been, licensed as provided by the respective state laws to engage in the business of insurance in any state of the United States other than those last above mentioned.

Respondent has sold a substantial number of its said policies to insureds now residing in states other than those in which respondent has been duly licensed, as aforesaid, and respondent mails to such insureds or policyholders notices and receipts relating to the payment of renewal premiums and receives and accepts from such insureds or policyholders premiums mailed to it renewing the coverage purchased for the period of time covered by the premium submitted. Respondent also corresponds with insureds or policyholders located in said States other than those in which respondent has been duly licensed with respect to claims and the payment of claims; and when a claim is approved or a settlement made, the respondent mails to said policyholders located in said States in which the respondent is not licensed, as aforesaid, checks or drafts in payment of such claims. The renewal of term insurance in this manner constitutes trade in commerce to the same extent as the original purchase of said insurance.

PAR. 4. In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated and caused to be disseminated in the form of circulars and other printed and written matter, false, misleading and deceptive advertisements concerning the terms and provisions of various of its contracts of insurance as reflected by said policies aforesaid. These advertisements were disseminated by the United States mails or through licensed agents of respondent in commerce between and among the various States of the United States. The purpose and effect of these advertisements was and is to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

PAR. 5. In the course and conduct of its said business in said commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing statements hereinafter set forth.

1. (*a*) Relating to its "Hospital and Surgical Expense Policy," Form HAS-46—

Pays Full Benefits at All Ages. Policy does not contain provision terminating or reducing benefits at specified age.

(*b*) Relating to its "President's Bonus Plan," Form PB—

FOR INDIVIDUALS OR FAMILY GROUPS WITH FULL BENEFITS FOR ALL AGES FROM 1 DAY TO 80 YEARS
PAYS ALL AGES

Full benefits are paid to persons aged 1 to 80. Contains no clause terminating or reducing benefits at specified age.

(*c*) Relating to its "Accident Policy," Form ACH 37—

No Reduction in benefits because of age or because of doing any act pertaining to any occupation.

Non-Assessable
Issued to Insurable Men and Women 16–65.

2. (*a*) Pertaining to its "Ten-Year Bonus Policy," Form TYB—

For any and every kind of sickness or disease which is contracted by the Insured and which begins while policy is in force

(*b*) Pertaining to its "Expansion Refund Disability Policy," Form ERD–2M—

Covers all forms of SICKNESS AND ACCIDENT

* * * OUR PLAN WILL PAY YOU
FOR ANY AND EVERY KIND OF SICKNESS OR ACCIDENT

(*c*) Pertaining to its "President's Bonus Plan," Form PB—

Pays full monthly rate for all forms of sickness, accidents.

Our "President's Bonus Plan"
Covers all forms of
SICKNESS AND ACCIDENT

* * * OUR PLAN WILL PAY YOU * * *
*FOR ANY AND EVERY KIND OF SICKNESS OR ACCIDENT

Never before have so many benefits for the entire family been included in one policy.
Never before has such complete protection been offered.

(*d*) Pertaining to its "Hospital and Surgical Expense Policy," Form HAS–46—

Benefits for Accidents, Sickness and Childbirth.
Provides Benefits for Hospital and Ambulance Expense. Also fees for surgical Operations due to Accidents or Sickness, regardless of where operation performed.

(*e*) Pertaining to its "Family Medical and Surgical Policy," Form MES40—

A plan designed by Commercial Travelers Insurance Company will pay hospital, medical and surgical expenses, doctor calls at home, childbirth costs and many other expenses that will benefit every member of your family—

(*f*) Pertaining to its "Premium Reduction Disability Policy," Form R41—

WE WILL PAY YOU
*FOR ANY AND EVERY KIND OF SICKNESS OR ACCIDENT Non-Confining Disability Covered.
*Exceptions as provided by the policy; Childbirth, Suicide, War Disabilities and Private Flying.

3. In addition to the statements set forth above in subparagraph 2 of Paragraph Five, pertaining to the various policies therein described, the following statement has been made by respondent pertaining to its "Accident Policy," Form ACH37:

Covers All Accidents except Military and Naval service and non-commercial aviation.

4. (*a*) Pertaining to its "Family Medical or Surgical Policy," Form MES40, and its "Hospital and Surgical Expense Policy," Forms HAS–46—HAS–39.

2. Pays full hospital, medical and surgical benefits regardless of any other insurance or compensation you may now have.

9. Out patient benefits are paid in full in accordance with the benefits of the policy.

Here's what this amazing plan offers:

HOSPITAL ROOM. You select the hospital room coverage you feel is adequate for you and your family—$5.00 to $20.00 per day. Then if you are sick we pay up to 200 days room and board in any licensed hospital at the room rate you have selected.

HOSPITAL EXTRAS. In addition to your board and room, we pay for the many hospital extras that are usually the most expensive part of your hospital confinement. Look at this list!

Operating room—Laboratory service
Surgical dressings . X-Rays
Plaster casts and splints . Oxygen
Hypodermics—Drugs of all types
Anaesthesia and service of anesthetist
Blood transfusions . Iron

NO LIMIT UP TO $1000.00

(Pays all of first $100 plus 75% of next $1200 on these combined hospital extras).

AMBULANCE SERVICE. Pays both ways, to and from the hospital, for either sickness or accidents.

SURGEONS' FEES. For each operation we will pay from $10.00 to $525.00. There are no exceptions as to the type of operation you have.

DOCTOR FEES. Even though no surgery is performed we still pay for doctor calls at your home, in the hospital or visits you make to his office or clinic.

ADDITIONAL DOCTOR BENEFITS. Unlike many other plans that require hospitalization for benefits, the CTI Plan pays for costly X-Rays, blood transfusions, oxygen, electrocardiograms, metabolism tests and first aid treatment received IN THE DOCTOR'S OFFICE OR CLINIC.

MATERNITY BENEFITS. We pay a $50.00 delivery fee for doctor plus 8 times daily hospital benefit you select.

(*b*) Pertaining to its "Family Medical or Surgical Policy," MES40—

We are making this offer to acquaint you with the details of our new Hospital and Medical Expense Plan. This plan pays for your hospital room and board, surgical fees, doctor's calls at home, hospital or office, ambulance service, first aid treatment, plus extra hospital expenses such as operating room, surgical dressings, hypodermics, anesthesia, drugs, laboratory service, oxygen, blood transfusions, x-rays, etc. It also pays for hospital confinement for childbirth and the surgeon's fees for child delivery.

(*c*) Pertaining to its "Hospital and Surgical Expense Policy," Form HAS-46—

Pays full benefits regardless of any other insurance you have. Pays in addition to Workmen's compensation.

First Aid Benefit—pays benefit for doctor's fee for minor injuries not requiring hospital confinement.

Hospital room, hospital expenses, surgical fees, ambulance and other expenses will be assured for all family accidents or mishaps. In addition a special benefit allowance will be provided for maternity cases * * * and all at a price you can easily afford.

So, DON'T WORRY about illness and accidents in YOUR family. Your peace of mind alone is worth the few pennies this new policy will cost you.

(*d*) Pertaining to its "President's Bonus Plan," Form PB—

CTI's amazing new Hospital and Medical Expense Plan offers you and your entire family financial protection for accident, sickness, and childbirth * * * plus valuable benefits never before offered. Polio protection up to $5,000. Pays full benefits regardless of other insurance you may now have. No medical examination necessary. Includes an optional clause giving you up to $200 a month income. Contains an Incontestable Clause vitally important to you. "Increasing Benefits With Decreasing Cost" which simply means premiums are reduced up to 25% for non-claimants. Your policy is good anywhere in the world.

DOCTOR & SURGICAL BILLS

You choose your own doctor and surgeon. We pay up to $150 doctor's fees for office, home or hospital calls. We pay up to $525 for each surgical operation.

HOSPITAL BILLS

An identification card issued by the Company admits you to any hospital of your choice. Pays up to $20 a day for as long as 200 days

FIRST AID BENEFITS

Pays benefits for doctor's fee for minor injuries not requiring hospital confinement.

