IN THE MATTER OF

HERBERT B. SYKES TRADING AS SYKES HERNIA CONTROL SERVICE ET AL.

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

Docket 6118. Complaint, Aug. 13, 1953—Decision, Mar. 8, 1956

Order requiring an individual in St. Petersburg, Fla., to cease representing falsely in advertisements in newspapers and magazines that his "Sykes Hernia Control" device was radically different from a truss; that it would completely cure many hernias and would hold all securely in place at all times and under all conditions; and that he and his representatives conducted clinics where sufferers from hernia might be examined and treated by a physician.

Mr. Jesse D. Kash and *Mr. William M. King* for the Commission.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondent Herbert B. Sykes, an individual trading as Sykes Hernia Control Service, and Respondent Griffith and McCarthy, Inc., a corporation, have engaged in acts and practices which are in violation of the Federal Trade Commission Act—particularly that they have misrepresented a device for use by individuals suffering from hernia.

After the issuance of said complaint and the filing of respondents' answers thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received before the above-named hearing examiner, duly recorded and filed in the office of the Commission, and proposed findings of fact and conclusions of law were submitted by counsel. Upon the entire record, the hearing examiner, having determined that this proceeding is in the public interest, makes the following findings of facts and conclusions.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Herbert B. Sykes, since 1931, has been engaged in the sale of a device, as that term is defined in Section 15

of the Federal Trade Commission Act, as amended,[1] known as "Sykes Appliance," later changed to "Sykes Hernia Control," which was and is advertised and sold to those suffering from hernia or rupture. The business was first located in Michigan City, Indiana, and was operated under the name "Sykes Manufacturing Company"; then was moved to Chicago, Illinois and operated under the trade name "Sykes Service"; moved again, in 1950, to St. Petersburg, Florida, and operated as "Sykes Orthopraxy Service," then as "Sykes Hernia Control Service." On May 29, 1953, respondent, together with his son Robert A. Sykes, and William H. Winters, executed articles of incorporation, which were duly filed on June 4, 1953, in the office of the Secretary of State of Florida, for two Florida corporations, namely, Sykes Manufacturing, Inc., of St. Petersburg, and Sykes Hernia Control Service, Inc. Respondent Herbert B. Sykes subscribed for two shares of stock, Robert A. Sykes for 49 shares, and William H. Winters for 49 shares in each corporation, that being all of the stock. Respondent Herbert B. Sykes became secretary and a director of each of the corporations. Sykes Manufacturing, Inc., was and is a corporation set up, among other things, to manufacture the device, and Sykes Hernia Control Service, Inc., is the selling corporation.

By contract dated June 5, 1953, between Sykes Hernia Control Service, Inc., and Herbert B. Sykes and his wife, Lucille G. Sykes, wherein it is recited that the corporation "desires to hire Sykes in order to keep exclusively to itself his valuable services," the said Sykes agreed to give all of his services exclusively to the corporation to assist it in advertising and selling the aforesaid device. In consideration for these services, this corporation agreed to pay to Sykes, during his lifetime, 10% of its monthly gross receipts less refunds to customers, with a guarantee of a yearly minimum of $20,000, and, in the event that Sykes' wife should survive him, to pay the same amount to her during the remainder of her lifetime. By another contract of June 5, 1953, the Sykes Manufacturing Company, Incorporated (obviously erroneous for Sykes Manufacturing, Inc.) agreed to guarantee the payment of Sykes' salary.

By a bill of sale dated June 8, 1953, respondent Herbert B. Sykes transferred the entire assets, including the trade name, of the business operated by him as Sykes Hernia Control Service to Sykes Manufacturing, Inc., for a named consideration of $10.00.

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[1] Sec. 15 (d) The term "device" (Except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

Also on June 8, 1953, Sykes Manufacturing, Inc., entered into a contract with respondent Herbert B. Sykes, wherein it is stated that the total purchase price of the assets of the business transferred to it was $40,000, to be paid to Sykes in annual payments of $10,000 each, the first payment to be due on June 1, 1954. The contract further provides that in the event the corporation fails to pay any installment when due, Sykes may declare the whole balance to be due, and bring suit for that amount.

Herbert B. Sykes served as secretary and director of each corporation until about two weeks prior to March 10, 1954, when he transferred his two shares of stock in each corporation to William H. Winters, without consideration, and, by resignation, severed his official connection with both corporations.

PAR. 2. Prior to establishment of the aforementioned corporations, respondent Herbert B. Sykes, acting under his various trade names, established branch offices and distributorships in a number of cities throughout the United States, and issued franchises to persons who established offices in other specific territories. He provided advertising matter and, to the best of his ability, controlled the advertising used by these various offices. He participated in their profits, and in some instances paid their rent and other office expenses.

Parts for making up the devices involved in this proceeding were transported from respondent's principal place of business in the various States in which he was located to the branch offices, distributorships, franchise-holders, and traveling representatives located in various other States of the United States and in the District of Columbia, and Respondent Herbert B. Sykes maintained a course of trade in said device in commerce among and between the various States of the United States and in the District of Columbia. The volume of his business was substantial. This business has been and is now being carried on by the two Florida corporations.

PAR. 3. Respondent Griffith and McCarthy, Inc., is a corporation organized and existing under the laws of the State of Florida, with its office and principal place of business located in the St. Petersburg Times Building, St. Petersburg, Florida. Said respondent is now, and for more than one year last past has been, engaged in the operation of an advertising agency. In such capacity said respondent prepared advertising matter for respondent Sykes, and either delivered the same to Sykes for use by him and his distributors, or caused the same to be published in various newspapers throughout the United States. All the advertising prepared by this respondent was suggested by, approved and frequently revised

by respondent Sykes. The sole witness who appeared from the advertising agency stated that he did not think anything was ever prepared for Sykes that Sykes himself did not change. According to the testimony, this respondent had no part in the preparation or dissemination of the advertising matter in which the great bulk of the claims attacked in the complaint appeared. The record is unclear as to the part taken by this respondent as to other advertising. Accordingly, it is found, as suggested by the proposed findings submitted by counsel in support of the complaint, that the proof is insufficient to warrant a finding that this respondent has violated the Federal Trade Commission Act as charged.

PAR. 4. In the course and conduct of his business respondent Herbert B. Sykes disseminated and caused the dissemination of various advertisements concerning said device by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements in various newspapers and magazines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device.

PAR. 5. Among and typical of the advertisements disseminated or caused to be disseminated by said respondent are the following:

Sykes Hernia Control is not a "truss." Unlike a truss, the Sykes Hernia Control does not press on the pelvic bone structure in any way. Nor does it use straps, belts or buckles. It thus employs entirely new mechanical features and, *most important*, serves quite a different function—the physical correction of Hernia and Rupture.

MEN

Tired of Trusses? Let us prove that (1) you need never buy another truss; (2) your rupture troubles may vanish forever; and (3) that hernia disappears completely without surgery or injections in many cases. Check some of the testimonial letters from our file.

Sykes Service consists of lifetime service in the correction of your condition with a series of revolutionary new appliances which have no equal on the market today. The wearer is not burdened with troublesome straps, leather, or the soggy odorous parts that have always made wearing trusses so obnoxious and inadequate. We are doing what the medical profession has long considered impossible in the control of hernia and rupture. Very rapid improvement has been reported by 8 or 9 out of every 10 people fitted—and in the course of several months, many gratefully tell us that their hernia no longer comes out.

Sykes Hernia Control Service means that both Rupture and Hernia may now be successfully overcome without resorting to surgery. You do not have to go to the hospital. You do not have to lose time from work. You don't have to use up your savings. From the moment you are fitted with a modern Sykes Control your rupture or hernia is immediately held securely and muscles and organs are maintained in their proper position. Relief is permanent, and

nature usually, quickly, begins to restore muscular tissue to near normal condition.

SORRY

No rupture cripples! * * * We PROMISE immediate relief and lifetime service. Many report "hernia disappears" in a few months. Lift, strain, climb as if you had never been ruptured.

I've had two unsuccessful surgeries and used several types of trusses that did not hold my large double hernia. In November, I started using the Sykes Hernia Control and I can truthfully state that I feel much better. The hernias are no longer a problem, having almost completely disappeared. * * *

Fitted with Sykes hernia control on December 19, 1949, for hernia—hernia gone in 3 months time. * * *

* * * I have had a hernia for a period of 10 years and after wearing a Sykes Appliance for a period of fifteen months am completely cured.

After 40 years of hernia and about 16 trusses, Sykes Hernia Control Service has corrected my hernia in just two months—Even when I take off the control and strain, no sign of the hernia appears.

You will be able to lift heavy objects, strain in any position, climb, swing a sledge hammer if that is your work.

* * * June 4, 1951. Am 22 years old. Have had hernia about 15 years, as large as my fist. Started with Sykes Control August 5, 1950. Was doing heavy lifting on beer truck—since then it has been held and no longer comes out—can even leave off when not doing heavy work—played ball when doing without it—never came out—and the hernia is now gone completely.

I suffered two strangulations and had to call my doctor at three o'clock in the morning. After much trouble he got a replacement. Then after two months I had another strangulation, which was very serious. The doctor ordered an operation, but I refused.

A short time later your service man came to Pittsburg. I contacted him and purchased a control in June 1951.

I am almost completely healed—I haven't had a bit of trouble. I can work at anything I care to—stoop and bend, climb or lift—and even push a lawn mower without any discomfort whatsoever.

For 35 years I've had hernia trouble. I am a post operative case. Both sides are very bad. * * * I came to you of Sykes Hernia Control and got your appliance about two years ago. That was the end of my trouble.

The unique cantilever design of the Sykes Control stimulates circulation in the abdominal tissues and assists nature in building greater abdominal muscle tone and strength.

PAR. 6. Through the use of the statements contained in the aforesaid advertising, respondent Herbert B. Sykes has represented, and represents:

1. That the Sykes device is not a truss, is radically different from a truss, and is a revolutionary device;

2. That it will retain all ruptures or hernias;

3. That its use will improve the condition of hernia or rupture in a great majority of the cases of persons fitted, and many will be completely cured;

4. That the design of said device stimulates circulation of blood in abdominal tissues and assists nature in building greater abdominal muscle tone and strength, and in restoring muscular tissue to a more normal condition;

5. That said device will hold a rupture or hernia securely in place at all times and under all conditions of activity and strain.

PAR. 7. A hernia, frequently referred to as a rupture, is a protrusion of an organ or part through an opening in the walls of its natural cavity. A truss is an appliance to support a weakened or injured part and to retain the protrusion that may have taken place, as in a hernia.

1. The Sykes device is a truss, similar in design and principle to many other trusses on the market which depend upon the use of a spring to provide the pressure necessary to retain a hernia. It is not revolutionary, nor does it employ new mechanical features, although in some details it varies from other trusses which serve identical purposes.

Respondent's device consists of a frame of heavy spring steel wire, .192" (slightly more than $\frac{3}{16}$ of an inch) in diameter, covered with rubber tubing. The free ends of the wire frame are posterior and have pads attached which press against the hip muscles under tension when the device is in use. The wire is shaped to conform to the size and contour of the wearer's body, and is bent at the front to provide for the attachment of a pad or pads which can be adjusted to fit directly over either a single or a double hernia. These pads vary in size and shape to conform to the individual requirements of each user and, when properly adjusted, are held in place by the spring-steel tension. All pads are of foam rubber covered with cloth and attached to a metal disc. The spring steel frame provides elasticity which allows a certain freedom of movement on the part of the wearer.

2. The device will not retain all hernias. The fact is that no device or combination of devices will do that. There are incarcerated or strangulated hernias which would be made materially worse, with results which might be fatal, if respondent's device or any other truss were used. There are irreducible hernias in which the protruding parts cannot be pushed back into their normal cavities, because, in many instances, they have adhered to the walls through which they protrude. Such hernias cannot be retained by respondent's device. Likewise there are other types and sizes of hernia which cannot be retained by any truss.

The usefulness of respondent's device is limited to the retention of reducible hernias.

3. The use of said device will not cure any form of hernia, nor will it improve the condition of the hernia in most cases. Although the medical profession is not in complete agreement, the general consensus is that restoration of the weakened or damaged tissue can be brought about only by physical repair, which requires a surgical operation. An injection treatment for hernia was used formerly upon the theory that if the two edges of the ruptured tissue were irritated, a healing process would be induced which would cause them to unite, but this theory and this treatment have been practically abandoned. Surgery is now generally accepted as the only effective and reliable means of correcting and curing hernia. A truss merely provides support and has no curative effect.

4. A hernia is due, usually, if not always, to a structural weakness or defect. The impaired tissue through which the protruding organ or part extends may be, but is not ordinarily, muscular tissue. A truss helps to retain the protrusion by lending support to any muscles involved therein. It does not build muscle. Pressure of the truss upon the affected area would interfere in some degree with the circulation of blood, and to that extent an atrophying rather than a stimulating effect upon muscle tone and muscle development would be induced. The consensus of the expert opinion adduced in this proceeding is that the use of respondent's device does not stimulate circulation, contribute to the improvement of impaired muscular tissue, or assist nature in building muscle tone and strength.

5. Respondent's device is a good truss, but, like other trusses, it is not effective unless the retaining pad rests directly over the break in the cavity wall with sufficient, continuous pressure to constitute a barrier to the protrusion of the part or organ involved. It must be adjusted from time to time, and is affected by body movement; hence it cannot be depended upon at all times to provide the exact degree of tension in the precise spot necessary to hold a hernia in place.

PAR. 8. In the course and conduct of his business, and for the purpose of inducing the purchase of Sykes Hernia Control, Respondent Herbert B. Sykes has also caused advertisements to be inserted in newspapers and other advertising media, of which the following is typical:

Visit your nearest Sykes Division Office or write for a date when the Sykes specialist will hold a clinic in your vicinity.

PAR. 9. Through the use of the language quoted in the preceding paragraph and other statements of a similar nature, respondent

Herbert B. Sykes has made representations that have led or have the tendency to lead members of the public to believe that he and his representatives conduct clinics where persons suffering from hernia may be examined and treated by a physician.

PAR. 10. Respondent Herbert B. Sykes is not a physician, and there is no evidence in the record that any of his former franchise holders, distributors or representatives are physicians or have had medical training. The implications are all to the contrary—that the franchise holders, distributors and representatives were qualified only as salesmen; all the knowledge they have of the Sykes device and of hernias in general is that which they have acquired through association with said respondent; and none of them are physicians. The use of the term "clinic" in context with the other language of respondent's advertisements implies that the clinics to which readers of these advertisements are urged to come are for examination of, advice concerning, and treatment of the physical ailments incident to their hernias, by a qualified physician.

PAR. 11. Respondent Sykes' 1953 contract with Sykes Hernia Control Service, Inc., obligates him to a lifetime of service in promoting the sale of, and in selling, said device, and there is evidence of record that in July, 1954, he was actively engaged in selling the device. His compensation under the contract is partially determined by the volume of sales of the device. Under these circumstances, the contention of respondent Sykes that he is no longer actively engaged in the business and that therefore an order should not be issued against him is not supported by the evidence.

PAR. 12. In an order issued on December 11, 1953, denying a motion by respondent Sykes to dismiss the complaint in this proceeding because the assets of his business had been sold to the two corporations mentioned herein, the hearing examiner suggested that the complaint be amended to include the two corporations as parties respondent. Answer date was extended to January 15, 1954, so that the suggestion could be acted upon prior to answer, if considered proper, but no amendment of the complaint resulted. The record does not disclose that either of the two corporations, Sykes Hernia Control Service, Inc., or Sykes Manufacturing, Inc., of St. Petersburg, has ever used any of the objectionable advertisements or misrepresentations, or engaged in any of the practices which are the subject of the complaint, and neither of said corporations has been made a party to this proceeding.

CONCLUSIONS

The complaint, insofar as it relates to respondent Griffith and McCarthy, Inc., a corporation, should be dismissed.

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

ORDER

Accordingly, it is ordered, That respondent Herbert B. Sykes, an individual trading under his own name or any other name or trade designation, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale of a device designated as Sykes Appliance, or any product or device of substantially similar construction or design, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

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

(*a*) That said device is not a truss;

(*b*) That said device is revolutionary;

(*c*) That the use of said device will retain hernias or ruptures unless limited to reducible hernias or ruptures;

(*d*) That said device will cure hernias or ruptures;

(*e*) That the use of said device stimulates the circulation of blood, contributes to the improvement of impaired muscular tissue, or assists nature in building muscle tone and strength;

(*f*) That said device will hold ruptures or hernias securely in place under all conditions of activity or strain.

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

It is further ordered, That respondent Herbert B. Sykes, an individual trading under his own name or any other name or trade designation, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale of a device designated as Sykes Appliance or any product or device of substantially similar construction or design,

whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

Representing or causing to be represented, that respondent Herbert B. Sykes, or his agents or representatives, conduct or operate clinics where professional medical experts, specialists, or physicians will be present to consult with, examine, advise or treat persons suffering from hernia, unless and until such is actually the fact.

It is further ordered, That the complaint herein, insofar as it relates to respondent Griffith and McCarthy, Inc., a corporation, be, and the same hereby is, dismissed.

ON APPEAL FROM INITIAL DECISION

By MASON, Commissioner.

This matter is before the Commission on an appeal filed by counsel supporting the complaint from the hearing examiner's initial decision of August 4, 1955. Counsel supporting the complaint urges that the hearing examiner's findings of fact are in error as to two points. He further urges that, if the Commission so determines, the initial order should be amended to accord therewith. Respondents filed no brief in answer to the appeal brief of counsel supporting the complaint and oral argument was not requested.

The respondents were charged with dissemination of false and misleading advertising of a truss device for use by individuals suffering from hernia or rupture. The hearing examiner entered a finding of fact that

"The usefulness of respondent's device is limited almost exclusively to the retention of inguinal, umbilical and femoral hernias."

Counsel in support of the complaint objects to the absence of the word "reducible" in front of the word "inguinal" and the presence of the word "femoral" in the said findings. We find the expert testimony of record shows that respondent's trusses are useful only in connection with reducible hernias.

Dr. Frederick B. Brandt testified on direct examination as follows:

"Well of course it must be a reducible hernia. If it is not a reducible hernia, then a truss is an unsatisfactory and possibly a very dangerous thing to use" (T. 267).

There is other unqualified testimony to the same effect. We conclude, therefore, that the finding as to the usefulness of respondent's truss based on this record should be limited to reducible hernias.

As to the second point:

In contending that the examiner erred in including the word "femoral" in Paragraph 7 (2) of the findings, counsel in support of the complaint in effect argues that the record shows that respondent's truss is not useful for the femoral type of hernia. Careful analysis of all of the evidence does not support that contention. It shows, on the other hand, that the value or usefulness of respondent's truss cannot be related exclusively to any particular kind or class of reducible hernia.

Witness Brandt called in support of the complaint testified that respondent's truss would be "adaptable for reducible inguinal hernias for palliation" (T. 273); that, not infrequently, a truss would be used for "support for an incisional hernia which is not umbilical, or for a lumber hernia" (T. 298); and that respondent's truss might be useful for the umbilical variety (T. 299). Dr. Caulifield also testified that respondent's truss would be effective in retaining a navel hernia (T. 179).

We, therefore, substitute for the last two sentences of Paragraph Seven (2) of the examiner's findings the following:

"The usefulness of respondent's device is limited to the retention of reducible hernias."

That the order may comport with the Commission's ultimate findings of fact, the words "inguinal, femoral and umbilical" will be deleted from Paragraph 1 (c) of the initial order to cease and desist.

It is so ordered.

FINAL ORDER

This matter having come before the Commission upon appeal from the hearing examiner's initial decision, filed by counsel supporting the complaint, and the matter having been heard on the whole record, including brief in support of the appeal (no brief in opposition to said appeal having been filed and no oral argument having been requested); and the Commission having granted said appeal in part and denied it in part and directed modification of the initial decision in the manner set forth in the accompanying opinion:

It is ordered, That the last two sentences of Paragraph 7 (2) of the findings of fact contained in the initial decision be, and they hereby are modified to read as follows:

"The usefulness of respondent's device is limited to the retention of reducible hernias."