OTHER BENEFITS

Cash for the added expenses of X-Rays, Anaesthesia, Laboratory Service, Drugs, Oxygen, Blood, Transfusions, Iron Lung, Operating Room, Nurses and other costly hospital fees.

PAR. 6. Through the use of said statements and representations, and others of similar import and meaning not specifically set out herein, the respondent represents and has represented, directly or by implication with respect to said polices of insurance, as follows:

(1) That the indemnification provided by its said policies against loss caused by accident or sickness may be continued to the age of 80 or may be continued indefinitely at the option of the insured.

That the indemnification provided by all of its said policies is not subject to cancellation by the respondent and that the insured is assured of the continuance of the indemnification provided by said policies by the payment of renewal premiums at the expiration of the term covered by each premium.

(2) That the indemnification provided by its said policies against loss from sickness is broad and all inclusive and provides indemnification against loss caused by any and all sicknesses with no exclusions.

That the indemnification provided by its said policies provides full indemnification for all types of operations and not merely those specifically listed in the surgical schedule found in said policies and that surgical benefits are paid in full for female conditions, occasioning an operation or operations, and that said policies do not limit the in-

demnification provided the insured regardless of the number of days spent in the hospital in any one year and that there is no limit to the number of operations which may be performed and for which the respondent is liable during any disability or any period of time.

(3) That the indemnification provided by its said policies against loss from accident is broad and all inclusive and provides indemnification against loss caused by any and all accidents with the sole exception of those caused by Military and Naval service and non-commercial aviation.

(4) That the indemnification provided by its said policies against loss caused by accidents or sicknesses will indemnify the insured thereunder completely and fully for any and all losses as a result of any or all accidents or sicknesses.

That the indemnification provided by all of its said policies will pay for or will indemnify the insured thereunder fully for hospital rooms, any other hospital extras, complete ambulance service, surgeon fees up to $525, all doctor fees, whether in a hospital or in a doctor's office or clinic, and complete payment for maternity costs.

That said policies will provide an income up to $200 a month to any insured thereunder.

PAR. 7. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

(1) The indemnification provided by all of the respondent's said policies against loss caused by accidents or sicknesses, as the case may be, cannot be continued indefinitely or for any particular period of time at the option of the insured, but on the contrary, said policies are renewable at the option of the respondent only, and with the certain exceptions later referred to may be canceled or terminated by the respondent at the end of any premium payment period for any reason or for no reason at all and the indemnification against loss caused by one or more of certain specific accidents enumerated in said policies automatically terminate said policies and all further liability ceases.

Respondent's "Ten-Year Bonus Policy," Form TYB, and "Expansion Refund Disability Policy," Form ERD-2M, and "President's Bonus Policy," Form PB, all contain the following provision:

> This policy is guaranteed renewable during any period the insured is qualified for the special ten-year cash bonus. The payment of such bonus matures and terminates this policy. The renewal of this policy on the next succeeding premium due date following a claim payment shall be at the option of the company.

(2) The indemnification provided by all of the respondent's said policies against loss from sickness is not broad and all inclusive and

does not provide indemnification against loss caused by any and all sicknesses with no exclusions.

The indemnification, provided by the respondent by all of its said policies, does not provide full indemnification for all types of operations and does not provide full indemnification for all female conditions requiring an operation or operations and said policies limit the indemnification provided the insured thereunder to a definite number of days spent in a hospital or hospitals in any one year and there is a limit to the number of operations which may be performed and for which the respondent is liable during any disability or any period of time.

(*a*) Respondent's "Ten-Year Bonus Policy," Form TYB, provides as follows:

PART C. MONTHLY ACCIDENT BENEFIT

Total Disability.—The Company will pay a monthly income for the period of disability at the rate specified under Part A1 if "such injury" alone shall within two weeks from the date of accident, wholly and continuously disable and prevent the Insured from performing any and every duty pertaining to his business or occupation.

Partial Disability.—The Company will pay an income, for a period of disability not exceeding one month, at one-half the rate specified under Part A1 if "such injury" shall not, within two weeks from date of the accident wholly disable the Insured, but shall within ninety days thereafter disable him, or shall, commencing on the date of the accident or immediately following total loss of time, prevent the Insured from performing one or more important duties pertaining to his business or occupation.

The total amount payable under this Part C for any one accident shall not exceed the Principal Sum, and no benefits shall be paid for the first week of disability resulting from any accident causing any loss specified in Part G, nor for any time the Insured is not under the regular attendance of a legally qualified physician or surgeon.

PART D. MONTHLY SICKNESS BENEFIT

Confining Sickness.—The Company will pay a monthly income for the period of disability at the rate specified under Part A2 if "such sickness" shall wholly and continuously disable and prevent the Insured from performing any and every duty pertaining to his business or occupation, and shall necessarily and continuously confine him within the house.

Convalescence Clause.—The Company will pay an income, for a period of disability not exceeding one month, at the rate specified under Part A2 if "such sickness" shall wholly and continuously disable and prevent the Insured from performing any and every duty pertaining to his business or occupation, by reason of any non-confining sickness or immediately following a confining sickness.

The total amount payable under this Part D for any one sickness shall not exceed the Principal Sum, and no benefits shall be paid for the first week of disability. The benefits provided under this Part C shall not be paid for any disability resulting from any accident causing any loss specified in Part G, nor

for any time the Insured is not under the regular attendance of a legally qualified physician or surgeon.

PART E. HOSPITAL BENEFIT

If the Insured is necessarily and continuously confined in a licensed hospital, solely on account of "such injury" or "such sickness," the Company will pay from the first day of such confinement, in lieu of the monthly accident or sickness benefit. the monthly Hospital Benefit at the rate per month specified in Part A3, for a period not to exceed one month. If hospital confinement lasts longer than one month, benefits thereafter shall be payable at the regular monthly rate specified in Part A1 or A2. If hospital expenses are insured under Workmen's Compensation or Occupational Disease Law, or if they are covered or paid by the Veterans' Administration or some governmental body, then the benefits shall be payable at the regular monthly rate specified under Parts A1 or A2. The total amount of all payments shall not exceed the Principal Sum.

PART F. NURSE BENEFIT

If the Insured is necessarily attended by a graduate nurse, solely on account of "such injury" or "such sickness," the claim is not made for benefit under Part E, the Company will pay from the first day of such attendance, in lieu of the monthly accident or sickness benefit, at the rate of the monthly Nurse Benefit specified in Part A4 for a period not to exceed one month. If the attendance by a graduate nurse shall continue for more than one month, benefits thereafter shall be payable at the regular monthly rate specified in Parts A1 or A2. If the expense of a graduate nurse is insured under Workman's Compensation or Occupational Disease Law, or is covered or paid by the Veterans' Administration or some governmental body, then the benefits shall be payable at the regular monthly rate specified under Parts A1 or A2. The total amount of all payments shall not exceed the Principal Sum.

PART G. DEATH, DISMEMBERMENT OR LOSS OF SIGHT

If any one of the following specific losses shall result wholly from "such injury" within ninety days from the time of the accident the Company will pay:

FOR LOSS OF	
Life	THE AMOUNT SPECIFIED UNDER PART A6
Both Hands or Both Feet	THE PRINCIPAL SUM
Entire Sight of Both Eyes	THE PRINCIPAL SUM
Either Hand or Either Foot	ONE-HALF THE PRINCIPAL SUM
Sight of One Eye	ONE-FOURTH THE PRINCIPAL SUM

Payment of any of the above losses, specified in this Part G, shall terminate this policy and all liability hereunder. Loss of hands or feet means loss by severance at or above the wrist or ankle joint, and loss of sight means entire and irrevocable loss of sight.

(*b*) Respondent's "Expansion Refund Disability Policy," Form ERD, respondent's "President's Bonus Plan," Form PB, and respondent's "Premium Reduction Disability Policy," Form R41, all contain provisions identical with or substantially similar to those provisions quoted above from the respondent's "Ten-year Bonus Policy," Form TYB.