It is further ordered, That Paragraph 1 (c) of the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

"c. That the use of said device will retain hernias or ruptures unless limited to reducible hernias or ruptures."

It is further ordered, That the initial decision, as so modified, shall, on the 8th day of March, 1956, become the decision of the Commission.

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

IN THE MATTER OF

LEON WOLFF TRADING AS L. W. MAIL ORDER SURVEY, ETC.

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

Docket 6431. Complaint, Oct. 19, 1955—Decision, Mar. 8, 1956

Consent order requiring an individual in Los Angeles, Calif., selling a Survey or Guide having to do with the establishment and operation of a mail order business, to cease advertising falsely in newspapers, periodicals, etc., that anyone could start a successful mail order business by purchase and use of his Survey, and for only a few dollars; that the successful operators of mail order businesses named had purchased the Survey, and that the large incomes cited were typical and had been achieved by hundreds of small operators who had purchased it; that the Survey revealed confidential facts which had made fortunes for purchasers; that he was its author and one of the foremost experts in the United States on mail order business problems; and that installment purchasers could obtain a refund of all amounts paid if not satisfied.

Before *Mr. William L. Pack*, hearing examiner.
Mr. George E. Steinmetz for the Commission.
Mr. Ralph B. Herzog, of Beverly Hills, Calif., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Leon Wolff, an individual trading as L. W. Mail Order Survey and as L. W. Publishers, 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 Leon Wolff is an individual trading as L. W. Mail Order Survey and as L. W. Publishers. Respondent is now, and for more than one year last past has been, engaged in the promotion, sale and distribution of a Survey or Guide having to do with the establishment and operation of a mail order business and known as the "L. W. Survey." Respondent's office and principal place of business is located at 805 Larrabee Street, Los Angeles, California. Said Survey or Guide is sold directly to purchasers in various States of the United States by the respondent.

PAR. 2. In the course and conduct of his business, respondent now causes and has caused said Survey or Guide, when sold, to be transported from his place of business in the State of California to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce selling said Survey or Guide.

PAR. 3. Respondent at all times mentioned herein has been in substantial competition, in commerce, with other persons and with corporations, firms and partnerships engaged in the sale of courses of instruction, books and literature relating to the mail order business.

PAR. 4. In the course and conduct of his business and for the purpose of inducing the sale of his said Survey or Guide, respondent has made numerous statements in advertisements inserted in newspapers and periodicals and in other advertising literature, with respect to said Survey or Guide; the mail order business, the results that may be expected to follow the purchase of said Survey or Guide, and the establishment of a mail order business by following the said Survey or Guide.

PAR. 5. By and through statements made in said advertisements respondent represented, directly and by implication:

1. That anyone can start a successful mail order business by purchasing and following respondent's Survey or Guide;

2. That only a few dollars are required to conduct a successful mail order business by those purchasing and following respondent's Survey or Guide:

3. That the successful operators of mail order businesses named in the advertisements are persons who have purchased respondent's Survey or Guide;

4. That the examples of large incomes cited in the advertisements are typical and have been achieved by hundreds of small operators who have purchased respondent's Survey or Guide;

5. That the Survey or Guide offered for sale by respondent reveals confidential facts which have made fortunes for persons who have purchased it;

6. That respondent Leon Wolff is the author of the Survey or Guide and was the agent of the successful persons named in the advertisements; that he is one of the foremost experts in the United States on mail order business problems; and that purchasers will be given two free written opinions by the author of the Survey or Guide in his expert capacity at which time he will answer questions of their choice;

7. That the Survey or Guide may be purchased in one transaction or by installments on an examination basis and that the purchaser may obtain a refund if not satisfied. Said refund shall be the complete purchase price, if bought in one transaction, or all amounts paid by installments if all of the Survey or Guide the purchaser has received is returned within seven days of the latest shipment of the Survey or Guide he has received.

PAR. 6. The foregoing representations and implications are grossly exaggerated, false and misleading. In truth and in fact:

1. The purchase and study of respondent's Survey or Guide will not enable every purchaser to conduct a successful mail order business. The mail order business is extremely crowded, competitive, and risky. Success comes only to a very limited number of beginners in this field and then, in practically all cases, only after continued and prolonged investment, experimentation and initial failures. While the Survey or Guide does contain factual information about the field in general, it does not present to the purchaser any information which will assure him of success. The beginner's success will depend on his initiative, background, product, knowledge, resources, market conditions, and other fluctuating and uncertain factors, none of which can be satisfactorily determined by studying the Survey or Guide.

2. The establishment of a mail order business with any chance of success at all requires a minimum of $300 to $500 capital readily available at the very outset. This amount is required for advertising and supplies alone and additional amounts would be required for the initial inventory of items to be sold. Respondent's Survey or Guide does not enable the purchaser to obviate this necessary prerequisite in any manner.

3. The successful mail order operators named in respondent's advertisements have not purchased and used respondent's Survey or Guide.

4. The examples of large incomes cited in respondent's advertisements are not typical of the mail order business and have not been achieved by hundreds of small operators who have purchased respondent's Survey or Guide. On the contrary, earnings for most operators in the mail order business are either non-existent or extremely limited. This is especially true for beginners.

5. The Survey or Guide offered for sale by respondent does not reveal confidential information which has made fortunes for persons purchasing it.

6. Respondent is not the author of the Survey or Guide he sells and offers for sale and was not the agent for the successful mail

order operators named in his advertising. He is not a recognized authority on mail order business problems. The free written opinions are given in practically all instances by respondent and only in rare instances are they given by the actual author of the Survey or Guide. In all cases the purchaser is informed that the written opinions are given by respondent and that he is the author of the Survey or Guide.

7. Purchasers of respondent's Survey or Guide who purchase by the installment method do not receive a refund of their purchase money for prior shipments if they return said shipment within seven days of receiving their latest shipment. Under these circumstances the purchaser receives a refund of his purchase money for the latest shipment only.

PAR. 7. The use by the respondent of the foregoing false, deceptive and misleading statements, representations and practices in connection with the sale and distribution in commerce of his Survey or Guide has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasers and prospective purchasers of said Survey or Guide into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of the Survey or Guide offered for sale in commerce by the respondent. As a result thereof trade in commerce has been unfairly diverted to respondent from his competitors and injury has been done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and 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.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter, issued October 19, 1955, charges the respondent with misrepresenting a certain publication sold by him, in violation of the Federal Trade Commission Act. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the answer filed by respondent to the complaint shall be considered as having been withdrawn, and that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; 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; 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 entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate settlement and disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Leon Wolff is an individual trading as L. W. Mail Order Survey and as L. W. Publishers, with his office and principal place of business located at 805 Larrabee Street, Los Angeles, California.

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

ORDER

It is ordered, That respondent, Leon Wolff, an individual trading as L. W. Mail Order Survey and as L. W. Publishers, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a course of instruction known as the "L. W. Survey," or by any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That it is possible for anyone to organize and conduct a successful mail order business wholly as a result of the purchase and use of respondent's Survey or Guide;

2. That a successful mail order business can be started on a "shoe string" or on less than adequate capital;

3. That successful mail order operators have purchased respondent's Survey or Guide and have profited and benefited thereby, unless said persons have in fact purchased and subsequently used the Survey or Guide;

4. That unusually large incomes have been achieved wholly as a result of purchasing the Survey or Guide, or that unusually large incomes are typical of the mail order business;

5. That confidential information contained in the Survey or Guide in itself is capable of making fortunes for persons who purchase it;

6. That respondent is the author of the Survey or Guide, or that he is one of the country's outstanding experts in the mail order business;

7. That refunds of all payments will be made to dissatisfied purchasers of respondent's Survey or Guide under given conditions, unless such refunds are actually made when the conditions are fulfilled.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of March, 1956, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

INTERNATIONAL WEAVING INDUSTRIES, INCORPORATED, ET AL.

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

Docket 6416. Complaint, Sept. 21, 1955—Decision, Mar. 9, 1956

Consent order requiring a seller in Newark, N. J., of a "Speedweaving" reweaving kit, together with a course of instructions to prepare students for work at home as commercial reweavers, to cease representing falsely through statements made by its salesmen and in sales literature furnished them, that personal instruction and supervision would be given to each purchaser; that reweaving could be learned easily and quickly by anyone through use of the kit and instructions; that there was a great demand for reweaving and services of Speedweavers; that upon completion of the course, earnings of $3 to $5 per hour, $30 per week, and $200 per month, spare time, could be expected; that Speedweaving was a new method of invisible repairing; that respondents would arrange with dry cleaners, tailors, and others to supply all reweaving work they could handle to persons completing the course; that only a limited number of the kits and courses of instruction would be sold in each area; and that they maintained offices in New York, Chicago, California, and New Orleans.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. Michael J. Vitale for the Commission.
Mr. Henry Ward Beer, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that International Weaving Industries, Incorporated, a corporation, and Wallace Katz, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent International Weaving Industries, Incorporated, is a corporation, organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 45 Clinton Street, Newark, New Jersey. Respondent Wallace Katz is president of the corporate respondent. This individual formulates, directs and controls the acts, policies

and practices of corporate respondent. His address is the same as that of corporate respondent.

PAR. 2. Respondents are now, and have been for several years last past, engaged in the sale and distribution in commerce, among and between various States of the United States, of a reweaving kit designated as "Speedweaving," together with a course of instructions designed to prepare students thereof for work at home as commercial reweavers.

PAR. 3. Respondents sell their said reweaving kit and course of instruction by means of sales representatives obtained through newspaper and periodical advertisements and promotional literature. If persons are interested in selling said products, they make application on "salesman's application" form provided by respondents. If application is accepted, respondents supply a "Speedweaving Sales Outfit" and sales literature for the use of the salesmen in selling the kit and course of instructions. Respondents also furnish to salesmen "franchise application" forms to be used by them in taking orders for the kit and instructions. Said application provides that the purchaser shall pay to respondents a royalty of 10% of any income derived from engaging in the speedweaving business, providing such income is in excess of $100.00 monthly.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their reweaving kit and course of instruction in commerce, respondents have, through oral statements made by their salesmen and in various types of sales literature furnished to their salesmen for their use in selling said kit and course of instruction, made many statements with respect to said kit and course of instruction, the benefits that would accrue to the purchasers and other statements of varied nature. These statements and the implications arising therefrom were, in substance, as follows:

1. That personal instruction and supervision will be given to each purchaser in respondents' method of reweaving damaged garments.

2. That reweaving may be learned easily and quickly by anyone through the use and study of respondents' reweaving kit and course of instruction.

3. That there is a great demand for reweaving work and the services of Speedweavers.

4. That upon completion of respondents' course of instructions, earnings of $3.00 to $5.00 per hour; $30.00 per week, and $200.00 per month, sparetime, can reasonably be expected.

5. That Speedweaving is a new method of doing invisible repairing.

6. That respondents will make the necessary arrangements with dry cleaners, tailors and other concerns to supply all reweaving work they can handle to persons completing their course of reweaving.

7. That only a limited number of reweaving kits and courses of instruction will be sold in each area.

8. That respondents maintain offices in New York, New York; Chicago, Illinois; Hollywood, California; and New Orleans, Louisiana.

PAR. 5. All of the statements, representations and implications hereinabove set forth were and are false, deceptive, misleading or exaggerated. In truth and in fact:

1. Personal instruction and supervision are not given to purchasers in the method of reweaving damaged garments. In fact, the only assistance rendered by respondents is to send letters of encouragement when it is indicated by purchasers that they are having difficulty learning to reweave by respondents' method.

2. Only those persons having normal use of their hands, good eyesight with or without glasses, and who are temperamentally disposed to learn reweaving may learn respondents' method of reweaving easily or quickly by the use of their reweaving kit and course of instruction.

3. There is no great or general demand for reweaving work or for the services of persons who have completed respondents' course of reweaving.

4. $3.00 to $5.00 an hour or $30.00 per week or $200.00 per month, sparetime, is greatly in excess of the amounts which persons completing respondents' course of reweaving can reasonably expect to earn.

5. Speedweaving is not a new method of invisible reweaving but is a method of reweaving commonly known as "Patch Weaving" which has long been known and used by professional reweavers.

6. The only arrangements made by respondents to secure reweaving from dry cleaners, tailors and others for persons completing their course of reweaving, is to write to such concerns, upon request of such persons, notifying such concerns that such persons are available and qualified to do reweaving.

7. There is no limit to the number of persons sold respondents' reweaving kits in any particular area. In fact, respondent's representatives will sell the reweaving kits and course of instruction to any person who will purchase it.

8. Respondents do not maintain offices in New York, New York; Chicago, Illinois; Hollywood, California; or New Orleans, Louisiana. In fact the only office and place of business maintained by respondents is located in Newark, New Jersey.

PAR. 6. Respondents, in the course and conduct of their business as aforesaid, are and have been engaged in substantial competition in commerce with other corporations and firms and individuals in the sale of reweaving kits and courses of instruction.

PAR. 7. The use by respondents of the false, deceptive and misleading statements and representations set out in Paragraph Three hereof had the tendency and capacity to mislead a substantial portion of the purchasing public into the mistaken and erroneous belief that such statements and representations were true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' reweaving kit and course of instructions. As a result thereof trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on September 21, 1955, charging them with having violated the Federal Trade Commission Act through the making of certain misrepresentations regarding a reweaving kit designated as "Speedweaving," together with a course of instruction designed to prepare students thereof for work at home as commercial reweavers.

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into an agreement with counsel supporting the complaint dated January 4, 1956, providing for the entry of a consent order disposing of all the issues in this proceeding as to all parties, which agreement was duly approved by the Director and the Assistant Director of the Bureau of Litigation.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that

the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Respondents in the agreement waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with said agreement.

By said agreement respondents' answer to the complaint shall be considered as having been withdrawn and the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the said agreement. It was further agreed that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent International Weaving Industries, Incorporated, is a corporation, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 45 Clinton Street, Newark, New Jersey. Respondent Wallace Katz is an individual and officer of said corporation. The office and principal place of business of the aforesaid individual is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, which is in the public interest, and of the respondents hereinabove named; the complaint herein states a cause of action against said respondents under the provisions of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, International Weaving Industries, Incorporated, a corporation, and its officers, and Wallace Katz, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a reweaving kit together with a course of instructions, designated as "Speedweaving," or by any other name or names, do forthwith cease and desist from representing, directly or by implication:

1. That personal instructions and supervision will be given to each purchaser in respondents' method of reweaving damaged garments, unless such is the case.

2. That persons can learn reweaving easily or quickly unless restricted to the patch or overlay method of reweaving and unless it is disclosed that this is possible only in the case of those persons having normal use of their hands, good eyesight with or without glasses and who are temperamentally disposed to learn reweaving.

3. That the demand for reweaving work or the services of persons completing respondents' course of instruction is greater than it is in fact.

4. That the typical or potential earnings for persons completing respondents' course of instruction are greater than they are in fact.

5. Speedweaving is a new method of doing invisible repairing.

6. That respondents make arrangements with dry cleaners, tailors and other concerns who will supply all the reweaving work that can be handled by those persons completing respondents' course of reweaving.

7. That only a limited number of reweaving kits, together with courses of instructions, will be sold in each area.

8. That respondents maintain offices in New York, N. Y., Chicago, Illinois, Hollywood, California, and New Orleans, Louisiana.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall on the 9th day of March, 1956, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

CASKET MANUFACTURERS ASSOCIATION OF AMERICA ET AL.

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

Docket 6183. Complaint, Feb. 19, 1954—Decision, Mar. 13, 1956

Order dismissing, for insufficiency of evidence, complaint charging an association of some 160 of the larger manufacturers of burial caskets in the United States and its members, with collectively pushing the sale of higher priced caskets and thereby diminishing production of the lower priced caskets.

Mr. Raymond L. Hays, *Mr. Floyd O. Collins* and *Mr. Everette MacIntyre* for the Commission.

Waite, Schindel & Bayless, of Cincinnati, Ohio, for respondents generally.

McKenzie, Hyde, Willson, French & Poor, of New York City, for National Casket Co., Inc.

INITIAL DECISION DISMISSING COMPLAINT

BY FRANK HIER, HEARING EXAMINER

Complaint in this case charges the Casket Manufacturers Association of America (hereinafter referred to as C.M.A.) with conspiracy, agreement and understanding, a planned common course of action and collective and concerted action among the Association, its officers and members, to enhance, stabilize, fix and maintain prices of caskets and control and limit the production of such caskets. Boiled down to lay language, in the light of proof offered, the alleged agreement is that the Association members collectively pushed the sale of higher priced caskets in derogation of the lower priced caskets and thereby diminished the production of the latter.

The record at this stage consists only of the evidence offered in support of these charges and its sufficiency to constitute a prima facie case of violation of the Federal Trade Commission Act as to unfair methods of competition or unfair acts and practices in commerce, and is challenged by respondents by their collective motions to dismiss and other motions. The question for decision, therefore, is whether or not the present record would, in the event no further evidence were offered, sustain a finding of violation and adequately support the order attached to the complaint.

Speeches by the various Presidents and Executive Secretary of C.M.A. extending for the most part from 1930 to 1939, as well as one in 1949 and one in 1950, are heavily relied upon by counsel in support of the complaint to show the agreement alleged. These speeches reflect complaint of cut-throat competition; dog-eat-dog tactics; selling downward; sacrificing quality and price for temporary volume; and an influx of new competitors between 1930 and 1934, which competitors, bent on getting in on what they considered a depression-proof industry, were without "principle," and were bent on getting rich quick by cheapness and volume at the expense of "total opportunity of the industry." These speeches point out that lateral expansion is impossible, since industry demand is inelastic; that only upward selling, the stressing of quality and increasing the "total opportunity of the industry" will enable the industry member to meet rising costs and increase his gross and net margins. These speeches plead for cooperation in over-all price maintenance through C.M.A. and assert that if each casket manufacturer is going to engage in cut-throat competition without regard to his competitors, that C.M.A. might as well be disbanded; also assert that no casket manufacturer can expand his volume except at the expense of his competitors, thus inviting reprisals, but that he can increase his profit by selling upward if others do the same. In short, to increase or maintain prices generally. (Counsel for respondents insist that the phrase used is "selling higher quality merchandise" but to the examiner this means on this record selling higher priced merchandise.) Price fixation, as such, is impossible in this industry.

Perhaps the best expression of purpose, at least from the standpoint of counsel supporting the complaint, was that used by the President of C.M.A. in 1949:

> Unquestionably, the most important characteristic of the industry that every manager should constantly keep in mind is that its unit demand is fixed by mortality. True, it varies up and down, but at any time the number of units that can be sold depends primarily on current mortality and secondarily on funeral directors' stocks.
>
> While the unit pie cannot be increased, it can be cut up into any number of slices by competing manufacturers. But what is one man's gain is another man's loss—a loss that can't be made up as in other industries by creating a demand for more products.
>
> However, a casket manufacturer *can* expand his dollar volume by the sale of better merchandise and his biggest opportunity has always been in that direction.
>
> That type of expansion is most desirable because it adds to the total marketing possibilities of the industry without taking business away from a competitor.

These speeches, at least prior to 1939, were delivered at a time when the industry and its returns were at low ebb. Thus, in 1934, the average annual volume of the casket manufacturer was 2,000 caskets or a gross volume of $100,000. The industry numbered then 604 manufacturers but, since 68 of these were branches of one ownership, the net total was 536. The C.M.A. membership at this time was 144. In 1937 the average net profit per funeral unit netted by the casket manufacturer was less than $2.75; in 1936, it had been $1.56 and for 1938 it was predicted to be $1.38. Apparently during this period the net return on sales was 3% and still lower on investment.

There are many expressions in these speeches, which, as asserted by counsel in support of the complaint, found a reasonable inference of concert of action. But when they are read in their entirety this inference is considerably diluted.

Thus, one of these speeches, quite heavily relied upon by counsel, given in 1935, was preambled by:

> Before entering a detailed discussion of our opportunity and the problem of making the most of it, we ought to understand clearly the obligations of this Association to its membership.
>
> Each of you has always been and always will be the one to run his own business. The management of your own business is your obligation and not an Association obligation. Simultaneously, however, it is distinctly an obligation of your Association officers and staff to red-lantern the industry danger spots and keep those signals burning until you have passed them; but you are the ones who must navigate your own individual businesses to positions of safety and continuity of profit.
>
> Likewise, it is an Association duty to outline existent profit-making opportunities, but again what you do with those opportunities is distinctly your own administrative task in so far as they apply to your business.

Also contained in the 1949 speech of the then President of the Association, in which "cutting up the pie" was referred to, appears the following:

> Your Association will endeavor in every legitimate way to be of service to the industry as a whole and as individuals. But, as in all human efforts, results will be dependent largely upon the individual.

Appearing in another speech, delivered in the 1930's is the following:

> In particular it must be understood that The Casket Manufacturers Association of America is not a legislative body under any conditions as far as business of its members is concerned. It is organized to gather information, consider and analyze economic conditions and perform specific services for its members. It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

In 1939, the President of C.M.A. also stated that the Association was responsible, through its pleas for cooperation in selling upward and maintaining the market, for raising the price index from $47.55 in 1933 to $55.00 and that in his opinion, and of course it is nothing more than an opinion, it was responsible for raising the gross industry returns of from thirty-five million to one-hundred million more than would have occurred had it not been for C.M.A.

Do these speeches evidence an agreement to maintain or increase prices, or, are they, as contended by counsel for respondents, merely invitations, exhortations or pleadings to each member to do so individually. It is, of course, normal competitive conduct for any seller to push his long profit merchandise in preference to his short profit merchandise. It would seem that, if there were an effective and binding agreement to maintain or to increase and maintain prices, the industry would not have continued to show either losses or such niggardly returns on investments. On these speeches alone it seems to the Hearing Examiner that the inference contended for by counsel for respondents is equally reasonable with that contended for by counsel in support of the complaint.

However, counsel in support of complaint point to considerable other evidence in the record to strengthen the inference they claim of agreement. Thus, it is urged that the alleged conspiracy was furthered and strengthened by the Progressive Service Conferences held, under C.M.A. auspices, jointly with various national associations of funeral directors representing 47 State organizations during 1938 and 1939. C.M.A. officials attended and spoke. Proper display of caskets, their construction, merchandising methods, suggested cost accounting general procedures and funeral management were demonstrated and discussed and the same theme of "selling upward" was also stressed. But the evidence is wholly what was said—there is nothing to show what was done or the results of these meetings. Although several witnesses attendant on some of these meetings were called, they were not questioned as to what happened.

The same insistance is made for the regional conferences or territorial meetings, presided over by C.M.A. officials or staff members, attended by local C.M.A. members as well as C.M.A. nonmembers. There is but one instance on the record of what was said at one such meeting, although dozens of such meetings were held each year over more than a decade, and this speech was by a witness who was not asked what was done thereat. There is no evidence of what was done or what resulted from these meetings. These Progressive Service Conferences and territorial meetings

furnish no additional support for the inference of agreement contended for and it is indeed strange that, in view of the number of such meetings, the knowledge of who was present and the availability as witnesses of many who attended, there is nothing in the record except one or two speeches and nothing whatever as to what was done.

Much reliance is also placed on a 1940 address by the President of C.M.A. to its membership:

> Had dog-eat-dog conditions prevailed instead of a steady succession of club meetings, mass conferences, joint conferences for business improvement, credit clubs, progressive service conferences, staff conferences in manufacturers' offices and well-timed economic stimulations, that $700,000,000 (merchandise sold by industry in 1930–1940 decade) would unquestionably have been less than $665,000,000, would probably have been less than $630,000,000 and could easily have been below $600,000,000. Even this last figure, representing a 14% drop in value level, is less than the customary depression experiences of our unorganized industry.

This is cited as evidence that C.M.A. through collective action succeeded in milking the public of anywhere from 35 million to 100 million dollars in ten years through conspiracy. But it is obvious from a reading of the speech as a whole that it is not fact, but mere speculation, used as a sales talk to increase membership which was then at such low ebb that disbanding was being seriously urged. There is no factual or statistical evidence in the record to corroborate this speculation, or to prove it independently.

Another merchandising aspect of this industry, claimed to show the agreement alleged, is, what is called, "suggested retail prices." Caskets are customarily displayed for sale in showrooms. In cities where a casket manufacturer has his factory or a branch, this showroom is maintained by him; in localities where there is neither, a funeral director will maintain one in connection with his funeral parlor. When the bereaved family selects a funeral director, the latter usually brings the family to one of these showrooms where the casket selection is made. The casket manufacturer, of course, is only interested, at least primarily, in obtaining the wholesale price of the casket but the funeral director is selling a funeral, including a casket. Hence, it has been a custom since the early 1900's for the casket manufacturer, at the request of the various funeral directors who use his showroom, to place on the casket a suggested retail price for the funeral, which price is calculated by the funeral director by taking the wholesale price of the casket and multiplying it by a set of multipliers ranging from 2.5 to 4.5 in inverse ratio to the price of the casket. Sales are made generally by the funeral director; occasionally by a representative

of the casket manufacturer on request from the funeral director; sometimes by both.

In 1930 the joint conference of C.M.A., with a national association of funeral directors, recommended "that in arriving at retail prices for caskets displayed in manufacturers' showrooms * * * manufacturers and funeral directors should reach mutually satisfactory conclusions by conference." This, together with the use of the multipliers—characterized by counsel as arbitrary and artificial and having no relation to costs—is claimed to show beyond cavil, agreement on price fixation to the public.

Respondents' counsel argue that these multipliers are calculated to cover the funeral directors direct and overhead costs but there is no direct proof of that in the record. Neither average nor specific costs are shown. It is true also that artificial or arbitrary prices, or pricing factors, producing relative or absolute rigidity, have often been held to be the indicia of price conspiracy or agreement. But price agreements are not entered into, or continued, unless reasonably effective; and indispensable prerequisites, or at least concomitants of them, are uniformity of final prices, or a pattern, flexible in area, or product; or a formula rigidly applied. There must somewhere be a fixed determinant uniformly applied. This is missing here. Nor is there any evidence that C.M.A. compiled or disseminated price books, code books or multiplier books used, or capable of being used, to arrive at uniform prices or uniform price brackets, to its membership or the industry generally, nor any evidence of the existence of such from any authorship or source.

There is no evidence of the resultant suggested retail prices—hence, no comparison or examination may be made to detect either uniformity or rigidity horizontally. The evidence shows that a very substantial number of casket manufacturers do not use them; some have used them and then have abandoned them; others have not used them but have later done so. The multipliers used vary from manufacturer to manufacturer and from funeral director to funeral director; there is no uniformity mathematically or operationally. There is no showing that the wholesale casket price—the manufacturers' price—is either uniform or rigid; in fact, there are no such prices in the record for comparison or examination. Some of these suggested retail prices are in plain figures—others are in code known to the funeral director. In fact, it is plain on this record that such prices and their determination, their use and the manner of their use, is entirely at the instance of the funeral director and vary in all respects according to his desire or need.

The "mutually satisfactory conclusions by conferences" between funeral directors and casket manufacturers referred to above must have meant individual conferences rather than mass agreements, because there is no evidence of any general discussion of suggested retail prices at any mass conference or territorial meeting and no evidence that any C.M.A. member knew whether his competitors used them, how they were arrived at, what multipliers were used or what the prices were. If these "conferences" were between the manufacturing and funeral directors' industries, it is strange that they should be recommended to the membership by the assembly; it would seem more logical that all the respresentatives there assembled would then and there confer and arrive at a conclusion. Furthermore, preceding all the joint conferences, discussions and minutes thereof and action taken, appears:

> The conference has no legislative power. Therefore, its functions can only be those of discussion and exchange of information and recommendations. In particular, it must be understood that C.M.A. is not a legislative body under any conditions as far as the business of its members is concerned. * * * It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

The use of these suggested retail prices by funeral directors for their own purposes of package deals may be socially iniquitous but it is apparent to the Hearing Examiner that such funeral director alone is responsible for the practice. It is obviously for his benefit primarily—the C.M.A. member gets his casket price regardless. The funeral director alone knows, on this record, what costs he must recover, what profit he wants and he alone determines whether to adhere to such package deal prices or not. There is no showing that he does so. No funeral director, or trade association of funeral directors, is a party respondent herein.

Next, counsel in support of the complaint point to, and rely upon, the statistical service of C.M.A. as a means of carrying out the alleged agreement. Since 1939 at least C.M.A. has invited its members, as well as non-members, to send in, confidentially, descriptions of their respective selling areas. The nation was then divided into sixteen broad geographical areas, and the reported sales area allocated accordingly. In 1951 there were 209 participants of C.M.A. statistical service, 176 of which were C.M.A. members and 33 of which were non-members. These participants, grouped geographically as described, are called clubs. Thus there was a New England Club and a Southern Club, the latter embracing

casket manufacturer participants mainly selling in the southeastern United States.

Each participant each month, on a form provided for that purpose, sends to C.M.A. statisticians the number of caskets and total dollar value thereof which the participant has shipped to funeral directors during the previous thirty days of: (1) adult cloth covered caskets, (2) hardwood caskets, (3) Class I metal caskets (sheet steel and aluminum, (4) Class II metal caskets (all other metals), (5) children's caskets, and (6) all other kinds of caskets (plastics, masonite, etc.). This is the only report sent into C.M.A. by a participant.

C.M.A. computes total estimated mortality for the area involved and sends back to the participant seven blue prints which show: cumulative mortality for previous years and previous months of the current year, together with estimated mortality for current month; the participant's total unit and total dollar volume shipments, cumulated over previous years, over previous months of the current year, and for the current month; percent mortality (mortality divided by units shipped) cumulated over previous years, previous months of the current year, and the current month; and the participant's average return (dollar volume divided by units) cumulated similarly, this over-all and also broken down into the described classes. These same figures for the entire selling area of the group or club are compiled and furnished. From these any participant can determine how his current month's shipments, total or by each class, compare with what he accomplished in previous years, in the previous months of the current year and how he likewise compares with the group as a whole, generally or by classes. In a word, is he forging ahead, slipping back or holding his own in relation to the whole group of his local competitors, and with his previous business.

It must be noted that these product classifications are not accurate price classifications since they overlap pricewise and that nowhere on any of these statistical blueprints does any price appear, only total dollar volume shipped, so that only an average price of all can be obtained by dividing such volume by total units; that individual sales are not reported, not reported, nor are customer's names, or prices; that no participant can learn how any particular competitor is faring but can only determine how he himself is doing in relation to his own past performance and in relation to the group or club as a whole; that no measure of prices is possible; that comparison by any participant of his own average index price

with the general (group) average index price of his selling area can only be made by him because he alone has his own index; and that no participant receives or can obtain the figures of any other participant.

It should also be noted that C.M.A. does not allocate territory; does not restrict selling areas—that each participant may change, enlarge, diminish or abandon any selling area in which he is or has operated; that no production data is requested or furnished; and that no prospective sales or prices are reported. There is no evidence in the record as to how these statistics are actually used, although among the numerous witnesses called there were participants.

Respondents claim that this statistical service only enables a participant to compare his business health and efficiency with his own past performances and currently with his competitors as a group, whereas counsel in support of the complaint see in it a means whereby each participant can see whether his competition is carrying out the alleged agreement to sell upward and compare their combined alleged efforts in that direction with his own. If the latter is possible, there is no evidence that it is done.

Discussion in more detail of this service would unnecessarily lengthen this opinion. Suffice it to say that the hearing examiner has studied with great care the contrasting explanations of this service and its possible uses set out in considerable detail in the briefs and has studied also the voluminous statistics themselves and is of the opinion that it is no more than what counsel for respondents contend. The whole system is too amorphous, too lacking in central control, in policing or coercion, and too sketchy, by reason of secrecy, to serve as contended for by counsel for by counsel for the complaint.

The latter next contend that a shift in sales for the years 1946 through 1950 from the cloth covered wooden caskets to the higher priced metal caskets is proof in itself that an agreement to sell upward existed. Unfortunately there are no figures for other years since 1940 in the record. The five years chosen are hardly typical or reliable because it was in 1946 that metal first became available for caskets again after the war and in 1950 the Korean "police action" broke out with consequent widespread fear of restrictions on metal again. It is reasonable to assume that metal casket sales zoomed disproportionately in both years. Hence the years 1947, 1948 and 1949, being all else which are available, give a more reliable picture.

The record shows that shipments from 177 participants in the C.M.A. statistical service in these years were as follows:

	1947	1948	1949
Children's cloth-covered wood caskets	61,077	51,484	46,836
Adult, cloth-covered caskets	390,946	371,204	351,921
Hardwood caskets	113,793	110,465	104,534
Metal caskets	127,686	145,274	130,543
Other kinds	4,610	3,590	2,344

Index (average prices) for these years were:

	1947	1948	1949
Children's	$16.95	$18.90	$19.75
Adult C. C. W	59.25	61.95	61.95
Hardwood	113.80	118.55	115.75
Metal	175.25	172.35	155.25
Other kinds	213.95	206.60	209.55

The decline in children's caskets is accounted for by the decline in child mortality—on the average in excess of 20%. From the first above table it appears that from 1947 through 1949 approximately 10% less adult cloth covered caskets and approximately 8% less hardwood caskets were shipped, whereas approximately 2.2% more metal caskets were shipped. The latter are generally more expensive than the former two. Average prices of the former two remained relatively steady whereas average prices of the metal caskets substantially declined. The greatest variation seems to have been in "other kinds" of caskets where unit sales fell off nearly 50%, although average price declined but slightly. Industry price index lagged behind wholesale commodity index.

The above tables do not bear out the contention of counsel in support of the complaint. If average prices are to be trusted, the most expensive type of casket ("other kinds") declined nearly 50%, the next most expensive gained only 2.2% and the least expensive declined 8% and 10%, respectively.

The pattern here is too mixed, the shift too insignificant, to bespeak the active and effective agreement charged or to show its implementation or fruition.

The last major contention of government counsel is to apply the legal maxim "omnia praesumuntur contra spoliatorem" to supply any and all deficiencies of proof, which counsel thereby impliedly admit exist in their case. Just what these deficiencies are is not stated but apparently left up to the decisional authorities to determine.

The record shows that on June 10, 1946, C.M.A. was served with a subpoena duces tecum to appear before the Grand Jury of the

District Court of the United States for the Northern District of Illinois at Chicago on July 15, 1946, with practically its entire files between January 1, 1933, and May 31, 1946. There is no point in setting out the detail of what was required to be produced because it is only what was actually produced which is of interest here and this is shown by the return to C.M.A. of what was produced.

On May 12, 1949, while the subpoenaed documents were still in the possession of the Antitrust Division of the Department of Justice at Chicago, Harry A. Babcock, Attorney in Charge, Washington Office of Investigation of the Federal Trade Commission, wrote counsel for respondents stating that an application for complaint against C.M.A. had been docketed; that he was assigned to investigate allegations that the industry and its members, by illegal concert of action and agreement, were fixing prices between manufacturers, maintaining resale prices illegally, selling or refusing to sell under circumstances other than the selection of customers on good faith and cooperating with morticians to artificially restrain commerce and suppress competition. Formal request was made to inspect C.M.A. minutes, records and correspondence with members from July 1, 1939 with the statement that if some of this material was in the possession of the Department of Justice, authority to examine it there was requested by appropriate letter to the Attorney General.

On June 1, 1949, counsel for respondents replied that the material was in Chicago and that until the grand jury investigation was disposed of, nothing would be made available in any manner. Thereafter on September 2, 1949, the Acting Chief of the Antitrust Division of the Department of Justice returned to John M. Byrne, as Secretary of C.M.A., all documents produced listed as follows:

557 Minutes of meetings of various committees of C.M.A.

8 Mimeographed bulletins.

297 Mimeographed proceedings of annual mass conferences, C.M.A., 1933–40.

2 Lists of officers and executive committees, 1939–46.

14 Lists of members of C.M.A. as of 5–31–46.

8 Statistical charts.

2 Mimeographed copies of Constitution (C.M.A.).

1 Printed pamphlet entitled "The Truth About the Casket Industry."

1 Photostat of membership insignia.

Upon receipt of the above, and without opening, the Secretary (Byrne) after advice from counsel that there was no law requiring

their preservation, had all the above destroyed by burning. His reasons for doing so appear in his testimony at an investigational pre-complaint hearing as follows: The Department of Justice had examined and considered the documents thoroughly in the more than 3 years it had them and no indictment had been returned or other charge preferred; that, although he thus had a clean bill of health from the Department of Justice, he had observed the development of administrative law in this country and knew that things that were considered perfectly proper at one time came to be considered improper or objectionable not by statute but by interpretation by precedents set, and he did not want the nuisance of being bothered with the papers. Byrne died on January 3, 1952.

On this factual basis, government counsel contend: that such destruction was a deliberate thwarting of Commission attempts to ascertain the facts; that it was an obstruction of justice in the nature of a fraud to the prejudice of the public interest;[1] that every presumption should be indulged against one who destroys records relevant to an issue to which he is "party." Counsel do not contend for a presumption of general guilt, namely, that findings and order could be made and entered on the presumptions alone, but contend that it should be presumed that wherever that proof is deficient, that it was contained in the destroyed documents, that the latter were injurious to respondents, that destruction operates against the whole case of the destroyer but nowhere is it stated just what is to be presumed, what evidentiary gaps are to be proved by what destroyed documents, what the latter contained, or what gaps are thus to be closed. No case has been cited or found where the contended-for-presumption has been applied in an administrative proceeding although many other cases have been cited by counsel.

The hearing examiner has studied these cases, as well as some others, and detailed discussion thereof would extend this opinion beyond any reader's patience. Analysis thereof though shows that all of them, where the quoted maxim was applied, involved either a single document, or group of related documents, whose very title imported its contents and demonstrated vital relevancy to the case; secondary evidence showing the nature and substance of the destroyed material; subornation of perjury, alteration of documents, or refusal to produce with independent evidence thereof; or specific allegations as to what the destroyed documents would show, which allegations were taken as true in view of the destruc-

[1] If so, quere: why was not Section 10 of the Federal Trade Commission Act invoked?

tion.[2] In many of these cases, destruction occurred after litigation commenced.

All of these elements are missing here. There is no evidence, secondary or primary, of the contents. There is nothing to show their relevancy to the issue presented here. True, they presumably referred, or were thought to refer, to some violation of the anti-trust laws but whether the Sherman Act, the Clayton Act or some other Act, whether criminal or civil, whether conspiratorial or individual, does not and cannot appear. The 890 destroyed documents listed above give no clue as to their contents from the standpoint of relevancy to this case. Officers and membership of C.M.A. are in this record, as are statistical charts, whether the same or different is unknown. The C.M.A. constitution or membership insignia can hardly be presumed to be incriminatory, but what was contained in minutes, bulletins, proceedings or in the pamphlet "The Truth about the Casket Industry," one can only speculate and therefore any contended relevancy is pure speculation also. Relevancy, competency and materiality cannot be speculated under the command of the Administrative Procedure Act. It must be established.

None of these destroyed documents import their substance and, therefore, their relevancy by their title, such as would a deed, bill of sale, receipt, ship's manifest, mortgage, will or contract. Here is a mass of documents which may be innocuous or damning. One cannot assume that minutes and bulletins contain the agreement charged here from the mere fact that they were minutes and bulletins.

There is here, of course, no subornation of perjury or perjury, no fraudulent alteration of documents and no refusal to produce or any concealment of records nor any specific allegations as to contents or purport of the destroyed evidence. Without some specific evidence, without some reliable guide as to contents, the hearing examiner does not know what to presume specifically and has not been told and cannot presume guilt generally and is not asked to. The facts indeed give rise to a contrary presumption; that being, that no charge being preferred or indictment returned after over three years of examination and study, the destroyed documents were insufficient in the opinion of the responsible of-

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[2] Even in the old case of *Pomeroy* v. *Benton*, 77 Mo. 64, which is most supportive of government counsel's contention, at least in language if not on the facts, there was a specific charge that plaintiff's profit had been $200,000 and that such would be evidenced had not defendant destroyed the account books. In view of the latter, the court took plaintiff's allegation as true without further proof. In this proceeding, there is no pleaded or stated allegation that the destroyed records contained the agreement charged, nor any specific fact or Act from which its existence could be inferred.

ficials of the Department of Justice to constitute a violation of any antitrust statute over which that Department has jurisdiction. For these reasons the hearing examiner refuses to apply—indeed he cannot apply—the maxim contended for by government counsel.