(*c*) Respondent's "Hospital and Surgical Expense Policy," Form HAS46 and "Family Medical or Surgical Policy," Form MES40 provide, among other things, as follows:

The Insuring Clause.—(Company) HEREBY INSURES the Applicant first named in the attached application A, hereinafter called the Insured, and will pay, subject to all provisions and limitations herein contained, the benefits provided herein for expense of hospital confinement, commencing while this policy is in force, and other expenses actually incurred while this policy is in force on account of the Insured and the dependent members of the Insured's family, if any, named in said application (all of whom, including the Insured are hereinafter called the Family Group).

(*b*) Resulting from sickness or disease, the cause of which originates while this policy is in force, and more than fifteen days after the effective date thereof, hereinafter referred to as "such sickness"; and

(*c*) After ten months from the effective date hereof, resulting from childbirth, pregnancy or miscarriage.

In addition, respondent's "Hospital and Surgical Expense Policy," Form HAS46 provides as follows:

PART 1. HOSPITAL EXPENSE BENEFITS

If the Insured or any member of the Family Group shall be necessarily confined within a recognized hospital as a resident bed patient on account of "such sickness," or treated in a recognized hospital for "such injury," upon the advice of, and regularly attended by, a legally qualified physician or surgeon, other than the Insured or member of the Family Group, the Company will pay the Insured (or hospital if authorized by the Insured to do so) for the following items of hospital expense actually incurred by the Insured, or member of the Family Group, but not to exceed the amount stated below:

Hospital Room.

Including meals and general nursing care, not to exceed the Daily Indemnity set forth in Schedule A on the first page hereof, and not to exceed one hundred days for any one accident or sickness. The maximum period that the Daily Indemnity will be payable for each accident or sickness will be increased by twenty-five days for each full year that this policy is maintained in continuous force, until a maximum period of two hundred days has been reached.

Thereafter, this same policy provides that the respondent will indemnify the insured for the regular and customary charges made by the hospital for operating room charges, surgical dressings, hypodermics, plaster casts and splints, and specific payments, the amount of which depends upon the daily indemnity granted by such policy for anaesthesia, X-ray, laboratory service, drugs, oxygen, blood transfusion, and iron lung service.

The indemnity provided by this policy for childbirth benefits requires that the policy have been in force not less than ten months in order to obtain benefits and then will pay benefits equal to ten times the daily indemnity of said policy.

The indemnification for ambulance costs is limited to $25 if such ambulance is not confined to the corporate limits of a city.

The indemnity provided by this policy for tonsillectomy and adenoidectomy requires that the policy have been in force for at least six months and that respondent will pay the insured a sum equal to five times the daily indemnity of the policy and that "such payment shall be in lieu of any and all other benefits under this policy on account of such operation."

This said policy sets forth a schedule of maximum payments payable as indemnity for the expense of specific operations.

This policy provides for the following limitations and exclusions:

(1) This policy does not cover diagnosis, examinations or observations not due to actual illness or injury; rest cure; mental derangements or nervous disorders; dental treatment; injury or sickness caused by war or any act of war, declared or undeclared; alcoholism or hospital confinement in a hospital operated by the Veterans Administration.

(2) Tuberculosis, cancer, diseases of the heart or circulatory system, abdominal hernia or rupture, diseases of the generative organs, appendicitis, thyroidectomy, stomach ulcers, hemorrhoids, tonsillectomy, adenoidectomy or diseases of the gall bladder shall be covered under this policy only if hospital confinement begins after this policy has been in force six months or more.

Respondent's "Family Medical or Surgical Policy," Form MES40, in addition to the provisions from such policy quoted above contains the following provisions:

PART I. MEDICAL EXPENSE

If any member of the Family Group shall necessarily be treated by a duly licensed physician or surgeon for bodily injuries or sickness as described in the insuring clause on the first page hereof the Company will pay toward the expense of such medical treatments, including the first treatment for bodily injuries and beginning after the second treatment for sickness, up to Three Dollars ($3.00) per treatment at home and Two Dollars ($2.00) per treatment at the hospital or the doctor's office (limited in any case to one treatment per day) not to exceed One Hundred Fifty Dollars ($150.00) as the result of any one accident or any one sickness.

PART II. MISCELLANEOUS EXPENSE

If any member of the Family Group shall necessarily incur miscellaneous expense for bodily injuries or sickness as described in the insuring clause on the first page hereof the Company will pay the Insured the expense actually incurred as follows:

(*a*) X-ray examinations, electrocardiograms or metabolism tests not to exceed Fifteen Dollars ($15.00) as a result of any one accident or sickness.

(*b*) Use of oxygen not to exceed Fifteen Dollars ($15.00) as a result of any one accident or sickness.

(*c*) Use of Iron Lung not to exceed Two Hundred Fifty Dollars ($250.00) as a result of any one accident or sickness.

PART III. MATERNITY EXPENSE

If any member of the Family Group shall incur medical, surgical, or miscellaneous expenses due to childbirth, abortion, miscarriage, or any other complication of pregnancy while this policy is in force and not less than ten (10) months after its date of issue the Company will pay to the Insured the benefits provided herein for such expense but not to exceed Fifty Dollars ($50.00) as a result of any one pregnancy.

PART IV. SURGICAL EXPENSE

If any member of the Family Group by reason of injury or sickness as described in the insuring clause on the first page hereof, undergoes an operation named in the Schedule of Operations appearing herein, and such operation is performed by a duly licensed surgeon, the Company will pay the surgeon's fee up to the amount specified in the Schedule for such operation. If more than one operation be performed on account of injuries sustained in any one accident or on account of any one illness, the limit of payment shall be the largest sum specified in the schedule for any one of the operations so performed.

PART VI. EXCEPTIONS

This insurance does not extend to or cover loss due to (a) veneral disease or syphilis; (b) mental derangement or nervous disorders; (c) dental operations or dental treatment; (d) simple rest cure; (e) war or any act of war; (f) childbirth, miscarriage, abortion, or any other complication of pregnancy except as provided, in Part III under the heading "Maternity Expense"; (g) abdominal hernia, tuberculosis or heart disease unless the loss occurs not less than six months after the date of issue of this policy; (h) surgical operations caused by tonsillitis, appendicitis or diseases of the generative organs unless the loss occurs not less than six months after the date of issue of this policy; (i) examinations not due to actual illness or injury.

Benefits provided by this policy are payable under Part L or Part IV, whichever provides the greater benefit, but not under both Parts for the same injury or illness.

In addition this same policy sets forth a schedule of operations including a maximum benefit which will be paid by the respondent for surgeon fees for specific operations.

(3) The indemnification provided by the respondent by all its said policies against loss from accident is not broad and all inclusive and does not provide indemnification to the insured against loss caused by any and all accidents with the sole exception of those caused by Military and Naval service and non-commercial aviation. In addition to the provisions of the respondent's various contracts quoted above in subparagraph 2 of Paragraph Seven including all the limitations and exceptions pertaining to respondent's liability thereunder, respondent's "Accident Policy," Form ACH37, provides in part as follows:

PART C. MONTHLY ACCIDENT BENEFIT

Total Accident Disability.—If "such injury" shall within thirty days from the date of the accident wholly and continuously disable the Insured from per-

forming each and every duty pertaining to any business or occupation, the Company will pay for the period of such disability, beginning with the first day of disability, but not to exceed a total of sixty consecutive months, indemnity at the rate of the Monthly Accident Benefit specified in the schedule of Benefits under Part A1.

Partial Accident Disability.—If "such injury" shall, from the date of the accident, or immediately following a period of total accident disability, wholly and continuously disable the Insured from performing one or more important duties pertaining to his business or occupation, the Company will pay for the period of such partial disability, beginning with the first day of disability, indemnity at one-half the rate of the Monthly Accident Benefit, specified in the Schedule of Benefits under Part A1, but not to exceed a total of three months.

PART J. REDUCTIONS, LIMITATIONS AND EXCEPTIONS

* * * * * * *

3. In event of any disability caused by hernia or injured back, the amount payable under all parts of this policy shall be limited to the amount provided herein for two months' total accident disability.

4. All accident benefits specified in this policy shall be reduced one-half if loss arises or is caused by the performance of the duties of the Insured's occupation, as stated in the application for this policy, or by the performance of the duties of an occupation deemed by the Company to be equally hazardous."

(4) The indemnification provided by the respondent by all of its said policies against loss caused by accidents or sicknesses will not indemnify the insured thereunder completely and fully for any and all losses as a result of any and all sicknesses or accidents.

The indemnification provided by all of said policies will not pay for nor indemnify the insured thereunder fully for hospital rooms, any other hospital extras, complete ambulance service, surgeon's fees up to $525 for all operations, all doctors fees whether in the hospital or doctor's office or clinic and complete payment for maternity cost, and said policies will not provide an income up to $200 a month to any insured thereunder.

(*a*) The provisions of respondent's "Family Medical or Surgical Policy," Form MES40, quoted above, in subparagraph (2), provides for numerous exceptions and limitations to the indemnity provided by the respondent pursuant to such agreements.

(*b*) The provisions of respondent's "Hospital and Surgical Policy," Form HAS46, quoted above in subparagraph (2) and described therein provides for a number of exceptions and limitations upon the indemnity provided by the respondent by said policies.

(*c*) The provisions of respondent's "President's Bonus Policy," Form PB, described and quoted from above in subparagraph (2), provides for numerous limitations and exceptions from the indemnification provided by the respondent by such contracts. Respondent's "President's Bonus Policy," in addition to continuing provisions substantially identical to those quoted above in subparagraph 2 (a) from respondent's "Ten-Year Bonus Policy," Form TYB, contains the following provisions:

PART L. REDUCTIONS, LIMITATIONS, AND EXCEPTIONS

* * * * * * *

3. The insurance herein shall cover diseases peculiar to women, but not sickness which is complicated with, or caused by pregnancy or childbirth.

4. The Insured shall not be entitled to benefits for two or more disabilities at one and the same time, resulting respectively from accident and sickness; however, the Insured shall receive the largest benefit applicable thereto.

5. Hernia and injured back shall be covered only under the sickness clause of this policy, regardless of whether caused by accidental bodily injury.

PAR. 8. The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

The aforesaid acts and practices of 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 January 27, 1955, 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

The Federal Trade Commission, on October 14, 1954, issued its complaint in this proceeding, charging the respondent with the dissemination, during the two years last past, of false, misleading and deceptive advertisements concerning the terms and conditions of various of its contracts of insurance of the type known as "accident and health policies" or "accident and sickness policies," and its failure to reveal the limitations of coverage of such policies, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, on December 21, 1954, counsel in this proceeding re-

quested a substitution of hearing examiners for the reason that Hearing Examiner William L. Pack, heretofore duly appointed to preside herein, was temporarily unavailable. Simultaneously counsel consented to the substitution of Hearing Examiner Abner E. Lipscomb for Hearing Examiner Pack, which substitution was forthwith effectuated. The respondent then entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to Hearing Examiner Lipscomb a Stipulation For Consent Order disposing of all the issues in this proceeding. Subsequent thereto, counsel submitted an amendment to the stipulation, which was duly received by the hearing examiner.

The respondent is identified in the stipulation as a corporation organized under and existing by virtue of the laws of the State of Utah, with its office and principal place of business located at 32 Exchange Place, Salt Lake City, Utah.

Respondent admits all the jurisdictional allegations set forth in the complaint, and agrees that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith. It expressly waives the filing of an answer, hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other proceedings before the hearing examiner or the Commission to which it may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

It is agreed by respondent that the order contained in the stipulation shall have the same force and effect as if made after full hearing, presentation of evidence and findings and conclusions thereon. Respondent specifically waives any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with its stipulation. It also agrees that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record in this proceeding, upon which the initial decision shall be based. The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the Stipulation For Consent Order is for settlement purposes only, and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

In view of the facts outlined above, and the further fact that the order embodied in said stipulation is, in substance, the order accom-

panying the complaint, and is adequate to forbid all the acts and practices charged therein, it appears that such order will safeguard the public interest to the same extent as could be accomplished by full hearing and all other adjudicative proceedings waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, the hearing examiner accepts the Stipulation For Consent Order submitted herein, together with the amendment thereto; finds that this proceeding is in the public interest, and issues the following order:

It is ordered, That the Commercial Travelers Insurance Company, a corporation, and its officers, 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 any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from:

(*a*) Representing, directly or by implication:

(1) That said insurance policy may be continued in effect indefinitely or for any period of time, when, in fact, said policy provides that it may be canceled by respondent or terminated under any circumstances over which insured has no control, during the period of time represented;

(2) That said policy provides indemnification to insured in cases of sickness or accident generally or in any or all cases of sickness or accident, when such is not the fact;

(3) That said policy provides indemnification for hospital room and board, hospital extras, ambulance service, surgeon's fees, doctor's fees, additional doctor expenses, delivery fees in maternity cases or for any other medical, surgical or hospital expenses in any or all cases which are in excess of what is actually provided;

(4) That said policy will pay in full or in any specified amount or will pay up to any specified amount for any medical, surgical, or hospital service unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondent Commercial Travelers Insurance Company, a corporation, 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 January 27, 1955].

IN THE MATTER OF

NOVELTY KNITTING MILLS, INC., ET AL.

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

Docket 6171. Complaint, Feb. 11, 1954—Decision, Jan. 29, 1955

Consent order requiring a manufacturer of wool products in Philadelphia, Pa., to cease violating the Wool Products Labeling Act through falsely tagging wool products as to the character and proportion of their constituent fibers, failing to label products with the information required by the Act, and furnishing false guaranties; and to cease violating the Federal Trade Commission Act through labeling as "100% Cashmere", etc., men's sweaters which were composed of a blend of cashmere and wool of the sheep.

Before *Mr. J. Earl Cox* and *Mr. Loren H. Laughlin*, hearing examiners.

Mr. George E. Steinmetz for the Commission.

Sterling, Magaziner, Stern & Levy, of Philadelphia, Pa., for respondents.

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 January 29, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on February 11, 1954, issued its complaint herein under the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, against the above-named corporate respondent and also against the now deceased respondent Martin J. Feld, both individually and as an officer of said corporate respondent, and doing business as Ascot Knitwear Company, charging them and each of them in several particulars in substance with engaging in unfair and deceptive acts and practices and unfair methods of competition in violation of the provisions of said Acts and of the Rules and Regulations of the Commission promulgated under said Wool Products Labeling Act by misbranding, advertising and selling in commerce certain wool prod-

ucts as "Cashmere." Said complaint was duly served upon each of said respondents and on June 21, within time extended therefor by the hearing examiner then assigned to the case, the respondent Novelty Knitting Mills filed its answer. The answer in substance admits the jurisdiction of the Commission; alleges its own corporate capacity and admits its business to be the manufacture and sale of sweaters as alleged in the complaint; alleges that it is and for many years past has been a closed family corporation of the Feld family; alleges the death of the respondent Martin J. Feld on April 24, 1954, and that he was the sole active participant in the corporate affairs and business prior to his death by reason of certain trusts of the capital stock of said corporation theretofore created (and referred to more particularly later herein); that the other officers and stockholders, Rose Feld and Isaac Feld, the parents of Martin J. Feld, had no part in the active management of the corporation and had no knowledge of its business practices and further, said corporate respondent avers it had no knowledge of the acts complained of which pertain to the alleged violations charged, and denies the allegations of its competitive status with other corporations and individuals in commerce.