Looking at the record as a whole, the deficiencies in the government's evidence which the hearing examiner believes to be fatal to the asserted inference or conclusion of agreement and concerted action are: that there is no evidence of allocation of sales, of territory or of production, nor any control of them; no system of discovery, checking, policing, coercion or punishment; no means of implementing or effectuating the asserted agreement; and no evidence of curtailment, restriction or stoppage of production of the cheaper merchandise in any or all producing units. While on the other hand, the record shows affirmatively that such merchandise is still freely and widely offered for sale and is nationally still available to all; that competition in its sale is still active and over-all competition in casket sales has not decreased—at least, there is no showing that it has; that while there is evidence of what was said, there is too little reliable or conclusive evidence of what was done; and that the purpose of the charged conspiracy on this record is just as reasonable and more consistent with normal individual competitive conduct as with a "planned common course of action."

There are few, if any, industries where the ultimate consumer is so psychologically and chronologically disadvantaged; where the normal bargaining power is so handicapped in an immediate and imperative, even desperate, need; therefore, the law should be especially vigilant to prevent advantage being taken of his helpless position. Because of this, the hearing examiner has given very detailed consideration to this record. The record herein presents a merchandising picture of many possibilities of unjustified consumer exaction. Whether these possibilities are translated into actualities is not known but, in any event, the record does not support with substantial evidence the claim that these respondents collectively did so. Any taking advantage of such possibilities on this record was individual and redress or correction must be found in other proceedings than this.

A painstaking study of this record convinces the hearing examiner that there is insufficient reliable and substantial evidence to sustain the order prayed for and, accordingly, the complaint should be dismissed.

This action makes unnecessary rulings on the other motions filed, or decision on the questions of joinder propriety of class action

and the substantive question of whether an agreement among competitors to each push his long profit merchandise, is illegal.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed as to all respondents.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges a violation of Section 5 of the Federal Trade Commission Act in that respondents "from about 1930 to the present, by agreement, combination and planned common course of action (1) enhanced, stabilized, fixed and maintained prices of burial caskets; (2) controlled and limited the unit production and unit sales of burial caskets; (3) controlled and limited the production and sale of burial caskets in that the production and sale of higher-priced caskets were expanded while the production and sale of lower-priced caskets were curtailed; and (4) fixed and maintained uniform, artificial and noncompetitive suggested retail prices for burial caskets sold by funeral directors to the public from manufacturer-owned showrooms."

At the conclusion of the evidence in behalf of the complaint, the hearing examiner sustained respondents' motion to dismiss on the ground that a prima facie case had not been established. Counsel supporting the complaint appeals.

The respondents are Casket Manufacturers Association of America (C.M.A.), a trade association, its officers, and 13 corporation members of the association, the latter being named individually, also as members of C.M.A. and as representative of all of the members.

It is the claim of counsel supporting the complaint that the agreement, combination and planned common course of action is to be found in the following:

(1) The power and capacity of respondents to accomplish the alleged unlawful activities;

(2) Speeches and statements made by officers of C.M.A. at various meetings;

(3) The C.M.A.'s statistical service;

(4) The rise of the index price and the movement of sales from lower to higher price brackets;

(5) Suggested resale prices by the casket manufacturers;

(6) The destruction of certain documents by the Secretary of C.M.A.

The membership of C.M.A. consists of about 160 corporations, partnerships and individuals engaged in the manufacture and sale of burial caskets and funeral supply items to funeral directors. During much of the time in question, the membership consisted of many large casket manufacturers. According to the figures in the brief of counsel supporting the complaint, sales of C.M.A. members were, in 1946, 56% of the total national sales and in 1950, 49%.

From time to time, the Association and its members held meetings. For example, from 1930 to 1954, annual mass conferences were held, to which all members of the funeral supply industry were invited. In addition, territorial meetings were held in some 14 strategically located cities. These meetings were arranged by the Secretary of the Association under the direction of the Executive Committee. Some excerpts of speeches made by officers of C.M.A. at these meetings are:

(1) From a speech of the President in 1949:

Unquestionably, the most important characteristic of the industry that every manager should constantly keep in mind is that its unit demand is fixed by mortality. True, it varies up and down, but at any time the number of units that can be sold depends primarily on current mortality and secondarily on funeral directors' stocks.

While the unit pie cannot be increased, it can be cut up into any number of slices by competing manufacturers. But what is one man's gain is another man's loss—a loss that can't be made up as in other industries by creating a demand for more products.

However, a casket manufacturer *can* expand his dollar volume by the sale of better merchandise and his biggest opportunity has always been in that direction.

That type of expansion is most desirable because it adds to the total marketing possibilities of the industry without taking business away from a competitor.

* * * * * * *

Your Association will endeavor in every legitimate way to be of service to the industry as a whole and as individuals. But, as in all human efforts, results will be dependent largely upon the individual.

(2) From a speech made in 1935:

Before entering a detailed discussion of our opportunity and the problem of making the most of it, we ought to understand clearly the obligations of this Association to its membership.

Each of you has always been and always will be the one to run his own business. The management of your own business is your obligation and not an Association obligation. Simultaneously, however, it is distinctly an obligation of your Association officers and staff to red-lantern the industry danger spots and keep those signals burning until you have passed them; but you are the ones who must navigate your own individual businesses to positions of safety and continuity of profit.

Likewise, it is an Association duty to outline existent profit-making opportunities, but again what you do with those opportunities is distinctly your own administrative task in so far as they apply to your business.

There were other speeches and statements of similar import. Concerning this phase of the case, the initial decision contains the following:

Speeches by the various presidents and Executive Secretary of C.M.A. extending for the most part from 1930 to 1939, as well as one in 1949 and one in 1950, are heavily relied upon by counsel in support of the complaint to show the agreement alleged. These speeches reflect complaint of cut-throat competition; dog-eat-dog tactics; selling downward; sacrificing quality and price for temporary volume; and an influx of new competitors between 1930 and 1934, which competitors, bent on getting in on what they considered a depression-proof industry, were without "principle", and were bent on getting rich quick by cheapness and volume at the expense of "total opportunity of the industry." These speeches point out that lateral expansion is impossible, since industry demand is inelastic; that only upward selling, the stressing of quality and increasing the "total opportunity of the industry" will enable the industry member to meet rising costs and increase his gross and net margins. These speeches plead for cooperation in over-all price maintenance through C.M.A. and assert that if each casket manufacturer is going to engage in cut-throat competition without regard to his competitors, that C.M.A. might as well be disbanded; also assert that no casket-manufacturer can expand his volume except at the expense of his competitors, thus inviting reprisals, but that he can increase his profit by selling upward if others do the same. In short, to increase or maintain prices generally. (Counsel for respondents insist that the phrase used is "selling higher quality merchandise" but to the examiner this means on this record selling higher priced merchandise.) Price fixation, as such, is impossible in this industry.

During a membership drive in 1940, the President of the C.M.A. said:

Except for the N.R.A. period, membership and financial support of the Casket Manufacturers Association have been diminishing steadily since 1929. Nevertheless, the Casket Manufacturers Association kept on fighting the forces of demoralization and depression and each year seemed to bob up with enough energy, surplus and vitality to perpetuate itself each succeeding year.

Even in the face of those difficulties, its work has been outstanding. Over $700,000,000 worth of merchandise has been sold by casket manufacturers to funeral directors during the past ten years.

Had dog-eat-dog conditions prevailed instead of a sturdy succession of club meetings, mass conferences, joint conferences for business improvement, credit clubs, progressive service conferences, staff conferences in manufacturer offices, and well-timed economic stimulations, that $700,000,000 would have unquestionably been less than $665,000,000, would probably have been less than $630,000,000 and could easily have been below $600,000,000. Even this last figure, representing a 14 percent drop in value level, is less than the customary depression experiences of an unorganized industry. **(Com. Ex. 181, p. 1; Ap. Br. 43.)**

At many of these meetings, the following also was said:

> The conference has no legislative power. Therefore, its functions can only be those of discussion and exchange of information and recommendations. In particular, it must be understood that C.M.A. is not a legislative body under any conditions as far as the business of its members is concerned. * * * It does not attempt to commit its members to any joint action and by its constitution is specifically forbidden to attempt to commit its members to any joint action.

The statistical service, operated under the direction of C.M.A. officials, is participated in by both members and non-members. The number has varied; in 1951, of 209 participants, 176 were members and 33 were non-members. The country is divided into 16 areas; the participants in the several areas include the manufacturers selling mainly in that area. Each participant reports once each month to C.M.A. the total number of caskets and total dollar volume thereof, which the participant has shipped to funeral directors that month. The figures are broken down to cover the six principal classifications of caskets.

The C.M.A. sends to all participants various reports or "blueprints" which contain certain compiled information applicable to the particular area. Included are reports of mortality for the preceding year, and the preceding month, and estimates for the current month. These figures are based upon mortality figures of the Bureau of Vital Statistics of the United States Government. The reports also show for the participant and also for the area, the following: total unit and dollar volume of shipments over previous years, over previous months of the present year, and for the present month; percent mortality (mortality divided by units shipped) over previous years, previous months, and current month; the average return (dollar volume divided by units shipped). All these figures are broken down into the various classifications of caskets.

On the question of the rise of the index prices (average prices) and the movement of sales from lower to higher price brackets, counsel supporting the complaint submits a table based on sales of 177 manufacturers participating in the statistical service. A part of this table is reproduced showing for the various classifications of caskets, total units shipped, the percent of total units shipped, the percentage of total dollar volume, and the index price:

	1946	1947	1948	1949	1950
Childrens C. C. W. caskets:					
1. Units	58,034	61,077	51,484	46,836	42,889
2. Percent of total units	8.3	8.7	7.6	7.4	6.2
4. Percent of total dollar volume	1.4	1.5	1.4	1.4	1.2
5. Index price	$14.50	$16.95	$18.90	$19.75	$22.05
Adult cloth-covered caskets:					
1. Units	405,311	390,946	371,204	351,921	360,491
2. Percent of total units	57.9	55.0	54.4	55.3	51.7
4. Percent of total dollar volume	34.4	33.6	31.9	33.4	30.0
5. Index price	$51.65	$59.25	$61.95	$61.95	$63.60
Hardwood caskets:					
1. Units	128,562	113,793	110,465	104,534	111,161
2. Percent of total	18.3	16.3	16.2	16.4	15.9
4. Percent of total dollar volume	22.1	18.8	18.1	18.6	17.3
5. Index price	$104.75	$113.80	$118.55	$115.75	$118.85
Metal caskets (total of class I and class II metals):					
1. Units	100,283	127,686	145,274	130,543	181,544
2. Percent of total	14.3	18.3	21.3	20.5	26.0
4. Percent of total dollar volume	27.2	32.4	34.7	32.6	38.5
5. Index price	$165.25	$175.25	$172.25	$155.25	$157.05
Class I metal caskets:					
1. Units			137,865	124,394	173,527
2. Percent of total			20.2	19.5	24.9
4. Percent of total dollar volume			30.4	28.6	33.9
5. Index price			$159.05	$149.05	$149.70
Class II metal caskets:					
1. Units			7,409	6,149	8,017
2. Percent of total			1.1	1.0	1.1
4. Percent of total dollar volume			4.3	4.0	4.6
5. Index price			$420.60	$427.40	$440.70
Other kinds of caskets:					
1. Units	8,190	4,610	3,590	2,344	1,613
2. Percent of total	1.2	0.7	0.5	0.4	0.2
4. Percent of total dollar volume	2.6	1.4	1.0	0.8	0.5
5. Index price	$196.85	$213.95	$206.60	$209.55	$241.80

Concerning this data, the hearing examiner points out that:

The decline in children's caskets is accounted for by the decline in child mortality—on the average in excess of 20%. From the first above table it appears that from 1947 through 1949 approximately 10% less adult cloth covered caskets and approximately 8% less hardwood caskets were shipped, whereas approximately 2.2% more metal caskets were shipped. The latter are generally more expensive than the former two. Average prices of the former two remained relatively steady whereas average prices of the metal caskets substantially declined. The greatest variation seems to have been in "other kinds" of caskets where unit sales fell off nearly 50%, although average price declined but slightly. Industry price index lagged behind wholesale commodity index.

The above tables do not bear out the contention of counsel in support of the complaint. If average prices are to be trusted, the most expensive type of casket ("other kinds") declined nearly 50%, the next most expensive gained only 2.2% and the least expensive declined 8% and 10% respectively.

The pattern here is too mixed, the shift too insignificant, to bespeak the active and effective agreement charged or to show its implementation or fruition.[1]

In the matter of suggested resale prices, it appears that caskets are usually displayed for sale in showrooms either in that of the

[1] The hearing examiner discounts the value of the figures for 1946 and 1950 because 1946 was the first year after the war when metal became available for caskets, and 1950 marked the beginning of the Korean "police action," with consequent widespread fear of the restriction on metal again.

manufacturer or that of the funeral director. For many years, it has been the custom of some casket manufacturers at the request of the funeral director to place on the casket a suggested resale price. This price is calculated by the funeral director by multiplying the wholesale price by a set of "multipliers" ranging from 2.5 to 4.5 in inverse ratio to the price of the casket.

On the occasion of a joint conference of C.M.A. with National Association of Funeral Directors in 1930, a recommendation was made that "in arriving at retail prices for caskets displayed in manufacturers' showrooms * * * manufacturers and funeral directors should reach mutually satisfactory conclusions by conference."

On this feature of the case, the initial decision states:

> There is no evidence of the resultant suggested retail prices—hence, no comparison or examination may be made to detect either uniformity or rigidity horizontally. The evidence shows that a very substantial number of casket manufacturers do not use them; some have used them and then have abandoned them; others have not used them but have later done so. The multipliers used vary from manufacturer to manufacturer and from funeral director to funeral director; there is no uniformity mathematically or operationally. There is no showing that the wholesale casket price—the manufacturers' price—is either uniform or rigid; in fact, there are no such prices in the record for comparison or examination. Some of these suggested retail prices are in plain figures—others are in code known to the funeral director. In fact, it is plain on this record that such prices and their determination, their use and the manner of their use, is entirely at the instance of the funeral director and vary in all respects according to his desire or need.
>
> The "mutually satisfactory conclusions by conferences" between the funeral directors and casket manufacturers referred to above must have meant individual conferences rather than mass agreements, because there is no evidence of any general discussion of suggested retail prices at any mass conference or territorial meeting and no evidence that any C.M.A. member knew whether his competitors used them, how they were arrived at, what multipliers were used or what the prices were.

The claim as to the destruction of documents is based on the burning of certain records by the then Secretary of C.M.A., Mr. John M. Byrne. In response to a subpoena duces tecum, C.M.A. had turned over these documents to the District Court Grand Jury for the Northern District of Illinois. While the papers were still in the possession of the Antitrust Division of the Department of Justice, the Federal Trade Commission's Washington Office of Investigation wrote counsel for respondent that a complaint had been docketed against C.M.A. Demand was made for examination of certain records and documents. Some time later, no indictment having been returned, the documents were returned to Mr. Byrne. These documents are listed as follows:

557 Minutes of meetings of various committees of C.M.A.

8 Mimeographed bulletins.

297 Mimeographed proceedings of annual mass conferences, C.M.A., 1933–1940.

2 Lists of officers and executive committees, 1933–46.

14 Lists of members of C.M.A. as of 5–31–46.

8 Statistical charts.

2 Mimeographed copies of Constitution (C.M.A.).

1 Printed pamphlet entitled "The Truth About the Casket Industry."

1 Photostat of membership insignia.

After advice of counsel, Mr. Byrne burned the documents. The reasons later given for this action were in substance that: the Federal Grand Jury had returned no indictment, the nuisance of keeping the papers, and "I had seen the development of administrative law in this country and I knew that those things that were considered perfectly proper at one time came to be considered improper or objectionable, not by statute, but by interpretation, by precedents set and I didn't want to be bothered with the papers."

The evidence establishes, prima facie, first that officials of C.M.A. did urge the pushing of higher priced caskets, that is, "selling upward", and second, that the statistical program did give the participants the opportunity to compare their results in selling upward, with the general result of all.

There is, however, no evidence of what the members did in response to the urgings, no evidence of what use they actually made of the statistical service. There is no evidence that territory was allotted, that prices were fixed, or even uniform, or that production of any type of casket was restricted or that any type was made unavailable to purchasers. There was no system of checking the activities of individual members, nor is there satisfactory evidence of adoption by them of any restrictive program, nor of results which would naturally flow only from a planned common course of action. It cannot be said that there was any variation in the types of caskets sold or in the prices thereof which is not as consistent with natural causes as with an agreement or planned action. Injury to competition because of any conduct of respondents has not been established, prima facie.

Many cases have pointed out that a formal agreement to restrict competition is not necessary, but may be inferred from other proven facts. But the facts relied on in those cases are not present here. See *Fort Howard Paper Company* v. *FTC* (1940), 156 F. 2d 899; *U. S. Maltsters Assn.* v. *FTC* (1945), 152 F. 2d 161;

Milk and Ice Cream Can Institute v. *FTC* (1946), 152 F. 2d 478; *Bigelow* v. *RKO Radio Pictures* (1945), 152 F. 2d 877. From a factual standpoint, the instant case has more in common with *Maple Flooring Manufacturers Assn.* v. *U.S.*, 268 U. S. 563, and *Tag Manufacturers Institute* v. *FTC*, 174 F. 2d 452.

There still remains to be considered the evidentiary value of the admitted fact that certain documents and records of C.M.A. were destroyed by its Secretary after he knew that the Federal Trade Commission desired to examine them.

The famous legal maxim, "omnia praesumuntur contra spoliatorem", has often been considered by the courts. The general rule is that, under certain circumstances, the refusal to produce certain evidence or the destruction of it, permits an inference to be drawn that the evidence would have been unfavorable to the party who destroyed it or who refused to produce it.

The inference does not automatically arise in every case from the mere fact of spoliation. As said in *Wigmore on Evidence*, Volume 2, Section 291:

> Upon the same general principle, namely, that the inference can arise only where the document was one that could have been used if produced, it is obvious that the inference is not available from mere non-production where the document would have been inadmissible on the possessor's or the demandant's behalf or is declared by the Court to be unnecessary or useless.

The inference arising from the destruction of evidence ordinarily would not dispense with the necessity for the introduction by the other party of some secondary evidence as to the contents of the document to prove facts which said party claims would have been shown thereby. It merely diminishes the force of the spoliator's evidence and enhances the probative value of that adduced by his opponent. 31 CJS, Sec. 152. Thus, in re *Enos' Will* (1921), 187 N.Y.S. 756, the court said that the unfavorable inference will not dispense with the necessity of the other party introducing some evidence of its contents that it may appear that the documents destroyed were, in fact, relevant to the case. In *Equitable Trust* v. *Gallagher* (1950) Del., 77 Atl., Sec. 548, a great deal of evidence was taken in an effort to reconstruct the contents of the destroyed instruments, after which the Chancellor applied the rule that where a party to an instrument deliberately destroys it, the natural inference is that its provisions are against his interests. In *Waters* v. *Lawler* (1921) Ill., 130 N.E. 335, it appeared that the grantor destroyed the only memorandum of direction regarding the control and disposition of a deed placed in escrow; the inference thus arising, "while not relieving the opposite party from the burden of

establishing delivery, nevertheless must prevail where the evidence on the point is vague and uncertain."

In some instances, the very nature of the document itself or the surrounding circumstances may be a sufficient showing of secondary proof to permit the inference. For example, a showing that the destroyed document was in fact a deed might be sufficient, whereas the fact that it was only some other document between the parties might not be. In re Herman (1913) 207 Fed. 594, the documents destroyed by the bankrupt's wife and mother-in-law were letters between them concerning claimed loans by the mother-in-law to the bankrupt. In *The Sam Sloan* 65 Fed. 125 (a libel suit against The Sam Sloan for damages in a collision), the paper destroyed was the first report of the accident made by the ship's captain and filed with the public authorities. See also *The Bermuda*, 70 U.S. 514.