On August 5, 1954, the undersigned, Loren H. Laughlin, was duly designated as the hearing examiner to hear and initially decide this proceeding in the place and stead of J. Earl Cox, the hearing examiner theretofore appointed for such purposes. On October 12, 1954, a hearing was held pursuant to notice duly given, at Philadelphia, Pennsylvania, before the undersigned hearing examiner upon the issues presented by said complaint and answer. At such hearing the respondent corporation appeared by its above-named attorney of record and it was stipulated between counsel supporting the complaint and the said corporate respondent by its said attorney that in lieu of the introduction of oral testimony and other evidence by the parties the proceeding would be submitted for decision on the basis of a "Stipulation as to the Facts" entered into by said counsel at said hearing on October 12, 1954. It was stipulated therein that the hearing examiner might proceed upon such stipulated facts to make his initial decision, stating his findings as to the facts, including inferences he might draw therefrom and his conclusions based thereon, and enter his order disposing of the proceeding without the filing of proposed findings and conclusions or the presentation of oral argument; and further, that the Commission might, if the proceeding should come before it upon appeal from the initial decision of the hearing examiner or by review upon the Commission's own motion, that the stipulation might in its discretion be set aside and the case remanded for further proceeding under the

complaint. It was still further stipulated that the complaint, insofar as it relates to the deceased respondent Martin J. Feld, individually and as an officer of Novelty Knitting Mills, Inc., and doing business as Ascot Knitwear Company, might be dismissed, and that the hearing examiner might upon the basis of the stipulated facts issue an order to cease and desist against said corporate respondent in form and substance as that set out in the "Notice" portion of the Complaint herein.

Said stipulation and also a "Stipulation of Counsel" dated September 27, 1954, entered into as a result of a pre-hearing conference, which stipulation incorporated attached true copies of the two trust agreements referred to later herein, were each offered in evidence without objection and each was accepted by the hearing examiner and received in evidence. No other evidence was presented. In connection with the presentation of such stipulations, however, brief oral statements were made by the respective counsel. Counsel for respondent in his oral statement in substance recited the history of the Novelty Knitting Mills, Inc. as a closed family corporation of the Feld family wherein Rose Feld, the mother of Martin J. Feld, now deceased, was the owner of approximately two-thirds of the shares of the issued outstanding stock of the company and the other approximate one-third of such stock was owned by the said Martin J. Feld; that Rose Feld on September 24, 1941, established an irrevocable trust under the terms of which her husband Isaac Feld, the father of Martin J. Feld, was the life income beneficiary, and Martin J. Feld and his children in the sequence stated in said trust were the beneficiaries of the remainder; that the said Martin J. Feld on January 12, 1944, established a revocable trust of his shares of said corporate stock wherein he retained complete control of the shares he had deposited therein throughout his life, so that during the respective years of the said trusts Martin J. Feld until his death not only formulated, directed and controlled the business policies of the respondent corporation, but without restraint or control by his mother or father, operated the business of the corporation as if it were a wholly-owned sole proprietorship enterprise; that Rose Feld and Isaac Feld were even at the time of establishment of the Rose Feld trust, aged persons and were inactive in corporate affairs, except only as to formal matters requiring their official signatures.

The matter was thereupon submitted and the hearing closed. At the hearing, however, it was announced that the complaint was dismissed by the hearing examiner as to the deceased respondent Martin J. Feld, this to be confirmed later by written order incorporated in the initial decision.

And the proceeding now having come on for final consideration and initial decision upon the complaint, answer, stipulations and statements of counsel made at the hearing, and the hearing examiner having fully and carefully considered the whole record herein, finds that this proceeding is in the interest of the public; that the complaint as a whole and in each alleged particular therein states cause for complaint under the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated under the latter Act; and that the Commission has jurisdiction of the subject matter and of the corporate respondent, Novelty Knitting Mills, Inc. The hearing examiner therefore makes the following findings of facts from those agreed to and recited in the said stipulations, his conclusions drawn therefrom, and order:

FINDINGS OF FACTS

1. Respondent Novelty Knitting Mills, Inc., is and was at all times material hereto, a corporation duly organized under and by virtue of the laws of the Commonwealth of Pennsylvania. Its office and principal place of business is Fourth and Cumberland Streets, Philadelphia, Pennsylvania.

2. The officers of the corporate respondent Novelty Knitting Mills, Inc., during the period of time referred to in the complaint were: President and Treasurer, Isaac Feld; Vice President and Secretary, the said individual respondent Martin J. Feld; and the directors thereof were, during such period of time, Rose Feld, Isaac Feld, and Martin J. Feld.

3. During the times mentioned in the complaint, the individual respondent Martin J. Feld acted as Vice President and Secretary of said respondent corporation, Novelty Knitting Mills, Inc., and as such, formulated, directed and controlled the manufacturing, marketing and merchandising policies, acts and practices thereof.

4. Martin J. Feld, the individual respondent, died April 24, 1954.

5. Approximately two-thirds of the issued and outstanding capital stock shares of the said respondent corporation (238 and 3534/10,000) since February 24, 1941, have been and now are owned and registered on the books of the corporation in the name of designated trustees under an irrevocable inter vivos trust created February 24, 1941, by the prior owner thereof, Rose Feld, mother of the late Martin J. Feld, for the life income benefit of Isaac Feld, father of the late Martin J. Feld, and after the death of Isaac Feld the income to Martin J. Feld, with power to withdraw payments from principal in his discretion, and after the death of the survivor of them, the principal then remain-

ing and unconsumed income therefrom to the living issue of Martin J. Feld.

6. The remaining approximately one-third of the outstanding and issued shares (141.375) of the capital stock of the corporate respondent Novelty Knitting Mills, Inc., have been and now are owned and registered on the books of the said corporation in the name of designated trustees under a revocable inter vivos trust of Martin J. Feld, Settlor, dated January 12, 1944, for his own benefit during his life and thereafter for the benefit of his wife and children.

7. Both of said trusts respectively, that created February 24, 1941, by Rose Feld, and that of January 12, 1944, established by Martin J. Feld, now deceased, are still presently in existence and operative under their respective terms and ownership of said shares of such capital stock is presently held as respectively provided in each of said trusts.

8. Subsequent to the effective date of the Wool Products Labeling Act, and particularly during 1953, the corporate respondent Novelty Knitting Mills, Inc., manufactured for introduction, introduced, sold, distributed, delivered for shipment and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool products" are defined therein.

9. Certain of said wool products described as men's sweaters 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 promulgated thereunder.

10. Said wool products, namely, men's sweaters, were misbranded within the intent and meaning of said Act and the Rules and Regulations promulgated thereunder in that they were labeled or tagged by respondent as consisting of "100% Cashmere" and "100% Imported Cashmere"; whereas, in truth and in fact, said wool products did not consist of 100% Cashmere, being the hair or fleece of the Cashmere goat, but were composed of a blend of said cashmere combined with the wool of the genus sheep.

11. Respondent, Novelty Knitting Mills, Inc., filed with the Commission, as provided by Section 9 of the Wool Products Labeling Act, continuing guarantees in the form provided by the Commission applicable to its wool products for the year 1953 and other years. During the time the said guarantees were in effect, particularly during the year 1953, said respondent did manufacture for introduction, introduced, sold, transported and distributed in commerce the aforesaid misbranded wool products. Said respondent did not come within the

exception provided by Section 9 of said Wool Products Labeling Act.

12. Respondent, in the offering for sale of certain sweaters, published advertisements in trade journals. Typical of the statements appearing in said advertisements are the following:

> Cash in on Cashmeres by Novelty
> Beautiful, soft cashmeres by Novelty offer the styling and craftsmanship that only 57 years of experience can bring. Feature these fine Cashmere Sweaters by Novelty—
> These cashmeres come to you individually packaged in cellophane lined boxes.

13. Through the use of the word "cashmere," respondent represented that sweaters referred to in said advertisement were composed entirely of "Cashmere" as the term "cashmere" is generally understood by a substantial portion of the purchasing public, namely, the hair or fleece of the Cashmere or Kashmir goat. In truth and in fact, said sweaters contained a substantial percentage of the wool of the genus sheep.

CONCLUSIONS

The acts and practices of the respondent Novelty Knitting Mills, Inc., as stipulated and now found to be factually true, were and are in each particular, violative of the Wool Products Labeling Act of 1939, and the Rules and Regulations of the Commission promulgated thereunder. And they constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act, and fully justify the order hereinafter made. But since the respondent denies the allegations of the complaint as to its competitive status with other corporations and individuals in commerce and there is no proof, either of competition in commerce or of injury or tendency to injure competitors, it is concluded that respondent's acts and practices have not been proved to be unfair methods of competition in commerce within the intent and meaning of said Act. See *Federal Trade Commission* v. *Raladam Co.* (1931), 283 U. S. 643, 652–654.