In these cases the admitted character of the documents was such that a reasonable conclusion could be drawn that they did have to do with some material fact involved in the litigation. In other words, the documents under the circumstances carried their own proof.

That is not, however, the situation in the instant case. Some of the documents seem to have been in the same categories as others actually introduced, such as statistical charts, etc. Others, such as mimeographed copies of the C.M.A. constitution, could probably have been introduced at the trial. Others, such as minutes of meetings and reports of proceedings at mass conferences, were records which an investigator would naturally explore; and it is within the realm of conjecture that such records may have thrown some light on important issues in the case.

For the purpose of this appeal, we assume that a prima facie showing has been made that certain officials did recommend "upward selling." Whether any action was taken on the proposal was therefore in issue. If there were some secondary proof that the destroyed records did in fact bear on this issue, the destruction might give rise to an inference unfavorable to the spoliator. There is, however, no such proof nor any proof that the destroyed records contained any matters relevant to the issues in the case.

The above conclusion makes it unnecessary to consider the circumstances of the destruction and the alleged reasons therefor as bearing on the weight to be given to any possible inference.

The record indicates that Mr. Byrne died prior to the filing of the complaint. We do think it proper, however, to call attention to Section 10 of the Federal Trade Commission Act which provides

a penalty for the willful destruction of records and documents under certain circumstances.

An examination of the whole record leads to the conclusion that the hearing examiner decided the issue correctly. His findings, conclusion and order are adopted as the findings, conclusion and order of the Commission.

The appeal is denied and the complaint is dismissed as to all respondents.

It is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision in this case.

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint, and the matter having been heard on the whole record, including briefs and oral argument of counsel; and the Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusion and order contained in said initial decision:

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

Commissioner Kern not participating.

IN THE MATTER OF

ABEL ALLAN GOODMAN TRADING AS WEAVERS GUILD

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

Docket 6153. Complaint, Dec. 22, 1953—Decision, Mar. 14, 1956

Order requiring a seller in Hollywood, Calif., to cease, in advertising for agents to sell a correspondence course designed to prepare students for work as commercial reweavers, representing falsely that highly exaggerated earnings were typical and that he furnished sales agents with names of prospects and everything necessary to make sales; and to cease representing falsely in statements made to prospects by his salesmen and otherwise: the scope of the course, ease of learning, personal assistance to students, earnings of persons completing the course, value of supplies, and refund of monies paid if persons were unable to complete the course; to cease representing falsely that his courses had been approved for training by State and Federal authorities; and to cease use of the word "Guild" in his trade name or otherwise.

Mr. William L. Pencke and *Mr. Edward F. Downs* for the Commission.

Wolver & Wolver, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On December 22, 1953, the Federal Trade Commission issued its complaint in this proceeding, charging the respondent with false, deceptive and misleading statements and representations in connection with the advertising and sale in interstate commerce of a course of study in reweaving, in violation of the Federal Trade Commission Act. On January 11, 1954, the respondent submitted an answer thereto, denying the principal charges of the complaint and praying that the said complaint be dismissed, and that no order be issued against him. In due course, evidence for and against the allegations of the complaint was received into the record. Thereafter proposed findings as to the facts and conclusions were presented by both parties.

IDENTITY AND BUSINESS OF RESPONDENT

Respondent Abel Allan Goodman is an individual who, until January 1, 1954, traded under the name of Weavers Guild, with his principal office and place of business located at 4634 Hollywood

Boulevard, Hollywood, California. Subsequent to January 1, 1954, the business of Weavers Guild has been taken over by a newly-created corporation known as Weavers Guild, Inc., under the direction of the respondent's daughter, his son-in-law and one of his former employees. Respondent Goodman has continued, however, to be associated with the business, and has sometimes signed letters on behalf of the corporation, using the title "Director."

During the time encompassed by the allegations of the complaint, respondent has been engaged in the sale and distribution in commerce, among and between the various States of the United States, of a course of study and instruction designed to prepare students thereof for work as commercial reweavers. This course of instruction is conducted through the medium of the United States mails. Respondent has caused said course of study and instruction to be transported from his place of business in the State of California to purchasers thereof located in other States of the United States. Respondent has, during the period of time mentioned, maintained a substantial course of trade in said correspondence course in commerce among and between the various States of the United States.

THE ISSUES

The complaint divides the alleged misrepresentations disseminated by the respondent into three categories:

1. The alleged misrepresentations made by respondent to prospective sales agents;
2. The alleged misrepresentations made by respondent or by his sales agents to prospective purchasers; and
3. The general misrepresentation inherent in respondent's use of the trade name "Weavers Guild."

In his answer respondent denies that he has made some of the alleged representations, and denies the falsity of all representations made by him. The issues, therefore, are whether respondent has made the alleged advertising representations, and, if so, whether they are in fact false, misleading and deceptive. The determination of these issues requires a detailed enumeration of the individual representations, and a thorough analysis thereof in the light of the entire record.

REPRESENTATIONS DIRECTED TO PROSPECTIVE SALES AGENTS

It is alleged in the complaint that the respondent, for the purpose of securing agents to sell his course of instruction in reweaving, has disseminated advertisements representing:

1. That earnings of $1,452 in 11 days, $1,368 in 7 days and $1,302 in 10 days are typical earnings of salesmen selling respondent's course of instruction; and

2. That respondent furnishes sales agents with the names of prospects and everything necessary in soliciting and closing sales, including an order-closing sales kit.

As to the first of these allegations, the record shows that respondent has disseminated advertisements setting forth earnings of sales agents as follows:

MEET A FEW OF OUR SALESMEN FACE TO FACE

Their earnings shown here are NOT EXCEPTIONAL or FICTITIOUS. As positive proof we will mail you actual photocopies of their checks.

G. Worthingham Minneapolis, Minn., Formerly Vacuums (PORTRAIT OF SALESMAN)		W. H. Orledge Edmonton, Canada, Formerly Home Study (PORTRAIT OF SALESMAN)		S. Buda Los Angeles, Calif., Formerly Freezers (PORTRAIT OF SALESMAN)	
Typical earnings with us:		Typical earnings with us:		Typical earnings with us:	
12/1/52	$450	1/12/53	$228	1/13/53	$357
12/5/52	150	1/12/53	228	1/15/53	67
12/11/52	627	1/15/53	570	1/16/53	260
12/12/52	225	1/19/53	342	1/19/53	293
				1/21/53	65
Total, 11 days	1,452	Total, 7 days	1,368	1/23/53	260
				Total, 10 days	1,302

Under questioning, respondent admitted that the particular earnings set forth in the advertisements were exceptional. Respondent further admitted that the represented earnings "could be typical if he (the salesman) had employed a number of other salesmen under him to bring up that total," adding that "we never know whether that is so or not." In respondent's published advertisements, no mention was made of the necessity of hiring assistant salesmen in order to make such earnings as were set forth as "typical."

In view of the admission by respondent that the above-cited incomes were exceptional, it must be concluded that they are not, as represented in the advertisement, typical of the earnings which might reasonably be expected by anyone undertaking to sell respondent's course of instruction in reweaving.

Relative to the second of the above allegations, that respondent furnishes sales agents with the names of prospects and everything necessary in soliciting and closing sales, including an order-closing sales kit, respondent states in his published advertisements:

You work on qualified leads.

Endless qualified leads to work on. * * * You buy NOTHING—you demonstrate NOTHING. We furnish everything from tested, proven sales talk to order-closing kit.

The phrase "qualified leads" suggests prospective purchasers or students who are qualified to purchase respondent's course. Thus, by implication, respondent has represented to prospective sales agents that they will be furnished with the names of prospective customers.

Respondent admitted that such sales material as brochures and order-closing kits are not furnished free to sales agents, but must be paid for by them. He also admitted that, except on rare occasions, names of prospective purchasers are not furnished to salesmen. A deposit of $5.00 (erroneously set forth in the complaint as $500, and admitted to be erroneous by counsel in support of the complaint at the first hearing held herein) is required by respondent to be paid by sales agents for their "order-closing kit." Respondent stated that this deposit "is returnable to the agent," and that he has "a price list on supplies that they (the sales agents) need, such as brochures, certain things that they leave with customers."

It must therefore be concluded that respondent, contrary to his advertising representations, does not furnish to his sales agents the names of prospective purchasers, nor does he furnish his salesmen with everything necessary in soliciting and closing sales.

REPRESENTATIONS DIRECTED TO PROSPECTIVE PURCHASERS OF RESPONDENT'S REWEAVING COURSE

It is alleged that respondent, for the purpose of inducing the sale of his course of instruction in reweaving, has disseminated through various media including oral sales talks by his salesmen, thirteen statements and representations, as follows:

1. That respondent's course of instructions constitutes a complete course in reweaving.

Respondent denies that any of his advertising justifies this allegation. This representation is alleged to be misleading because respondent's course of instruction is not a complete course in reweaving, but is confined to so-called overweaving or patch weaving and does not include French or other methods of reweaving.

Commission's Exhibit 4, a brochure advertising "Nu-Weaving," left by respondent's salesmen with prospective customers, sets forth, among others, representations as follows:

Learn and Earn with NU-WEAVING.

The modern method of invisible re-weaving. * * * We furnish everything you'll need to learn. To reweave you must know the three basic weaves of cloth. * * * We furnish everything you'll need to run your own home business * * *.

The above statements imply that there are only three basic weaves of cloth, and that respondent's course will impart, to a student thereof, a complete knowledge of the craft of reweaving applicable thereto, including "invisible re-weaving." This implication is misleading because, as shown by testimony herein, respondent's course of instruction is confined to the method of reweaving known as "over-weaving" or "patch weaving," and offers no instructions relative to thread-by-thread replacement or so-called French reweaving. Although in other and separate representations, Nu-Weaving is explained, the advertising described has the tendency and capacity to mislead and deceive as herein described.

2. That a person completing the course is assured of a lifetime of employment with substantial earnings.

This representation is alleged to be false because there are no assurances that a person who completed respondent's course of instruction would thereby be enabled to operate a profitable business for any period of time. Respondent denies that he has represented that a person completing his course is assured of a lifetime of employment at substantial earnings, but contends that he has truthfully represented that a person with proper and skillful application, who has completed his course, has the possibility of substantial earnings.

It is believed that respondent's contention is correct. Respondent has represented in his advertisements that "Nu-Weaving can bring you security and independence," but such statement says merely that it is possible. Nowhere in respondent's advertising does there appear to be any assurance offered that one taking the course will thereafter make a substantial income therefrom, or that such income, if made, will last a lifetime. Accordingly, it appears that this representation is not deceptive.

3. That reweaving is easily learned; can be mastered by completing respondent's course of instruction; and that such course can be completed within as short a time as ten days.

It is alleged in the complaint that the above representations are misleading because learning reweaving is not easy, especially through a correspondence course; reweaving requires manual dexterity and long practice, and respondent's course cannot be completed by most persons within ten days.

The evidence shows that it is not easy to learn thread-by-thread reweaving, called French reweaving, and other types of reweaving, which require considerable manual dexterity as well as practice and experience over a long period of time. On the other hand, there is reliable evidence in the record that the overweaving or patch

weaving taught in respondent's correspondence course is relatively easy to learn and can be learned by correspondence, and that the course can be completed in a relatively short period of time. Furthermore, counsel supporting the complaint, by subdivision (f) of his proposed Order to Cease and Desist, by inference admits the above facts.

We must conclude, therefore, that reweaving in general is not easily learned nor quickly learned, but that the particular method of patch weaving or overweaving taught by respondent through his correspondence course is relatively easily learned, and can be learned by correspondence, by apt students, in a comparatively short period of time.

4. That respondent, through his sales agents, arranges for personal instructors to assist students.

The above representation is alleged to be misleading in that respondent did not arrange for personal instruction through sales agents or otherwise.

The evidence shows that at times the sales agents made the representation that prospective students would be given personal assistance in completing the course, whereas no such personal assistance was provided as a regular part of the course. The respondent, in defense, contended that no salesman was authorized by him to make any such representation or to arrange for personal instruction. Respondent further contended that his salesmen were independent contractors who purchased and resold his course of instruction, and that he was not responsible for any unauthorized representations made by them.

This contention is contrary to the basic concept of fair dealing implicit in the Federal Trade Commission Act. No seller of a product can in justice foster in the minds of prospective purchasers the impression that a salesman selling his product is his authorized representative, and thereafter, having enjoyed, through the efforts of such salesman, a substantial volume of business, disclaim responsibility for any representation, either oral or written, by which such business was obtained. This principle has been repeatedly affirmed both by the Commission and by the courts.

It must therefore be concluded that respondent is responsible under the Federal Trade Commission Act, for all representations made by his salesmen in promoting the sale of his course of instruction. Accordingly, the above representation is false and misleading.

5. That $25.00 per week for spare time work and from $50.00 to $200.00 per week can reasonably be expected by persons completing said course.

This representation is alleged to be misleading because the claimed earnings both as to spare time and full time were far in excess of the average earnings of those completing respondent's course.

The evidence shows that theoretically it is possible for one doing patch reweaving to make $5.00 an hour, or up to $200.00 a week, if sufficient work is available and supplied to the reweaver in her home, directly by the owners of the garments being repaired, and if the reweaver devotes her entire time to reweaving. On the other hand, in practice, if the work is supplied by tailors or cleaners, the organization so supplying work to the reweavers retains a large percentage of the price charged for such work, and the percentage remaining as the reweaver's income therefrom is relatively small. In addition, if the reweaver works independently in her home, she finds it practically impossible to obtain sufficient work to provide an income at or near respondent's represented potential earnings. It follows, therefore, that the above representation has the tendency and capacity to mislead and deceive purchasers and prospective purchasers of respondent's course of instruction.

6. That respondent assists graduates in obtaining work from dry cleaners, upholsterers and insurance companies.

It is alleged that this representation is misleading because respondent did not assist graduates in obtaining reweaving work.

The evidence shows that at the request of graduates of his reweaving course, and upon the submission by them of a list of not more than 20 names of dry-cleaners in their vicinity, or of other concerns requiring reweaving, respondent would send a letter of recommendation to such concerns, stating that there was in their vicinity a graduate of his course who was competent and would do reweaving for them at a reasonable charge. Thereafter the responsibility of making personal contact and procuring work rested upon the graduate. It appears, therefore, that respondent did make assistance in obtaining work available to his graduates if requested.

7. That respondent limits the number of sales of his course of instruction in each neighborhood.

It is alleged that this representation is misleading because respondent did not so limit the number of courses sold.

The evidence shows that respondent's salesmen represented that only a few students were being selected in a community, and that the salesmen were instructed to represent to prospective customers that only enough reweavers would be trained in their neighborhood to take care of the amount of reweaving to be done in that area. There is, however, no evidence that respondent did not limit the

number of courses sold in any particular area. On the other hand, there is evidence presented by respondent that a list of graduates in each particular area was kept for the purpose of ascertaining whether or not there was an excess of graduates in that area. Respondent testified that no such excess was ever found to exist, but if such an excess had been found, he would have advised his salesmen in that territory to transfer their efforts elsewhere.

From the evidence in the record, we are not satisfied that respondent maintained an effective system of limiting the sales of his correspondence courses to the actual need for reweaving in any particular community. On the other hand, there is in the record no evidence to show that respondent did not limit his sales of correspondence courses in reweaving in any particular area. Accordingly, it must be concluded that the burden of proof with respect to the allegation here in question has not been sustained.

8. That the regular price of said course is $240 or $94 or $69.50.

This representation is alleged to be misleading in that except for a few isolated instances, the regular and usual price charged for respondent's course was $35.00.

The evidence shows that $240 was the price charged by respondent for a resident course of instruction in reweaving. Respondent's salesmen were instructed, however, in presenting the correspondence course in reweaving to the prospective purchaser, to "* * * then show her the $240 resident school contracts, the photostats of government and state letters." The evidence does now show, however, that $240 was represented as the regular price for the correspondence course, as distinguished from the resident school course.

The evidence further shows that respondent's correspondence course was offered as follows:

TO EXPEDITE OUR FIELD AGENTS WORK WE MAKE THIS LIMITED OFFER $69.50

The exhibit just quoted shows that the course was offered at $69.50 as a special price and not as a regular price as alleged. Furthermore, there is no evidence in the record that the course was ever offered as being sold at a regular price of $94.00. There is evidence that the course was offered, on the printed order blank, at a regular price of $135.00, which was crossed out and a lesser amount substituted whenever the course was sold for less than $135.00. It thus appears that respondent's course was represented as being

sold at a regular price, when in fact it was actually being regularly sold for a lesser price. It does not appear, however, that such regular price was specifically, $240.00 or $94.00 or $69.50.

In view of the above facts, it must be concluded that the particular allegation set forth above has not been sustained.

9. That the needles supplied with the course are worth $30.00.

This representation is alleged to be false because the needles supplied with the course were worth only a fraction of $30.00, and, in fact, replacements were sold to students for $1.00.

The evidence shows that respondent's sales agents have been instructed to represent to prospective students that the set of three needles furnished with the course is comparable in value to a similar set sold by an unspecified firm for $27.50, whereas, in fact, the needles are purchased by respondent for less than a dollar, and are sold to students as replacements for $1.00 each. Accordingly, it must be concluded that the representation by implication that respondent's needles had a value in excess of $1.00 each was misleading.

10. That respondent will make full refund of all monies paid under contracts if persons find they are unable to complete the course.

Falsity of this representation is alleged because respondent refused to make any refund for partial payments on contracts for the purchase of his course when the purchaser did not wish to complete the course.

The record shows that in some instances respondent's salesmen have represented that the money paid for the course will be refunded if students find that they are unable to complete the course. There is evidence that respondent has refused to make such refunds when requested to do so. This representation, although contradicted by the terms set forth in the printed sales contract, nevertheless has the capacity to mislead and deceive purchasers of respondent's course.

11. That graduates will receive a membership or an associate membership in Weavers Guild of America.

This representation is alleged to be false because graduates do not receive a membership of any nature in any Weavers Guild.

It is admitted by respondent that the Weavers Guild of America was not developed beyond the "idea point" and never came into actual existence. It appears, however, that respondent's representation with respect to this "Guild" was discontinued more than four years before the issuance of the complaint herein, and does not, therefore, fall within the period of time contemplated by this proceeding.

12. That respondent's course of instruction has been approved for G.I. training by the Bureau of Education of the State of California and the United States Veterans Administration.

Falsity and deception are alleged with respect to this representation because such approval has not been granted.

The Commission finds that the respondent has falsely represented that his course of instruction has been approved for training by the Bureau of Education of the State of California and the United States Veterans Administration.

GENERAL MISREPRESENTATION INHERENT IN RESPONDENT'S USE OF THE TRADE NAME "WEAVERS GUILD"

It is alleged in the complaint that the use of the trade name "Weavers Guild" constitutes a false representation by respondent that his business is a national association or guild of weavers, organized in the interests or for the benefit of members of that trade.

The evidence shows that said "Weavers Guild" is not a national association or organization of weavers; that respondent conducts no national programs for weavers; nor does he maintain a headquarters or grant memberships in any guild of weavers. Respondent is neither the director nor founder of any guild or organization of weavers, but is merely engaged in the sale for profit of a correspondence course in reweaving. Respondent admits that the "Weavers Guild of America" never actually existed. Accordingly, since the words "Weavers Guild" suggest an organization or association of weavers, their use by the respondent as a trade name and otherwise has the tendency and capacity to mislead and deceive prospective purchasers into the belief that the so-called "Weavers Guild" is, in fact, such an organization, with all the implications inherent therein.