The respondent Martin J. Feld having died on April 24, 1954, the complaint insofar as it relates to him individually and as an officer of said corporation, and doing business as Ascot Knitwear Company should be dismissed.

ORDER

It is ordered, That the respondent Novelty Knitting Mills, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in

connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of sweaters 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 or misrepresenting such products by:

(1) Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers therein;

(2) Failing to securely affix or to place on each such product 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 products, exclusive of ornamentation not exceeding five percentum of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentages by weight of such fiber is five percentum 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 Wool Products Labeling Act of 1939.

(3) Furnishing false guaranties when there is reason to believe the wool products so guaranteed may be introduced, sold, transported or distributed in commerce.

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.

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

It is further ordered, That the respondent, Novelty Knitting Mills, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, 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 sweaters or other wool products, do forthwith cease and desist from, directly or indirectly:

Using the term "Cashmere" or any other word or words of similar import and meaning, either alone or in connection or conjunction with any other word or words to designate, describe or refer to any product which is not composed entirely of the hair of the Cashmere goat: PROVIDED, however, that in the case of a product composed in part of the hair of the Cashmere goat and in part of other fibers, such term may be used as descriptive of the Cashmere content if there are used in immediate connection or conjunction therewith in letters of at least equal size and conspicuousness, words truthfully designating such other constituent fibers.

It is further ordered, That the complaint, insofar as it relates to the deceased respondent Martin J. Feld, individually and as an officer of Novelty Knitting Mills, Inc., and doing business as Ascot Knitwear Company, should be, and the same hereby is, dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent Novelty Knitting Mills, Inc., a corporation, and its officers 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 January 29, 1955].

IN THE MATTER OF

BARNES METAL PRODUCTS COMPANY ET AL.

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

Docket 6225. Complaint, June 29, 1954—Decision, Feb. 8, 1955

Consent order requiring 19 manufacturers of rain-carrying and drainage equipment—known as "rain goods"—to cease engaging in any planned common and concerted course of action to fix and maintain prices, discounts, etc., of said products; selling their products in accordance with any geographical zone system of delivered prices where the purpose or effect is to fix or maintain prices, discounts, etc.; exchanging price lists and discount schedules and corresponding with respect to them or deviations from them; maintaining classifications of customers; and maintaining resale prices except as permitted by the McGuire Act.

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

Mr. Paul H. LaRue, *Mr. Lewis F. Depro* and *Mr. Everette MacIntyre* for the Commission.

Tenney, *Sherman*, *Bentley & Guthrie*, of Chicago, Ill., for Barnes Metal Products Co.

Whiteford, *Hart*, *Carmody & Wilson*, of Washington, D. C., for Berger Brothers Co., Lyon, Conklin & Co., Inc. and Benjamin P. Obdyke, Inc.

Rosenthal & Goldhaber, of Brooklyn, N. Y., for L. Bieler and Sons, Inc. and Sheet Metal Manufacturing Co., Inc.

Mr. Robert H. Duffy, of Terre Haute, Ind., for Braden Manufacturing Co., Inc.

Dinsmore, *Shohl*, *Sawyer & Dinsmore*, of Cincinnati, Ohio, for Cincinnati Elbow Co., Cincinnati Sheet Metal and Roofing Co., Inc. and The Ferdinand Dieckmann Co.

Mayer, *Friedlich*, *Spiess*, *Tierney*, *Brown & Platt*, of Chicago, Ill., for Inland Steel Products Co.

O'Connor, *Thomas*, *McDermott & Wright*, of Dubuque, Ia., for Klauer Manufacturing Co.

Johns, *Roraff*, *Pappas & Flaherty*, of La Crosse, Wis., for La Crosse Steel Roofing and Corrugating Co.

Mr. Howard W. Robbins, of Boston, Mass., for Lamb & Ritchie Co.

Irwin & Kevlin, of Philadelphia, Pa., for Benjamin P. Obdyke, Inc.

Benton, *Benton*, *Luedeke & Rhoads*, of Newport, Ky., for Newport Steel Corp.

Baker, Hostetler & Patterson, of Cleveland, Ohio, for Reeves Steel & Manufacturing Co.

Mr. H. C. Lumb, *Mr. W. J. De Lancey* and *Mr. A. J. Gentholts*, of Cleveland, Ohio, for Republic Steel Corp.

Mr. William W. Cohan and *Mr. Morton J. Simon*, of Philadelphia, Pa., for Samuel A. Schecter.

Schmidt, Hugus & Laas and *Mr. J. E. Bruce*, of Wheeling, W. Va., for Wheeling Corrugating 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, hereinafter referred to as respondents, have violated the provisions of Section 5 of the said Federal Trade Commission 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 and states its charges in these respects as follows:

PARAGRAPH 1. The respondent, Barnes Metal Products Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4425 West 16th Street, Chicago, Illinois.

Respondent, Berger Brothers Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 229 Arch Street, Philadelphia, Pennsylvania.

Respondent, L. Bieler and Sons, 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 35–42 41st Street, Long Island City, New York.

Respondent, Braden Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 431 North 14th Street, Terre Haute, Indiana.

Respondent, Cincinnati Elbow Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 221 Eastern Avenue, Cincinnati, Ohio.

Respondent, Cincinnati Sheel Metal and Roofing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office

and place of business located at 230 East Front Street, Cincinnati, Ohio.

Respondent, The Ferdinand Dieckmann Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 180 Harrison Avenue, Cincinnati, Ohio.

Respondent, Inland Steel Products Company, a wholly owned subsidiary of Inland Steel Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4101 West Burnham Street, Milwaukee, Wisconsin. This respondent was originally incorporated under the name of Milwaukee Corrugated Steel Company, and was acquired by the Inland Steel Company, after which the corporate name was changed to Inland Steel Products Company.

Respondent, Klauer Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business located at 9th & Washington Streets, Dubuque, Iowa.

Respondent, La Crosse Steel Roofing and Corrugating Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 227 Jay Street, La Crosse, Wisconsin.

Respondent, Lamb & Ritchie Company, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at Cambridge, Massachusetts.

Respondent, Lyon, Conklin & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at Race & McComas Streets, Baltimore, Maryland.

Respondent, The New Delphos Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 102 South Pierce Street, Delphos, Ohio.

Respondent, Benjamin P. Obdyke Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 443–453 North 8th Street, Philadelphia, Pennsylvania.

Respondent, Newport Steel Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 9th & Lowell Streets, Newport, Kentucky.

Respondent, Reeves Steel & Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 137 Iron Avenue, Dover, Ohio.

Respondent, Republic Steel Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. It is engaged in the manufacture, sale and distribution of rain carrying equipment, through the Berger Manufacturing Division, which maintains its principal office and place of business at 1038 Belden Avenue, N.E., Canton, Ohio. The Berger Manufacturing Division was originally an Ohio corporation, which was acquired by respondent, Republic Steel Corporation, in 1930, and thereafter dissolved and operated as a division of said respondent.

Respondent, Samuel A. Schecter, is an individual doing business under the trade name Schecter Brothers Company, with his principal office and place of business located at Hancock and Huntington Streets, Philadelphia, Pennsylvania.

Respondent, Sheet Metal Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 941–953 Myrtle Avenue, Brooklyn, New York.

Respondent, Wheeling Corrugating Company, a wholly owned subsidiary of Wheeling Steel Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at Wheeling Steel Building, Wheeling, West Virginia.

PAR. 2. Each of the above respondents manufactures, sells and distributes rain carrying and drainage equipment, hereinafter referred to as "rain goods."