CONCLUSION

In the light of the above analysis, this proceeding is found to be in the interest of the public. Furthermore, it is concluded that the acts and practices of respondent hereinabove found to be false, misleading and deceptive are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Abel Allan Goodman, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale,

sale and distribution of courses of instruction in reweaving in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(*a*) That the typical earnings of persons selling respondent's course of instruction are greater than they actually are in fact;

(*b*) That respondent will furnish sales leads or other selling assistance to those selling his course of instruction unless he actually does furnish such leads and assistance;

(*c*) That sales kits and other advertising material are furnished to sales agents unless it is clearly disclosed that such articles are furnished only after said agents have made deposits or payment therefor;

(*d*) That respondent's course of instruction constitutes a complete course in reweaving unless and until such is in fact true;

(*e*) That reweaving is easily learned, or quickly learned, by taking respondent's correspondence course, unless such representation be specifically restricted to the overweaving or patch type of reweaving;

(*f*) That respondent will arrange for personal instructions for those purchasing his course;

(*g*) That the potential earnings of persons completing respondent's course and engaging in the reweaving business are greater than they are in fact;

(*h*) That the needles supplied with the course are worth any amount in excess of the amount ordinarily charged for such needles by respondent;

(*i*) That respondent will refund payments made on contracts unless he in fact makes such refunds upon demand by the purchasers;

(*j*) That respondent's courses of instruction have been approved for training by the Bureau of Education of the State of California or the United States Veterans Administration;

2. Using the word "Guild" in his trade name or otherwise;

3. Representing, directly or by implication, that respondent's business is anything other than a private business enterprise selling a correspondence course of instruction in reweaving, unless such representation is true.

ON APPEAL FROM INITIAL DECISION

By KERN, Commissioner:

This case comes before the Commission upon the cross appeals filed by the respondent and counsel supporting the complaint from the initial decision of the hearing examiner.

The complaint under which this proceeding was instituted charged that the respondent had engaged in unfair and deceptive acts and practices in connection with the sale and distribution in commerce of a course of instruction designed to prepare purchasers, through home study, for work as commercial weavers. In the initial decision, the hearing examiner held that certain of the allegations of the complaint were sustained by the evidence received in the hearings, and that, in respects there designated, the respondent had engaged in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. The order contained in the initial decision requires the respondent to cease and desist from the acts and practices found to be unlawful. The hearing examiner further held that other designated charges of the complaint were not adequately supported by the record. The appeals now challenge certain of the rulings in that decision which are adverse to the appealing parties' respective contentions in the course of the hearings before the hearing officer.

Respondent's courses have been sold through salesmen whose services were solicited by him in magazine advertisements containing statements as to the opportunities for earnings and sales assistance afforded. The hearing examiner held that the evidence established that the respondent's advertisements have falsely represented that earnings of $1452 in a period of eleven days and other large amounts inuring within similarly brief periods were not exceptional for salesmen selling the course. Although the appeal contends that the foregoing earnings for the periods named were both typical and non-fictitious, it is clear from the evidence that they were not typical but instead related to very exceptional instances. There likewise is sound record basis for the hearing examiner's conclusions that other statements contained in the advertising have served to represent and imply to prospective salesmen, contrary to the true facts, that the respondent would furnish them with sales leads. These aspects of the appeal relating to the hearing examiner's conclusions of misrepresentation to prospective salesmen, are denied.

The initial decision further held that false and misleading statements and representations as to the merits of the course have been made in printed matter and oral sales presentations to prospective students. In the advertising, the course is not offered to satisfy feminine academic curiosity or to augment a woman's accomplishments as a homemaker. Instead, its central theme has emphasized the financial betterment afforded those trained in reweaving who are willing to do full or spare time work in mending torn and burned garments and fabrics.

The first error urged under respondent's brief in reference to findings of deceptive promotional activities for inducing purchases of the course, is directed to the hearing examiner's failure to find that the advertising statements have not served to represent that the respondent's course constitutes a complete course of reweaving. There was no error, however. This is true for the reason that the term "Nu-Weaving" itself and its designation in the advertising as the modern method of invisible reweaving serve to represent and imply that knowledge of the reweaving craft in general is afforded by the course.

Although evidence was received indicating that the respondent's method of "patch weaving" may be learned in a comparatively short time by apt pupils, the evidence further shows that other methods of weaving are outside its scope and that mastery of "French" weaving, particularly, is not quickly or easily acquired. The latter entails actual thread by thread replacement of the injured portion of the fabric and requires a high degree of skill. There, accordingly, is sound record basis for the hearing examiner's rejection of the respondent's requested finding to the effect that reweaving in general is easily learned by his students.

The appeal additionally objects to the initial decision's rulings that the respondent shares legal responsibility for false oral statements that the respondent arranges personal instruction for assisting purchasers and that full refund will be made of all moneys paid if the enrollee is unable to complete the course. The circumstance that the testimony offered to support the complaint's charges on the latter issue related to but one sales presentation and that the shown instances of misrepresentation as to personal instruction were limited to other presentations made by the same salesman is not controlling. The hearing examiner's findings that misrepresentation occurred in those transactions are supported by substantial evidence and each instance, manifestly, represented a deceptive act contravening the public policy expressed in the Federal Trade Commission Act. The appeal contends also that the hearing examiner erred in failing to find that these particular statements and promises were unauthorized by the respondent. Inasmuch as they were made within the scope of the salesman's apparent authority and formed part of the inducement for sales inuring to the respondent's benefit, an order to require the respondent's cessation from those misrepresentations has sound basis in law. *International Art Co.* v. *F.T.C.*, 109 F. 2d 393, 396 (C.A. 7, 1940); *Standard Distributors, Inc.* v. *F.T.C.*, 211 F. 2d 7, 13 (C.A. 2, 1954).

The appeal's exceptions to the hearing examiner's conclusion that the needles furnished with the respondent's course do not have a

value of $27.50 have been considered and are deemed to be without merit. Properly rejected by the hearing examiner also were findings requested by the respondent that students completing the course can reasonably expect earnings of $50.00 to $200.00 per week, and $25.00 weekly for spare time employment. It is theoretically possible for those performing the type of patch reweaving taught by the respondent to earn up to $200.00 per week if self-employed and fully occupied, but this circumstance is not controlling, however. Probative evidence was received showing that the actual opportunities for performing this type of mending provide no such remuneration. The advertising statements as to earnings which are challenged in the complaint clearly have exceeded those afforded women whose training and experience are limited to completion of a correspondence course on patch reweaving.

The initial decision held, in effect, that the word "Guild" in the trade name "Weavers Guild," has falsely represented and implied that the respondent's sales enterprise is a national association or a guild of weavers, organized in the interests of members of that trade. The appeal takes issue with that finding and the provision of the initial decision's order forbidding future use of the word "Guild" in identifying the respondent's business. From the printed sales talks, it must be inferred that prospective purchasers frequently inquired whether their payment of a royalty to the Guild would be necessary in case they undertook commercial reweaving. Salesmen have been counseled to emphasize to purchasers that they are needed to fulfill a national program and the instructions have contemplated reference by the salesmen to being "with the Guild." Conclusions that the respondent's use of the word "guild" has had the capacity and tendency to deceive have sound record basis and the Commission is of the further view that the form of remedy provided under the order is appropriate.

The remaining matter presented under the respondent's appeal involves contentions that no cease and desist order should issue for the reason that the respondent discontinued business on December 31, 1953. The record shows, however (Commission Exhibits 30, 77, 78, 79, and 80), that Mr. Goodman, after that date, was participating in a successor business, operated from the same address, in which close relatives were associated.

Having considered the appeal of counsel supporting the complaint, the Commission has determined that the rulings to which objections are interposed in the first six subsections of counsel's appeal brief have adequate support in the record. Those exceptions are, accordingly, denied. Another exception concerns the hearing officer's

ruling that the evidence failed to support the complaint's charge that representations were made that the course was officially approved for G.I. training. Although G.I. training was not involved, it does appear from the evidence that agencies of several states have in instances sponsored purchases of the respondent's correspondence courses on behalf of handicapped persons. The respondent, however, had supplied to his salesmen a brochure which mentioned "the V.A. and State Approvals," and contained facsimiles of an enrollment acknowledgment from the California State Bureau of Vocational Rehabilitation and of a Veterans Administration authorization for enrollment, both communications have reference to respondent's former "Weaver's Guild Institute," through which he offered resident training. Respondent's correspondence course in reweaving, to which the sales brochure otherwise referred and which is involved herein, was never approved by either of these authorities.

These facsimiles were characterized by the respondent as "dynamite" in other material supplied to salesmen. Hence, they obviously were used to promote sales of unapproved correspondence courses under a name quite similar to that of the officially approved school with which the respondent was no longer connected. That purchaser confusion and deception necessarily attended this promotional situation is also obvious. Mr. Goodman's letter to a salesman under date of January 28, 1952, stated that the fact that his course was accepted and successfully used in the training of G.I.'s was the highest recommendation he could submit. In the light of these matters, the Commission is of the view, and so finds, that the respondent has falsely represented that his correspondence course has been approved for training by the two official agencies noted above. Respondent's acts and practices in this regard have constituted unfair and deceptive acts and practices and are unlawful. The hearing examiner erred in not so finding and in omitting appropriate proscriptions in respect thereto from the initial decision's order.

Our accompanying order accordingly provides for modifying the initial decision in the foregoing respect. The respondent's appeal is denied and the appeal of counsel supporting the complaint granted to the extent hereinbefore noted. With the findings and order to cease and desist thus modified, the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Counsel for the respondent and counsel supporting the complaint having respectively filed on November 7, 1955, and November 4,

1955, their cross appeals from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the briefs; and the Commission having rendered its decision denying the respondent's appeal and granting in part the appeal of counsel supporting the complaint and adopting the initial decision as modified as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by striking the second unnumbered paragraph following the paragraph numbered 12, and by substituting in its place and stead the following:

The Commission finds that the respondent has falsely represented that his course of instruction has been approved for training by the Bureau of Education of the State of California and the United States Veterans' Administration.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified by inserting immediately after subparagraph (*i*) of Paragraph 1 the following:

(*j*) That respondent's courses of instruction have been approved for training by the Bureau of Education of the State of California or the United States Veterans Administration.

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

IN THE MATTER OF

CARNATION COMPANY ET AL., THE BORDEN COMPANY ET AL., BEATRICE FOODS COMPANY (DELAWARE), ET AL., NATIONAL DAIRY PRODUCTS CORPORATION ET AL., PET MILK COMPANY ET AL., FAIRMONT FOODS COMPANY ET AL., ARDEN FARMS COMPANY ET AL., FOREMOST DAIRIES, INC. ET AL.

Dockets 6172–6179. Order and opinions, Mar. 14, 1956

Interlocutory order granting appeal of complaint counsel from hearing examiner's ruling denying request for subpoena duces tecum as being in violation of agreement between counsel.

Before *Mr. John Lewis*, hearing examiner.

Mr. Lynn C. Paulson, *Mr. Ashby H. Canter* and *Mrs. Estelle Lee Ague* for the Commission.

Mr. Frank D. MacDowell, *O'Melveny & Myers*, *Mr. James R. Baird, Jr.* and *Mr. Gordon T. Jeffers*, of Los Angeles, Calif., for Carnation Co., et al.

Dewey, Ballantine, Bushby, Palmer & Wood and *Mr. Cecil I. Crouse*, of New York City, for The Borden Co., et al.

Winston, Strawn, Black & Towner, of Chicago, Ill., for Beatrice Foods Co. (Delaware), et al.

Snyder, Chadwell & Fagerburg, of Chicago, Ill., for National Dairy Products Corp., et al.

Mr. Robert S. Gordon, of New York City, also represented National Dairy Products Corp., and along with—

Whiteford, Hart, Carmody & Wilson, of Washington, D. C., for Southern Dairies, Inc.

Cann, Taylor, Lamb & Long, of Washington, D. C., for Pet Milk Co., et al.

Flansburg & Flansburg, of Lincoln, Nebr., for Fairmont Foods Co., et al.

Mr. Milton R. Barker, *Mr. Milton H. Barker* and *Gibson, Dunn & Crutcher*, of Los Angeles, Calif., for Arden Farms Co., et al.

White & Case, of New York City, and *Milam, McIlvane, Carroll & Wattles*, of Jacksonville, Fla., for Foremost Dairies, Inc., et al.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter having been heard upon the appeal of counsel supporting the complaints from the hearing examiner's ruling of January 26, 1956, denying a request for a subpoena duces tecum as

being in violation of an agreement dated August 22, 1955, between counsel, regarding the furnishing of documents and other materials by the respondents, and upon answers in opposition thereto; and

It appearing that the agreement referred to purports to restrict in a material respect the full utilization by the Commission of its statutory subpoena powers; and

The Commission being of the opinion that, to the extent said agreement prevents counsel supporting the complaints from obtaining and presenting relevant, material and reliable evidence, it is in derogation of the public interest and not binding upon the Commission or the hearing examiner; and

The Commission being further of the opinion that, because of the foregoing, oral argument herein is unnecessary:

It is ordered, That the appeal of counsel supporting the complaints be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and he hereby is, directed to reconsider counsel's application for subpoena without regard to the agreement dated August 22, 1955, between counsel.

Commissioner Kern not participating, and Commissioner Mason dissenting.

OPINION OF THE COMMISSION

PER CURIAM:

An agreement was entered into between counsel for the respondents and counsel supporting the complaints limiting the documents or other material that respondents might be required or requested to submit. Counsel supporting the complaints have sought to obtain information from respondents by subpoena which, in the opinion of the hearing examiner, falls within the exclusions of the agreement. He has therefore refused to issue the subpoena duces tecum, and the matter is before the Commission on appeal by the attorneys supporting the complaints.

Agreements between counsel should not be entered lightly and when entered should be observed to the letter. They should be withdrawn or abrogated by the Commission only under conditions which would permit no other course. In the matter before us we are of the opinion that the agreement between counsel places an undue restriction on the obtaining of information which otherwise may be necessary to establish the case of counsel supporting the complaints, and to that extent is contrary to the public interest. As said by the Court in *P. Lorillard Co.* v. *F.T.C.*, 186, F. 2d 52:

"It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided."

The aim of an administrative hearing is to get the facts and search for the truth. Observance of all the terms of the agreement may preclude the introduction of the complete facts necessary for a decision of this matter. We therefore would be failing to discharge our duty in the protection of the public interest if we did not correct this situation. For this reason the agreement between counsel may be disregarded by the hearing examiner to the extent that it limits or restricts full access to all relevant information and documents necessary to a full trial of the issues. The matter is accordingly remanded to the hearing examiner for further proceedings consistent herewith.

As to this matter, Commissioner Mason dissented and Commissioner Kern did not participate.

DISSENTING OPINION

By MASON, Commissioner.

We can all agree the public interest must be paramount. But it seems these words mean different things to different people. To the totalitarian, they means solemn treaties are valid, only as long as they benefit him.

We condemn this view in Affairs of Government whilst we practice it in Government Affairs.

The great evil lies not in our inconsistency, but rather in our mistaken idea that the Public Interest can ever be disassociated from the Public Integrity.

As Mr. Justice Brandeis once petulantly observed when his colleagues approved illegal wire tapping by Federal employees:[1]

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

The facts surrounding the present motion in the instant case are these:

Under the aegis of the hearing examiner and with the stamp of his approval, defense and complaining counsel both entered into a solemn commitment and understanding of record. It is this agreement the prosecution would now have us set aside.

The need for the agreement arose because after the original complaint had been filed and trial begun, the prosecution decided to try defendants on charges different from those set forth in the complaint.

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[1] *Olmstead* v. *U.S.*, 277 U.S. 438.

Under the *Morgan* decision[2] defendants have to be told why they are in court. "The right to a 'full hearing' embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

While this annoys some quasi-judicial bodies, it nonetheless remains part and parcel of the American judicial scene.

To avoid the pitfalls of a record that might disclose neglect of this element of due process, the defendants were willing to say they would not challenge an amendment on the face of the complaint in the midst of trial before the examiner; and in return, the prosecution agreed to the mass production by totals of certain types of transactions, rather than to insist upon the introduction of a piecemeal welter of miscellaneous items.

In the *Canteen* case, I adumbrated against a plethora of cumulative evidence.[3]

One cannot at this point say whether it would be necessary or not in the present case, but the public interest was quite thoroughly explored by the hearing examiner at the time of the agreement. And he himself took pains to see that both sides understood their commitments, so there would be no inadvertence or mistake.

This was no unusual procedure for in the quid pro quo of trial work, opposing counsel often waive procedural rights to the end that time-consuming methods may be short-circuited.

This being done in the instant case, the trial proceeded just as though the usual protections of our judicial process had been observed. With defendants' waiver safely in their stomachs, the prosecution was content. But having digested the benefits, the prosecution now finds the burdens of their agreement onerous to a second change of heart, for now they would again switch the theory of their presentation. While taking nourishment from the "quid," the prosecution would regurgitate the "quo," believing that the public interest is thus best served.

I would advance the not entirely novel contention that, whether it be Government in the halls of justice or a tout at the race track, welshing is a dirty business.

The initial and "on the scene" trier of the facts, our hearing examiner, permitted a full oral hearing before him on the motion

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[2] *Morgan* v. *United States*, 304 U.S. 1.

[3] *F.T.C.* v. *Canteen*, D. 4933, Opinion of Commission by Mason: "The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by government counsel in the instant matter. Neither harassment of litigants nor the waste of government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name fourteen sellers as typical of a group from which respondent had induced or received discrimination in price, and certainly the records of not more than five of such sellers would have supplied ample evidence of such discriminations or price differentials."

to set aside the agreement. He heard the contentions of both parties. Was there veniality? fraud? misunderstanding? a failure to protect the public interest or private rights in the challenged stipulation? The hearing examiner was unconvinced of any such defects.

Granting the solid authority of the Circuit Court of Appeals decision in Old Gold,[4] that the Commission need not concern itself with such agreements where they stand in the way of a finding of guilt, nevertheless to say that we must now repudiate the instant agreement else we may be unable to find defendants guilty, places us in a partisan role at variance with our judicial protestations.

Is this the impartiality so sought after in the legislative commands of the Administrative Procedure Act?

Or is our judicial demeanor a mere pose to be set aside at the cajoling of the prosecutor?

Does our cavalier acceptance of his request sans hearing, sans showing of veniality, fraud or misunderstanding, put us where we should not be?

Or, to state it plainly, does the stern rejection by the hearing examiner of the prosecution's proposal presage the value of a hearing officer less subject to the importunities of our staff than we seem to be?

As for the appeal of counsel in support of the complaint from the hearing examiner's ruling denying request of counsel in support of the complaint for subpoena duces tecum on respondents—

I am against it.

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[4] *P. Lorillard* v. *F.T.C.*, U.S.C.A. 4th Circuit, No. 6140.

IN THE MATTER OF

JOHN HULL CUTLERS CORPORATION ET AL.

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

Docket 6398. Complaint, Aug. 23, 1955—Decision, Mar. 14, 1956

Consent order requiring two associated corporations in New York City to cease affixing to cutlery and flatware before shipment to retailer purchasers, tickets or tags printed with fictitious prices greatly in excess of prices at which the items were usually sold at retail, and furnishing such customers with advertising mats reading "Save $10 * * * Regularly 19.98—9.98", when $9.98 did not afford purchasers a saving of $10.

Before *Mr. Robert L. Piper*, hearing examiner.
Mr. Charles S. Cox for the Commission.
Goldman & Frier, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John Hull Cutlers Corporation, a corporation, and John Hull Silversmiths, Inc., a corporation, and William B. Berger and Max E. Landau, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents John Hull Cutlers Corporation, and John Hull Silversmiths, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their office and principal place of business at 1239 Broadway, New York, New York. They are now, and have for several years last past been, engaged in the sale and distribution of cutlery and flatware under such corporate names. Said cutlery and flatware are sold to retailers for resale to the purchasing public.

Respondents William B. Berger and Max E. Landau are President and Secretary-Treasurer, respectively, of said corporations. These individuals formulate, direct and control the policies, acts and practices of said corporate respondents, including those here-

inafter specified. Their address is the same as the corporate respondents.

PAR. 2. In the course and conduct of their business, respondents now cause, and for several years last past have caused, the cutlery and flatware, when sold, to be transported from their place of business in the State of New York 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 substantial course of trade in said cutlery and flatware in commerce between and among the various States of the United States and the District of Columbia.

PAR. 3. Respondents at all times mentioned herein have been in substantial competition with other corporations and persons, firms and partnerships engaged in the sale of cutlery and flatware in commerce between and among the various States of the United States and the District of Columbia.

PAR. 4. Respondents before shipping their cutlery and flatware to the purchasers thereof, affix tickets or tags thereto upon which are printed various prices.

By means of the prices appearing on said tickets or tags respondents represent that such amounts are the usual and regular retail prices for such cutlery and flatware. Such representations are false, misleading and deceptive. In truth and in fact, such amounts are fictitious and greatly in excess of the price at which said items are usually and regularly sold at retail.

PAR. 5. Respondents also furnish advertising mats to their retail customers for their use and which they do use, in advertising respondents' products to the public. A portion of a typical mat contains this statement:

Save $10. on this attractive, durable Stainless Steel Flatware
Regularly 19.98–9.98

PAR. 6. By means of the statements appearing on said mats, it is represented that the usual and regular retail selling price for the product advertised is $19.98 and that by paying the price of $9.98, a saving of $10.00 is afforded the purchaser.

PAR. 7. The amount of $19.98 is not the price at which said product is usually and regularly sold at retail but is a fictitious price greatly in excess of the usual and regular retail price and a saving of $10.00 is not afforded to purchasers at the price of $9.98.

PAR. 8. By means of the aforesaid practices respondents place in the hands of retailers a design, device or instrumentality whereby such retailers may mislead and deceive members of the purchasing

public as to the usual and regular retail price of their cutlery and flatware and the savings afforded to retail purchasers.

PAR. 9. The aforesaid acts and practices of respondents have had and now have the tendency and capacity to mislead and deceive members of the purchasing public as to the usual and regular retail selling prices of said cutlery and flatware and to induce the purchase of substantial quantities thereof because of such erroneous and mistaken belief. As a result thereof substantial trade in commerce has been and is being unfairly diverted to the respondents from their competitors and substantial injury has been and is being done to competition in commerce.

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

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on August 23, 1955, charging them with having violated the Federal Trade Commission Act. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated December 29, 1955, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settle-

ment purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondents John Hull Cutlers Corporation and John Hull Silversmiths, Inc. are corporations existing and doing business under and by virtue of the laws of the State of New York, and respondents William Berger[1] and Max E. Landau are president and secretary-treasurer, respectively, of said corporations. All of said respondents have their office and principal place of business located at 1239 Broadway, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents John Hull Cutlers Corporation, a corporation, and John Hull Silversmiths, Inc., a corporation, and their officers, and respondents William Berger and Max E. Landau, individually and as officers of John Hull Cutlers Corporation and John Hull Silversmiths, Inc., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in

[1] Incorrectly referred to as William B. Berger in the caption of the complaint and other documents.

excess of the prices at which such merchandise is usually and regularly sold at retail.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 14th day of March, 1956, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

S. A. BARKER COMPANY ET AL.

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

Docket 6433. Complaint, Oct. 27, 1955—Decision, Mar. 14, 1956

Consent order requiring a furrier in Springfield, Ill., to cease violating the Fur Products Labeling Act through advertising in newspapers which did not give the correct name of the animal producing certain furs, did not disclose the country of origin of imported furs or that certain products were made of artificially colored fur, or named animals other than those producing the fur; and through failing to comply with labeling and invoicing requirements of the Act.

Before *Mr. Robert L. Piper*, hearing examiner.
Mr. William A. Somers for the Commission.
Stevens, Herndon & Nafziger, of Springfield, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that S. A. Barker Company, a corporation, and S. A. Barker and Louis Friedman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The corporate respondent, S. A. Barker Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois.

Individual respondent, S. A. Barker, is President and individual respondent, Louis Friedman, is Vice-President of the corporate respondent. These individual respondents formulate, direct, and control the acts, practices and policies of the corporate respondent. The office and principal place of business of all of said respondents is located at 603 East Adams Street, Springfield, Illinois.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondents have introduced, sold, advertised, offered for sale, transported, and distributed fur

products in commerce, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur product," are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondents caused the dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of certain advertisements concerning said products by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of the Fur Products Labeling Act and which advertisements were intended to and did aid, promote and assist, directly and indirectly, in the sale and offering for sale of said fur products.

PAR. 4. Among and including the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in various issues of the Illinois State Journal and Illinois State Register, publications having wide circulation in the State of Illinois and in the adjacent areas of other States of the United States.

By means of the aforesaid advertisements, and through others of similar import and meaning, not specifically referred to herein, the respondents falsely and deceptively advertised its fur products in that said advertisements:

A. Failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

B. Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact in violation of Section 5 (a) (3) of the Fur Products Labeling Act.

C. Failed to disclose the name of the country of origin of imported furs contained in such fur products in violation of Section 5 (a) (6) of the Fur Products Labeling Act.

D. Contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5 (a) (5) of the Fur Products Labeling Act.

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

PAR. 6. Certain of said fur products were misbranded in that respondents, on labels attached thereto, set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 4 (3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 7. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

A. Required information was abbreviated on labels, in violation of Rule 4 of the said Rules and Regulations;

B. Required information was set forth on labels which did not comply with the minimum size requirements in violation of Rule 27 of said Rules and Regulations;

C. Required information was mingled with non-required information on labels, in violation of Rule 29 (a) of the said Rules and Regulations;

D. Required information was set forth in handwriting on labels, in violation of Rule 29 (b) of the said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced, in that they were not invoiced as required under the provisions of Section 5 (b) (1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 9. Respondents, in the course of their business, are in substantial competition in commerce with other firms, corporations, co-partnerships and individuals also engaged in the sale of fur products to members of the purchasing public. As a result of the acts and practices alleged herein substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents were in violation of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on October 27, 1955, charging them with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act.

After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated December 27, 1955, containing a consent order to cease and desist disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent S. A. Barker Company is a corporation existing and doing business under and by virtue of the laws of the State of Illinois. Individual respondent, S. A. Barker, is president of the corporate respondent. Lester Friedman[1] is vice president of the corporate respondent. The office and principal place of business of all of said respondents is located at 603 East Adams Street, Springfield, Illinois.

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[1] Incorrectly referred to as Louis Friedman in the caption of the complaint and other documents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Fur Products Labeling Act and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents S. A. Barker Company, a corporation, S. A. Barker and Lester Friedman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or the sale, advertising or offering for sale, or the transportation or distribution of any fur product in commerce; or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur when such is the fact;

(*c*) The name of the country of origin of imported furs contained in fur products.

2. Contains the name or names of any animal or animals other than the name or names provided for in Paragraph A (1) (*a*) above.

B. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of used fur, when such is a fact;

(*c*) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur when such is a fact;

(*d*) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur when such is a fact;

(*e*) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(*f*) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products, the name or names of any animal or animals other than the name or names provided for in Paragraph B (1) (*a*) above.

3. Setting forth on labels attached to fur products;

(*a*) Required information in abbreviated form or in handwriting;

(*b*) Non-required information mingled with required information.

4. Attaching to fur products labels which fail to meet the minimum size requirements of Rule 27 of the Rules and Regulations.

C. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices showing:

(*a*) The name or names of the animal producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of used fur when such is a fact;

(*c*) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur when such is a fact;

(*d*) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is a fact;

(*e*) The name and address of the person issuing such invoices;

(*f*) The name of the country of origin of any imported furs contained in the fur product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 14th day of March, 1956, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

CROSSE & BLACKWELL COMPANY, POMPEIAN OLIVE OIL CORPORATION, McCORMICK & COMPANY, INC.

Dockets 6463, 6468, 6470. Orders and opinion, Mar. 15, 1956

Interloctuory order in Clayton Act proceeding denying respondents' appeals from hearing examiner's denial of motions to quash subpoenas duces tecum issued by him.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope and *Mr. Frederic T. Suss* for the Commission.

Niles, Barton, Yost & Dankmeyer, of Baltimore, Md., and *Mr. James W. Cassedy*, of Washington, D. C., for Crosse & Blackwell Co.

Mr. Morton J. Hollander, of Baltimore, Md., and *Mr. James W. Cassedy*, of Washington, D. C., for Pompeian Olive Oil Corp.

Anderson, Barnes & Coe, of Baltimore, Md., and *Mr. James W. Cassedy*, of Washington, D. C., for McCormick & Co., Inc.

ORDER RULING ON RESPONDENTS' APPEALS FROM ORDER OF HEARING EXAMINER

The respondents having filed appeals from the hearing examiner's order denying their motions to quash the subpoenas duces tecum issued by the hearing examiner on January 12, 1956; and

The matter having been heard on the briefs of counsel and the Commission having determined, for reasons stated in its accompanying opinion, that the appeals should be denied:

It is ordered, That the respondents' appeals be, and they hereby are, denied.

OPINION OF THE COMMISSION

Per Curiam:

The respondents in each of these cases filed motions to quash the subpoenas duces tecum which were issued by the hearing examiner directing production, by designated officers of the respective respondent corporations, of records and documentary information there described. Those motions were denied by the hearing examiner and, as permitted under Section 3.17 (d) of the Commission's published rules and procedures, the respondents have brought appeals here from his rulings.

The complaints in these proceedings charge that each of the respondents has engaged in acts and practices violative of subsection

(d) of Section 2 of the Clayton Act, as amended. The appellants contend that the hearing examiner erred in failing to quash the challenged subpoenas duces tecum for the reasons (*a*) that the Commission lacks such power of compulsory process in proceedings instituted under the Clayton Act, and (*b*) that the requirements of the subpoenas are unreasonable and their enforcement will serve to deprive the respondents of rights afforded them under the Fourth Amendment.

It is not controlling, however, that the Commission was not expressly empowered in the Clayton Act to issue subpoenas in inquiries and proceedings instituted under that Act. Nor is it material here that Section 9 of the Federal Trade Commission Act, in referring to the visitorial and other powers conferred upon the Commission thereunder, relates such authority to the purposes of that Act. Under the Clayton Act, service of complaints, orders and "other processes" is specifically provided for. Broad powers of compulsory process in the discharge of its duties have been conferred upon the Commission under the Federal Trade Commission Act. The Federal Trade Commission Act and the Clayton Act were enacted as remedial measures designed to correct apparent deficiencies in the Sherman Act through administrative proceedings. They are statutes *in pari materia* which were enacted in the same session of Congress and, therefore, are to be construed together so as to reinforce their common legislative purpose.

The Federal Trade Commission was designated as a major agency for enforcement of Sections 2, 3, 7 and 8 of the Clayton Act. That designation necessarily implied that the Commission was to be aided in the effective discharge of its duties in adversary proceedings by the compulsory processes which were being made available to it under its organic act. That Congress thus intended is clear because Section 11 of the Clayton Act provides for quasi-judicial hearings culminating in findings as to the facts and orders, including orders to cease and desist, and, without the power to compel the production of evidence in the course of proceedings thereunder, the danger of improvident orders lacking bases in fact would be great. We hold, therefore, that there is sound legal basis for the issuance and enforcement of the Commission's processes requiring the production of appropriate information in Clayton Act inquiries and adjudicative proceedings.

Also without merit are the appellants' contentions that the requirements of the challenged subpoenas are unreasonable and impinge on the respondents' constitutional rights. The appeals do

not challenge the Commission's substantive authority to institute these proceedings or the lawful purpose thereof. The date and information requested in each of the subpoenas are limited to designated periods of time and confined to three metropolitan areas wherein each of the respondents apparently engages in the distribution of products; and the documents and information requested are clearly identified. The data's relevancy to the allegations of the complaints is apparent and the material requested appears necessary for disposition of the issues which will be presented for determination in each proceeding. In these circumstances, the directions of the subpoenas must be regarded as reasonable and valid.

There being no error in the rulings appealed from, the appeals are being denied.

IN THE MATTER OF

HARPER & BROTHERS

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

Docket 5898. Complaint, June 29, 1951—Decision, Mar. 22, 1956

Consent order—identical with the order in the *Doubleday*[1] case—requiring a New York City corporate book publisher to cease discriminating in price in the sale of trade books, through granting book clubs which leased them the printing plates, exclusive rights to publish, sell, and distribute "book club editions" of certain titles of their trade books; and fixing and maintaining minimum resale prices for its publisher's editions of certain of its trade books sold to retail book sellers, while permitting book clubs to sell their "book club editions" of the same titles at any prices and on any terms and conditions; and order requiring it to cease selling its trade books at higher prices to some purchasers than to certain of their competitors.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Mr. Alexander S. Andrews, of New York City, for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) and of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. 13), the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation under the laws of the State of New York, with its principal office and place of business located at 49 East 33rd Street, New York, New York. Said complaint was issued simultaneously with five other similar complaints against other publishing firms, one of which was against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein are substantially the same as Counts I and II of the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II of the six complaints, that the proceeding against Doubleday & Company, Inc., Docket 5897, would be fully tried first, and after the taking of evidence in that case was closed, counsel in the other cases,

[1] *Doubleday & Co., Inc.*, D. 5897, Aug. 31, 1955. See p. 169 of this volume.

including counsel for respondent herein, further agreed that the record in the Doubleday case Docket 5897 would be taken by them as the record in each of their individual cases for Counts I and II thereof. Under date of August 31, 1955, the Commission issued the final order in the Doubleday case, which order has not been appealed from.

Accordingly, on January 12, 1956, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

Count III of this proceeding alleges a price discrimination charge against this respondent in its distribution of its publications in interstate commerce. After a substantial amount of evidence in support of this charge had been received, counsel for respondent entered into a stipulation with counsel in support of the complaint on February 14, 1952, which reads as follows:

IT IS HEREBY STIPULATED AND AGREED by and between Fletcher G. Cohn and Lewis F. Depro, Attorneys in support of the complaint, and Alexander S. Andrews, Attorney for the respondent herein, that, the following statement of matters alleged and set out in said Count III of said complaint, which are hereinafter set forth in PARAGRAPHS 1 to 6, inclusive, may be made a part of the record of evidence herein and may be taken, together with the evidence as hereinbefore presented at hearings before the said Hearing Examiner, either in the form of oral testimony or exhibits, as evidence in this proceeding, and in lieu of any further evidence in support of the charges stated in said Count III of said complaint, or in opposition thereto; and that the said hearing examiner may proceed upon said evidence and the record herein to make his initial decision as to said Count III of said complaint, stating his Findings as to the Facts, including inferences which he may draw from the matters herein stipulated and the record herein, and his Conclusion based thereon, and including an Order to Cease and Desist disposing of this proceeding, without the presentation of arguments, or the filing of briefs or other intervening proceedings relating to said Count III, and that the Commission likewise may proceed upon the matters herein stipulated and the record herein to make its Findings as to the Facts and Conclusion thereto and enter its Order disposing of this proceeding, without the presentation of arguments, or the filing of briefs or other intervening proceedings relating to said Count III:

PARAGRAPH 1. Respondent, Harper & Brothers, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 49 East 33rd Street, New York, New York.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, distribution and sale of popular fiction and non-fiction books, commonly known as trade books.

Respondent was incorporated in 1900 and since then has become, and is now, one of the largest publishers of trade books in the United States.

Respondent sells and distributes its trade books to retail book sellers for resale to the public and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been and is now engaged in commerce, as "commerce" is defined in the Clayton Antitrust Act, as amended

by the Robinson-Patman Act, in that it ships, or causes to be shipped, publisher's editions of said trade books from the States in which said trade books are produced to purchasers thereof located in other States of the United States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

PAR. 4. Except insofar as it is specified to the contrary in Paragraph 6 hereof, respondent in the course and conduct of its said business in commerce has been and is now in competition with persons, firms and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except insofar as it is specified to the contrary in Paragraph 6 hereof, many of said jobbers or wholesalers were and are in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other in the retail sale of said trade books.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has for many years, and more particularly since June 19, 1936, either directly or indirectly, discriminated in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sold such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such books within the United States, except as it has been affected.

Respondent has priced and sold its publisher's editions at list prices less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Said discriminations by respondent were, and are, that it has priced and sold said books to some jobbers or wholesalers at said list prices with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	*Discount (percent)*
1– 49	41
50– 99	42
100–249	43

Whereas, respondent has priced and sold said books to other jobbers or wholesalers, who are in competition in the resale of said books with those jobbers or wholesalers receiving the aforementioned discounts, at list prices with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	*Discount (percent)*
1– 99	43
100–249	44

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy, or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of such discriminations or with the customers of either of them.

* * * * * * *

IT IS FURTHER SPECIFICALLY STIPULATED AND AGREED that any and all admissions made by the respondent herein are solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review thereof in the Supreme Court of the United States, or for any other proceeding in connection therewith, which may be brought or instituted by or on behalf of the United States Government or any agency thereof by virtue of the authority contained in the Federal Trade Commission Act and the aforesaid Clayton Act, as amended by said Robinson-Patman Act.

IT IS FURTHER STIPULATED AND AGREED between Counsel that they hereby jointly recommend to the hearing examiner that in his initial decision, insofar as same pertains to Count III of the aforesaid complaint, and to the Commission in its final disposition of the case, insofar as same pertains to said Count III of said complaint, adopt as the Order to Cease and Desist the following:

It is ordered, That the respondent, Harper & Brothers, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of trade books in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Directly or indirectly discriminating in price between different purchasers of its trade books by selling such books to any of its purchasers at higher prices than it sells the same books by whatever titles, of like grade and quality, to others of its purchasers where such purchasers are in competition with each other in the resale or distribution of said books.

In view of the foregoing, and after consideration of the agreement and proposed order applicable to Counts I and II and the stipulation of facts and order applicable to Count III, the hearing examiner is of the opinion that they provide an appropriate disposition of this proceeding, and the agreement and stipulation is

accepted. The hearing examiner further finds the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, that the proceeding is in the public interest, finds the facts as stipulated to in Count III and in accordance with the agreement and the stipulation hereby enters the following order.

ORDER

It is ordered, That respondent Harper & Brothers, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act (15 U.S.C.A., Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization, whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sub-licenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That the respondent, Harper & Brothers, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of trade books in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Directly or indirectly discriminating in price between different purchasers of its trade books by selling such books to any of its purchasers at higher prices than it sells the same books by whatever titles, of like grade and quality, to others of its purchasers where such purchasers are in competition with each other in the resale or distribution of said books.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

ORDER GRANTING APPEAL

It appearing that the hearing examiner filed his initial decision herein January 20, 1956, based upon a stipulation and an agreement between respondent and counsel in support of the complaint; and

It appearing further that respondent has noted an appeal from said initial decision seeking to have the first paragraph of Para-

graph 5 thereof amended in certain respects, to which amendment counsel in support of the complaint have interposed no objection in their reply to said appeal; and

The Commission being of the opinion that the amendment sought by the appeal does not alter the initial decision in any material respect and since counsel in support of the complaint do not oppose the said proposed changes:

It is ordered, That the first paragraph of Paragraph 5 of the hearing examiner's initial decision be changed to read as follows:

"PAR. 5. Respondent in the course and conduct of its said business, in commerce, has for many years, and more particularly since June 19, 1936, either directly or indirectly, discriminated in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sold such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such books within the United States, except as it has been affected."

It is further ordered, That respondent's alternative request on appeal, namely that there be added at the end of said Paragraph 5 the sentence "All findings in this Paragraph 5 refer exclusively to times prior to July 1, 1953," be, and it hereby is, denied for the reason that there is no proof in the record to support such finding.

It is further ordered, That, as so modified, the initial decision did, on the 22nd day of March, 1956, become the decision of the Commission.

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

IN THE MATTER OF

THE NORITO COMPANY ET AL.

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

Docket 6494. Complaint, Jan. 12, 1956—Decision, Mar. 27, 1956

Order requiring drug distributors in Chicago to cease advertising falsely the therapeutic properties, nature, method of operation, etc. of its "Norito-Plus Tablets" represented to be a specific treatment for all kinds of arthritis and rheumatism.

Mr. Morton Nesmith for the Commission.
Nash & Donnelly, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On January 12, 1956, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with unfair and deceptive acts and practices in commerce by the use of false, misleading and deceptive representations in the sale and distribution in commerce of their drug product, designated "Norito-Plus Tablets", in violation of the Federal Trade Commission Act.

On February 6, 1956, counsel for Respondents submitted their answer to the complaint herein, admitting all material allegations of said complaint to be true. Under the provisions of Section 3.7 (2) of the Commission's Rules of Practice, such an answer constitutes a waiver of hearing as to the facts alleged in the complaint, and the Hearing Examiner is directed to issue an initial decision containing appropriate findings and conclusions and an appropriate order. Accordingly, on the basis of the complaint and admission answer, the Hearing Examiner finds the facts to be as follows:

1. Respondent, The Norito Company, is an Illinois corporation, having its office and principal place of business located at 225 North Michigan Avenue, Chicago, Illinois. Respondent I. R. F. Spiegel is an individual having the same office and principal place of business as the corporate respondent, and serving as president and a director thereof. In such capacity, Respondent Spiegel, during the time mentioned herein, formulated, directed and controlled the practices of the corporate respondent, including those here involved.