There are two general categories of rain goods, namely, footage items and accessories. Footage items comprise conductor pipe, gutter and eaves trough. Included in the category of rain goods designated as accessories are elbows, shoes, mitres, end-pieces, caps, outlets, slip-joint connections, funnels, cutoffs, hangers, hooks, circles and strainers. Both categories of these products are fabricated from galvanized steel, 16 ounce copper, stainless steel and aluminum sheets, and from Toncan and Armco, which are registered trade-marks designating metal alloys manufactured by Republic Steel Corporation and the American Rolling Mill Company, respectively. Rain goods are manufactured by respondents in standardized sizes and weights.

Respondent manufacturers sell and distribute rain goods to each

other and to other manufacturers of rain goods, and to jobbers and dealers (hardware stores and applicators or roofers) at different discounts for each of these classes of customers.

Footage items are sold by respondent manufacturers on a zone delivered price basis, with different delivered prices between zones, while accessories are sold at uniform delivered prices which are identical for all the respondents at any given time throughout the United States.

PAR. 3. In the course and conduct of their respective businesses, respondent manufacturers sell and distribute rain goods to purchasers thereof located in various States of the United States, and cause same, when sold, to be transported to purchasers thereof who are located in States other than the States of origin of said shipments. Respondent manufacturers maintain, and at all times herein mentioned, have maintained a regular course of trade in commerce in rain goods between and among the several States of the United States and in the District of Columbia.

PAR. 4. Respondent manufacturers, in the course and conduct of their businesses in the manufacture, sale and distribution of rain goods, are in substantial competition, except as such competition has been restrained or destroyed, as hereinafter set forth, with each other and with others who are likewise engaged in the manufacture, sale and distribution of rain goods in commerce.

Respondent manufacturers sell in excess of 50% of the dollar volume of rain goods produced in the United States, and have been and are now the dominant factor in the industry with power to determine and control, and have determined and controlled, the prices at which rain goods are sold to the various classes of purchasers of such products.

PAR. 5. Respondent manufacturers have entered into, and for more than three years last past, have been and are now carrying out a conspiracy, combination, agreement, understanding and planned common course of action to fix and maintain uniform delivered prices, discounts, terms and conditions of sale at which rain goods have been and are sold by respondent manufacturers with the purpose and effect of restricting, restraining and eliminating price competition in the offering for sale, sale and distribution of such products in interstate commerce.

PAR. 6. Pursuant to, and as a part of said conspiracy, combination, agreement, understanding and planned common course of action, and in furtherance thereof, respondents have adopted and carried out the following uniform policies:

1. fixing and maintaining uniform prices, discounts, terms and conditions of sale of rain goods;

2. fixing and maintaining standard list prices, discounts, terms and conditions of sale for accessories, so that all respondent manufacturers are enabled to, and do, sell such products at uniform and identical delivered prices throughout the nation;

3. maintaining a uniform system of zones, for the sale of footage items whereby the United States is divided into certain definite geographical zones which have been fixed on the basis of State, county, city and township lines. (As of September, 1952, the respondents had divided the country into seven geographical zones, with all of the respondents selling in one or more of said zones, and some of them selling in all zones. All of the respondents have, and do, designate the Central Zone as their base zone, which zone, as of the aforesaid date, included the States of Illinois, Indiana, Iowa, Kentucky, Ohio, Michigan, Minnesota, Wisconsin, parts of Missouri, New York, Pennsylvania and West Virginia, and the cities of Fargo, North Dakota; Sioux Falls, South Dakota, and Omaha, Nebraska. The boundaries of each of said zones are identical for each of the respondent manufacturers selling said products in that zone.) By the use of said uniform zone system, all respondents are enabled to and do offer for sale and sell said products at the same prices for all localities within a given zone, regardless of the point of origin of shipment of said products;

4. fixing and maintaining standard list prices and discount differentials between zones, as well as the terms and conditions of sale for all footage items; by the employment of such a policy, the respondents are enabled to, and do, offer for sale and sell, rain goods of this category at uniform and identical delivered prices for each class of purchasers located within a given zone;

5. maintaining as part of said uniform zone system, an arrangement for the sale of footage items whereby, regardless of the zone from which said items may be actually shipped by any respondent, the purchase thereof is required to pay a delivered price which the respondents have fixed for shipments originating in the Central Zone.

PAR. 7. Furthermore, as part of, and in order to effectuate and carry out said conspiracy, combination, agreement, understanding and planned common course of action, and the aforedescribed policies, the respondents have performed, and are still performing, the following acts and practices:

1. have met together for the purpose of revising standard list prices and discounts (such a meeting was held by representatives of a majority of respondents on November 9, 1950, at Cincinnati, Ohio);

2. have agreed upon, and adopted, revised standard list prices and discounts for the sale of rain goods;

3. have disseminated and exchanged among themselves their respective price lists and discount schedules, in order to facilitate and maintain uniformity of delivered prices for rain goods;

4. have corresponded among themselves with respect to current list prices and discounts and deviations therefrom by any of respondent manufacturers;

5. have established and maintained uniform classifications of customers, in order to facilitate and maintain uniformity of delivered prices for rain goods;

6. have fixed, adopted and maintained prices, discounts, terms and conditions of sale at which respondent manufacturers have resold, and are now reselling, rain goods purchased from other respondent manufacturers.

PAR. 8. Each of the respondent manufacturers acted in concert with one or more of the other respondents in carrying out one or more of the policies, acts and practices hereinbefore described.

PAR. 9. The results and effects of the aforesaid conspiracy, combination, agreement, understanding and planned common course of action, and the policies, acts and practices adopted and carried out as part of and pursuant thereto, have been, and are, to tend:

1. to hinder, lessen and suppress competition in prices, terms and conditions of sale between and among respondent manufacturers of rain goods;

2. to duly enhance the prices of that category of rain goods designated footage items, inasmuch as all purchasers of same, who are located in zones other than the Central Zone, are required to pay higher prices in purchasing such products from those respondent manufacturers located in their respective geographical areas than they would have to pay but for the use of the zone system, under which delivered prices are arbitrarily determined as if all shipments originated in the Central Zone;

3. to further restrict competition between and among respondent manufacturers, since many of them, who are located in zones other than the Central Zone, find it unprofitable to absorb freight costs and thus refrain from making sales of footage items to prospective purchasers who are located in zones which would entail such absorption;

4. to deprive the purchasing public of the advantages which it would derive if competition between and among respondents in the sale of rain goods in "commerce" were not restrained and restricted in the manner and by the methods hereinbefore set forth.

PAR. 10. The acts and practices of respondent manufacturers, as hereinbefore alleged, have a dangerous tendency unduly to hinder competition, because they have promoted and contributed to the suppression, elimination and prevention of price competition between and among respondents in the manufacture and sale of rain goods in commerce, as "commerce" is defined in the Federal Trade Commission Act, and such acts and practices, all and singularly, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 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 February 8, 1955, 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

The complaint in this proceeding charges the respondents with having entered into and with having carried out, for three years last past, a combination, agreement, understanding and common course of action to fix and maintain uniform delivered prices, discounts, terms and conditions of sale at which rain goods have been sold by respondents, with the purpose and effect of restricting, restraining and eliminating price competition in the offering for sale, sale and distribution of such products in interstate commerce, in violation of the provisions of Section 5 of the Federal Trade Commission Act.

Rain goods are described in the complaint as being divided into "* * * two general categories, namely, footage items and accessories. Footage items comprise conductor pipe, gutter and eaves trough. Included in the category of rain goods designated as accessories are elbows, shoes, mitres, end-pieces, caps, outlets, slip-joint connections, funnels, cutoffs, hangers, hooks, circles and strainers. Both categories of these products are fabricated from galvanized steel, 16-ounce copper, stainless steel and aluminum sheets, and from Toncan and Armco, which are registered trade-marks designating metal alloys manufactured by Republic Steel Corporation and the American Rolling Mill Company, respectively. Rain goods are manufactured by respondents in standardized sizes and weights."

On December 8, 1954, all the respondents except Samuel Schecter, a copartner with Florence Schecter, Administratrix of the Etate of Morris Schecter, Deceased, trading as Schecter Brothers Co. (erroneously designated in the complaint as Samuel A. Schecter, an individual doing business as Schecter Brothers Company) entered into an agreement with counsel supporting the complaint and, pursuant thereto, submitted to the hearing examiner a Stipulation For Consent Order disposing of all the issues as to them involved in this proceeding. On the same date counsel supporting the complaint rested his case as to respondent Schecter without having presented any evidence in support of the allegations of the complaint insofar as they relate to said respondent, averring that the state of the potential evidence as to this respondent was such that he did not deem it in the public interest to proceed against this respondent alone. It appears, therefore, that the complaint insofar as it relates to respondent Schecter should be dismissed. Accordingly, as used hereinafter, the word "respondents" will refer only to those respondents who signed the Stipulation For Consent Order.

The respondents are identified therein as follows:

Respondent Barnes Metal Products Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4425 West 16th Street, Chicago, Illinois.

Respondent Berger Brothers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 229 Arch Street, Philadelphia, Pennsylvania.

Respondent L. Bieler and Sons, 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 35–42 41st Street, Long Island City, New York.

Respondent Braden Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 431 North 14th Street, Terre Haute, Indiana.

Respondent Cincinnati Elbow Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 221 Eastern Avenue, Cincinnati, Ohio.

Respondent Cincinnati Sheet Metal and Roofing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and

place of business located at 230 East Front Street, Cincinnati, Ohio.

Respondent The Ferdinand Dieckmann Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 180 Harrison Avenue, Cincinnati, Ohio.

Respondent Inland Steel Products Company, a wholly-owned subsidiary of Inland Steel Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4101 West Burnham Street, Milwaukee, Wisconsin. This respondent was originally incorporated under the name of Milwaukee Corrugated Steel Company, and was acquired by the Inland Steel Company, after which the corporate name was changed to Inland Steel Products Company.

Respondent Klauer Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business located at 9th & Washington Streets, Dubuque, Iowa.

Respondent La Crosse Steel Roofing and Corrugating Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 227 Jay Street, La Crosse, Wisconsin.

Respondent Lamb & Ritchie Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at Cambridge, Massachusetts.

Respondent Lyon, Conklin & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at Race & McComas Streets, Baltimore, Maryland.

Respondent The New Delphos Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 102 South Pierce Street, Delphos, Ohio.

Respondent Benjamin P. Obdyke Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 443–453 North 8th Street, Philadelphia, Pennsylvania.

Respondent Newport Steel Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 9th & Lowell Streets, Newport, Kentucky.

Respondent Reeves Steel & Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 137 Iron Avenue, Dover, Ohio.

Respondent Republic Steel Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. It is engaged in the manufacture, sale and distribution of rain-carrying equipment, through the Berger Manufacturing Division, which maintains its principal office and place of business at 1038 Belden Avenue, N. E., Canton, Ohio. The Berger Manufacturing Division was originally an Ohio corporation, which was acquired by respondent Republic Steel Corporation in 1930 and thereafter dissolved and operated as a division of said respondent.

Respondent Sheet Metal Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 941–953 Myrtle Avenue, Brooklyn, New York.

Respondent Wheeling Corrugating Company, a wholly-owned subsidiary of Wheeling Steel Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at Wheeling Steel Building, Wheeling, West Virginia.

Respondents admit all the jurisdictional allegations set forth in the complaint, and agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith. They request, in effect, that their answers heretofore made to the complaint herein be withdrawn, and expressly waive hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other proceedings before the hearing examiner or the Commission to which they may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

It is agreed by respondents that the order contained in the stipulation shall have the same force and effect as if made after full hearing, presentation of evidence and findings and conclusions thereon. They specifically waive any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with their stipulation. They also agree that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record in this proceeding. Inasmuch as this initial decision, and the decision of

the Commission, if it affirms such initial decision, must hereafter also become part of the record, the aforesaid provision of the stipulation is interpreted to mean that it is agreed that the complaint and Stipulation For Consent Order shall constitute the entire record upon which the initial decision herein shall be based.

The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the Stipulation For Consent Order is for settlement purposes only, and does not constitute an admission by any respondent that it has violated the law as alleged in the complaint.

In view of the facts outlined above, and the further fact that the order embodied in said stipulation differs from the order accompanying the complaint only in that it contains a proviso which in no wise detracts from the effectiveness of the order, it appears that such order will safeguard the public interest to the same extent as could be accomplished by full hearing and all other adjudicative proceedings waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, the hearing examiner accepts the Stipulation For Consent Order submitted herein; grants the request that respondents' answers heretofore made to the complaint herein be withdrawn; finds that this proceeding is in the public interest, and issues the following order:

It is ordered, That Barnes Metal Products Company, a corporation, Berger Brothers Company, a corporation, L. Bieler and Sons, Inc., a corporation, Braden Manufacturing Company, Inc., a corporation, Cincinnati Elbow Company, a corporation, Cincinnati Sheet Metal and Roofing Company, Inc., a corporation, The Ferdinand Dieckmann Company, a corporation, Inland Steel Products Company, a corporation, Klauer Manufacturing Company, a corporation, La Crosse Steel Roofing and Corrugating Company, a corporation, Lamb & Ritchie Company, a corporation, Lyon, Conklin & Company, Inc., a corporation, The New Delphos Manufacturing Company, a corporation, Benjamin P. Obdyke, Inc., a corporation, Newport Steel Corporation, a corporation, Reeves Steel & Manufacturing Company, a corporation, Republic Steel Corporation, a corporation, Sheet Metal Manufacturing Company Inc., a corporation, and Wheeling Corrugating Company, a corporation, respondents herein, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distri-

bution of rain goods in Commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common and concerted course of action, understanding, agreement, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts:

1. fixing, adopting, maintaining, or adhering to, by any means or methods, the prices, discounts, terms or conditions of sale of said products;

2. adopting, adhering to, maintaining, or selling in accordance with any geographical zone system of delivered prices where the purpose or effect, directly or indirectly, is to fix or maintain prices, discounts, terms or conditions of sale of said products;

3. disseminating or exchanging among themselves their respective price lists and discount schedules for the purpose or with the effect of fixing or maintaining prices for said products;

4. corresponding among themselves with respect to current list prices and discounts and deviations therefrom by any of respondent manufacturers, where the purpose or effect, directly or indirectly, is to fix or maintain prices, discounts, terms or conditions of sale of said products;

5. establishing or maintaining classifications of customers;

6. fixing, adopting, or maintaining prices, discounts, terms or conditions of sale at which any respondent manufacturer offers for resale or resells any of said products which he has purchased or secured from any other respondent manufacturer,

Provided, That nothing herein contained shall be construed to limit or otherwise affect any right with respect to resale price maintenance contracts or arrangements which any of the respondents may have under Section 5 of the Federal Trade Commission Act as amended by the McGuire Act (Public Law 542, 82d Cong., Chap. 745, Second Session, Approved July 14, 1952).

It is further ordered, That the answers to the complaint herein heretofore submitted by all respondents, except respondent Samuel Schecter, be, and the same hereby are, withdrawn from the record.

It is further ordered, That the complaint herein, insofar as it relates to respondent Samuel Schecter, be, and the same hereby is, dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Barnes Metal Products Company, a corporation, Berger Brothers Company, a corporation, L. Bieler and Sons, Inc., a corporation, Braden Manufacturing Company, Inc., a corporation, Cincinnati Elbow Company, a corporation, Cincinnati Sheet Metal and Roofing Company, Inc., a corporation, The Ferdinand Dieckmann Company, a corporation, Inland Steel Products Company, a corporation, Klauer Manufacturing Company, a corporation, La Crosse Steel Roofing and Corrugating Company, a corporation, Lamb & Ritchie Company, a corporation, Lyon, Conklin & Company, Inc., a corporation, The New Delphos Manufacturing Company, a corporation, Benjamin P. Obdyke, Inc., a corporation, Newport Steel Corporation, a corporation, Reeves Steel & Manufacturing Company, a corporation, Republic Steel Corporation, a corporation, Sheet Metal Manufacturing Company, Inc., a corporation, and Wheeling Corrugating Company, a corporation, 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 February 8, 1955].