2. Respondents are now, and have been for more than one year last past, engaged in the business of offering for sale, selling and

distributing in commerce a drug product, as "commerce" and "drug" are defined in the Federal Trade Commission Act, designated "Norito-Plus Tablets", of which the formula and directions for use are as follows:

Formula:

	Gr.
Sodium Salicylate	1¼
Salicylamide	3
Caffeine Alkaloid	¼

Directions for use:

Take 2 tablets followed by full glass of water, every 3 hours 4 times daily, in indicated conditions; in responsive cases when not needed for pain, gradually reduce number of tablets taken.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce between and among the various states of the United States, their volume of business therein being substantial.

3. In the course and conduct of their business, Respondents have disseminated and caused the dissemination of advertisements concerning said product by the United States mails and by various means in commerce, including, but not limited to, advertisements inserted in newspapers and magazines of general circulation and in circulars and leaflets, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and also advertisements concerning said product by various means, including but not limited to the means aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce.

4. Through the use of the statements appearing in said advertisements Respondents represented, directly or by implication, that the use of Norito-Plus Tablets, as directed:

(1) Is an adequate, effective and reliable treatment for all kinds of arthritis and rheumatism;

(2) Will arrest the progress of, correct the underlying causes of, and cure all kinds of arthritis and rheumatism;

(3) Is an adequate and effective substitute for laboratory-made ACTH and will relieve ACTH deficiency in the body;

(4) Will stimulate the pituitary gland in the human body to produce more ACTH and thereby increase the production of cortisone-like substances;

(5) Will erect a "pain-block" in the thalamus to prevent pain impulses from reaching the brain;

(6) Will afford complete and permanent relief of all pain of arthritis and rheumatism, and prevent its recurrence; and

(7) Will expel pain-continuing pain-wastes (which Respondents claim gather in affected areas) quicker.

5. In truth and in fact the use of Respondents' product "Norito-Plus Tablets" without regard to the amount taken:

(1) Is not an adequate, effective or reliable treatment for any kind of arthritis or rheumatism;

(2) Will not arrest the progress of, correct the underlying causes of, or cure any kind of arthritis or rheumatism;

(3) Is not an adequate or effective substitute for laboratory-made ACTH and will not relieve ACTH deficiency in the body;

(4) Will not stimulate the pituitary gland in the human body to produce more ACTH and will not increase the production of cortisone-like substances in the human body;

(5) Will not erect a "pain-block" in the thalamus or prevent pain impulses from reaching the brain;

(6) Will not afford any relief of the pains of arthritis or rheumatism in excess of temporary relief of the minor pains and will not prevent its recurrence; and

(7) Cannot "expel pain-continuing pain-wastes" because pain does not cause "pain-wastes."

6. Respondents' use in their advertising of the said false and misleading statements and representations has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and, because of such belief, to purchase said product.

CONCLUSION

Respondents' acts and practices as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly, the Federal Trade Commission has jurisdiction over Respondents and over their acts and practices as herein found, and this proceeding is in the public interest. Therefore,

It is ordered, That Respondents, The Norito Company, a corporation, and its officers, and I. R. F. Spiegel, individually and as an officer and director of said corporation, and Respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of Norito-Plus Tablets or any other product of substantially the same composition or possessing substantially similar properties whether sold under the same name or under 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 other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(*a*) that Norito-Plus Tablets, in any amount, however taken,

(1) will constitute an adequate, effective or reliable treatment for any kind of arthritis or rheumatism;

(2) will arrest the progress of, correct the underlying causes, or cure any kind of arthritis or rheumatism;

(3) will constitute an adequate or effective substitute for laboratory-made ACTH and relieve ACTH deficiency in the body;

(4) will stimulate the pituitary gland in the human body to produce more ACTH and will increase the production of cortisone-like substances in the human body;

(5) will erect a "pain-block" in the thalamus or prevent pain impulses from reaching the brain;

(6) will afford any relief of the pains of arthritis or rheumatism in excess of temporary relief of minor pains, or that said preparation will prevent the recurrence of pain;

(7) will expel "pain-continuing pain-wastes";

(*b*) that pain causes pain-wastes;

2. Disseminating or causing to be disseminated any advertisements by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the drug preparation Norito-Plus Tablets, which advertisements contain any of the representations prohibited in Paragraph 1 of this order.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 27th day of March, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents The Norito Company, a corporation, and I. R. F. Spiegel, individually and as an officer and director 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.

IN THE MATTER OF

ARMOUR AND COMPANY ET AL.

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

Docket 6409. Complaint, Aug. 30, 1955—Decision, Mar. 30, 1956

Order dismissing, for lack of jurisdiction, complaint charging packing companies with violating the Oleomargarine amendment to the Federal Trade Commission Act by suggesting in advertising that their Cloverbloom "99" Margarine was butter, contained butter, or was produced the same as butter.

Mr. Morton Nesmith for the Commission.
Mr. Henry O. Kavina, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On August 30, 1955, the Federal Trade Commission issued its complaint in this proceeding, alleging that certain advertisements of Respondents' Cloverbloom "99" Oleomargarine were misleading in material respects and constituted false advertisements as such term is defined in Section 15 (a) (2) of the Federal Trade Commission Act, in that such advertisements deceptively suggest that Respondents' oleomargarine is a dairy product. The language of the complaint follows rather closely the amendment to the Federal Trade Commission Act of July 1, 1950, commonly known as the Oleomargarine Act.

On September 30, 1955, Respondents filed an answer to the above charges, contending in Part I thereof that each Respondent was, at all times mentioned in the complaint, a packer within the meaning of the Packers and Stockyards Act of 1921 (7 U.S.C.A. Sec. 181, and particularly Secs. 182, 183 and 191). Based upon such affirmative pleading, Respondents contend that the Federal Trade Commission is without jurisdiction over them.

In order to resolve the jurisdictional issue thus raised in Part I of Respondents' answer, counsel supporting the complaint and counsel for the Respondents entered into a stipulation as to the facts plead by Respondents, wherein it was agreed that the ultimate facts plead in Part I of Respondents' answer might be taken as fully proved. In view of this stipulation, establishing that Respondents are packers within the meaning of the Packers and Stockyards Act, the issue for present determination is whether the Federal Trade Commission has jurisdiction over the Respondents insofar as their advertisements of oleomargarine are concerned.

The complaint herein recognizes that the Commission's authority in this proceeding arises from "* * * the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, * * *." Section 5 (a) (6) of that Act sets forth the Commission's authority as follows:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

From the above empowering provision of the Federal Trade Commission Act, it is clear that certain legal authority is thereby vested in the Commission, and equally clear that certain legal authority is withheld therefrom. This provision of the Commission's organic Act clearly and in unambiguous words excludes from the Commission's jurisdiction "* * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921 * * *," excluding certain narrow execptions not relevant to this proceeding.

Consistent with the above exception and preceding it in point of time, the Packers and Stockyards Act, 1921, provided that the Federal Trade Commission should have no "power and jurisdiction" over the matters included in that Act. Section 406 (b) of that Act provides as follows:

> On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties * * *" * * * and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case. (August 15, 1921, Chap. 64, Sec. 406, 42 Stat. 169; 7 U.S. Code, Sec. 227.)

Thereafter, in 1938, when the Wheeler-Lea Amendment added Sections 12, 13, 14, and 15 to the Federal Trade Commission Act, expanding the Commission's powers and responsibilities to include the advertising of foods, drugs, devices and cosmetics, Section 5 of the Federal Trade Commission Act was amended to its present form, excluding packers and stockyards from the Commission's jurisdiction.

In considering this exclusion, the Court, in *United Corporation* v. *F.T.C.*, 110 F. 2d 473 (4th CCA, 1940), stated that:

> It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture by the Packers and Stockyards Act and the Meat Inspection Act, that Congress withheld jurisdic-

tion over packers from the Federal Trade Commission. Only confusion could result from an overlapping jurisdiction, as this case well illustrates.

Despite the unambiguity of the statutes quoted and the clarity of the above statement, counsel supporting the complaint contends that the Oleomargarine Amendment to Section 15 of the Federal Trade Commission Act, enacted March 16, 1950, effective July 1, 1950, gives exclusive jurisdiction to the Commission over advertisements of oleomargarine. This amendment is as follows:

SEC. 15. (a) (2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.

Based upon the above contentions, he asserts that the Oleomargarine Amendment, which establishes a standard for determining when an advertisement of oleomargarine shall be deemed misleading in a material respect, impliedly repeals that part of Section 406 (b) of the Packers and Stockyards Act which excludes packers from the jurisdiction of the Federal Trade Commission. This contention of implied repeal is based upon the theory that the sections of the Acts cited are repugnant each to the other. The same reasoning would require the conclusion that the Oleomargarine Amendment of 1950 impliedly repeals Section 5 (a) (6) of the Federal Trade Commission Act, which defines the Commission's powers and excludes therefrom jurisdiction over packers. In support of this theory of implied repeal by repugnancy, counsel quotes from the decision in *U. S.* v. *Tynen*, 11 Wall 88, wherein the court stated that if two legislative acts

are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

It is true that repeals by implication are not favored, but where the same subject matter is covered by two acts which cannot be harmonized with a view to giving effect to provisions of each, to the extent of the repugnancy between them the later act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. *Gibson* v. *U. S.*, 194 U. S. 182, 192.

It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute, which might otherwise prove controlling. *Kepner* v. *U. S.*, 195 U. S. 100, 125 (1904).

We recognize as correct in theory the court's statement that although implied repeals are not favored, an earlier statute on one subject may be impliedly repealed by a later statute on the same subject. The real question which arises in the instant proceeding, therefore, is whether the Oleomargarine Amendment is on the same subject as the earlier statutes on jurisdiction. A careful review of reports on the extensive Congressional debates and the Committee reports leading to the passage of the Oleomargarine Amendment fails, however, to reveal any reference to the jurisdiction of the Federal Trade Commission or that of the Secretary of Agriculture. In fact, all the reports are altogether silent on the question of the power of either to issue complaints.

Since the allegedly repealing Oleomargarine Amendment deals with the subject of a standard for determining what is a false advertisement of oleomargarine, and since the earlier statutes in question deal with the relative power and jurisdiction of the Federal Trade Commission and the Secretary of Agriculture, it appears clear that these statutes are on unrelated subjects. Furthermore, this conclusion is corroborated by the absence from the Congressional Record of any indication that Congress intended by the Oleomargarine Amendment to repeal, or in any way change, the existing jurisdictional power of either the Secretary of Agriculture or the Federal Trade Commission. Consequently, since the statutes in question are on unrelated subjects, there can be no repugnancy between them, and counsel's theory of repeal by repugnancy must fail.

Counsel supporting the complaint, in effect, further contends that a repugnancy exists between the Oleomargarine Amendment to the Federal Trade Commission Act, Sec. 15 (a) (2) on the one hand, and Section 5 (a) (6) of the same Act and Section 406 (b) of the Packers and Stockyards Act, 1921, on the other, resulting in an implied repeal of the earlier statutes because of the difference in the regulation of oleomargarine advertising which would otherwise result. Specifically, he contends that although the Packers and Stockyards Act authorizes the Secretary of Agriculture to prohibit any packer from engaging in any unfair, unjust, discriminatory or deceptive practice or device in commerce (7 U.S.C.A. § 192 (a)), that Act does not make unlawful the false advertisement of oleomargarine to the same extent as does the Oleomargarine Amendment of the Federal Trade Commission Act.

Counsel for the Respondents refers to the above contention as a "ghost of repugnancy," and one that would arise only from a "fantastic interpretation" of the Oleomargarine Amendment by the Federal Trade Commission.

We observe that Senate Report No. 309 (81st Cong., 1st Sess., Cal. 288) states that the Federal law regulating oleomargarine is "* * * designed to provide a minimum of protection to consumers of butter and colored oleomargarine and to insure honesty, fair dealing and an absence of all *deception* in the competitive sale of such products." Likewise, Section 202 of the Packers and Stockyards Act authorizes the Secretary of Agriculture to prohibit any "unfair, unjustly discriminatory or *deceptive practice* or device in commerce." [Underscoring supplied.] Comparison of the respective authority thus granted clearly indicates that the Secretary of Agriculture is empowered to enforce honesty and fair dealing by all packers, including those who may be advertising oleomargarine. It is obvious, therefore, that both the Federal Trade Commission Act and the Packers and Stockyards Act condemn the deceptive advertising of oleomargarine. Consequently, for a repugnancy to arise between these two acts, it would be necessary for the Federal Trade Commission and the Secretary of Agriculture to postulate two separate and different concepts of deceptive practice. "It must not be; * * * 'Twill be recorded for a precedent, and many an error, by the same example, will rush into the state; it cannot be."

In view of the facts established in this proceeding and the legal principles applicable thereto, there appears to be no repugnancy between Sections 12 (a) (2) and 5 (a) (6) of the Federal Trade Commission Act, nor between the Federal Trade Commission Act and the Packers and Stockyards Act, by reason of the Oleomargarine Act. It is concluded, therefore, that the jurisdictional provisions of both the Federal Trade Commission Act and the Packers and Stockyards Act remain unchanged and in force, and that the Federal Trade Commission, with the exceptions above mentioned, which are here irrelevant, has no jurisdiction over packers and, consequently, no jurisdiction over the Respondents herein. Accordingly,

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

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The sole question presented by this appeal is whether the Commission has jurisdiction to issue its complaint against a "packer" in its advertising of an oleomargarine product.

A complaint was issued by the Commission on August 30, 1955, charging the respondents with false and deceptive advertising of their Cloverbloom 99 Oleomargarine. Respondents filed an answer to this charge contending in Part One thereof that respondents

were "packers" within the intent and meaning of the Packers and Stockyards Act of 1921 and hence not subject to the jurisdiction of the Federal Trade Commission. Since this issue, if resolved in favor of the respondents, would control in the disposition of the case it was stipulated between counsel that the jurisdictional issue would be submitted to the hearing examiner on briefs before proceeding further with the litigation. The hearing examiner, on December 8, 1955, dismissed the complaint. Presented here for our consideration is counsel supporting the complaint's appeal from such dismissal.

In contending that the examiner erred in dismissing the complaint, counsel supporting the complaint alleges, inter alia, that while respondents are admittedly "packers" within the meaning and definition of the Packers and Stockyards Act of 1921, the manufacturing and marketing of oleomargarine constitutes a business "disassociated therefrom, not related thereto and not subject to the jurisdiction of" the Department of Agriculture. Counsel contends that the Oleomargarine Amendment to the Federal Trade Commission Act impliedly repealed the Packers and Stockyards Act of 1921 insofar as it related to the advertising of oleomargarine and vested complete jurisdiction over the advertising for such substances in the Federal Trade Commission. In support of this proposition counsel cites the "well settled principle" of statutory construction that "specific terms covering the given subject matter will prevail over general language of the same or another statute, which might otherwise prove controlling" (Citing *Kepner* vs. *United States*, 195 U.S. 100, 125 [1904]). Also relied upon by counsel is the proposition that where two laws are clearly repugnant to each other and both cannot be carried into effect, * * * the later of the two laws will prevail. (*Posades* v. *National City Bank*, 296 U.S. 497).[1]

The obvious answer to these contentions is that there can be no repugnancy if the one law is not on the same subject as the second law. The Packers and Stockyards Act conferred jurisdiction in the Secretary of Agriculture over the activities of a wide segment of American Industry, while the Oleomargarine Amendment amounted to no more than a definition of terms under the Federal Trade Commission Act. The later specific enactment not being on the same subject could and did not alter the jurisdiction already vested in the Secretary of Agriculture, nor did this Amendment disturb

[1] This rule is more explicitly stated in counsel's brief as "Where two legislative acts are repugnant to, or in conflict with each other the one last passed, being the latest expression of the legislative will, although it contains no repealing clause, govern, control or prevail so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy." (82 CJS 489 and the cases cited therein.)

or alter the "packers" exemption set forth under Section 5 (a) (6) of the Federal Trade Commission Act.

Counsel supporting the complaint contends that when respondents entered the field of the manufacture and distribution of oleomargarine, they entered into a new field of business disassociated from and not related to the packing industry and so as to this business are not subject to the jurisdiction of the Secretary of Agriculture. Counsel earnestly maintains that under this proceeding, respondents are not being proceeded against as "packers" but as manufacturers and distributors of oleomargarine.

In treating this and the related contentions of counsel supporting the complaint, we must delve into the legislative hearings in an attempt to determine what Congress intended in enacting the Packers and Stockyards Act of 1921. Since the House version of the Bill was ultimately adopted, with some modification, the following expression of views by sponsors of the legislation in the House is of interest in determining Congressional intent with respect to the various activities which the packer may be engaged in, yet which are not directly in the packing field:

Congressman Haugen (Chairman, House Committee on Agriculture):

* * * the farm bureau suggested that the definition of the term "packer" be so amended as to confine packers to those manufacturing or preparing meats or meat products for sale or shipment in commerce. While recognizing the justice of the complaint that the definition in the original Haugen bill might be construed to include independent tanneries, fertilizer plants, and other industries using by-products of the packing industry, the Committee at once perceived that the adoption of the suggestions of the American Farm Bureau Federation would be to leave outside of all regulation such industries *when conducted as subsidiaries of the packing industry.* It therefore amended the Haugen bill in such manner as to relieve from regulation these outside industries only when having no affiliation with a packer, *but subjecting the packer to complete regulation, no matter what line of business he goes into.* (61 Cong. Rec. 4781.) [Emphasis supplied.]

* * * * * * *

Congressman Anderson:

We did not undertake to prohibit the packers from engaging in any related or unrelated lines, but we did undertake to say that if the *packers* engaged in these other lines *or if the stockholders in the packing companies* owned stock in other lines, then the products of the business so owned or controlled while in commerce should be subject to exactly the same regulations as we imposed upon the *packers.* (61 Cong. Rec. 1888.) [Emphasis supplied.]

* * * * * * *

Further light on this question may be gained from the following excerpts from the committee hearings and report:

Congressman Anderson:

The definition of the term "packer" is found in section 201 on page 3 of the bill, and is an attempt to reach, in some way, the problems that have arisen in connection with the *so-called unrelated business of the packers.*

The hearings before the committee, I think, demonstrated a disposition on the part of the *large packers to extend their activities into many lines* which were not directly connected with them and, through subsidiaries and interlocking directorates and joint-stock ownership or community of stock ownership, to control a very widely diverging class of articles. * * *

We undertake to say that *if a person engaged in* the packing business—and when I say person, of course, I include corporations—*undertakes to extend its control over other commodities,* through the ownership of stock or otherwise, *that the products of the company over which it has extended its sphere of influence shall be subject to the same regulation as the products of the packers themselves.*

"I think that is a perfectly legal provision. I think it is a perfectly sound principle, that we shall not only regulate the packers and the products which they themselves produce, but that we shall regulate in commerce the products of companies *which are within their sphere of influence, either through community of stock ownership or otherwise, or direct stock ownership.* (Hearing before Committee on Agriculture on H.R. 14 etc., 67th Cong., 1st Sess., p. 17.) [Emphasis supplied.]

In order to bring within the terms of the bill the packers thus defined, whatever the ramifications of his business and whatever the form of corporate organization adopted, and at the same time to avoid interference with businesses having no packer affiliations, it is provided that a person engaged in the business of manufacturing or preparing, for sale or shipment in interstate or foreign commerce, live-stock products or of marketing such products in such commerce, shall be considered a packer if such person has an interest in a packing business as above defined, or if a packer has any interest in his business, or if a common control amounting to 20% exists in each business. In this manner an independent tannery would not be a packer, *but if a packer sets up a tannery business as a separate corporation, it would be controlled.* (From the unanimous Report from the Committee on Agriculture, H.R. Report No. 77, 67th Congress, 1st Session.) [Emphasis supplied.]

That it was the intention of Congress to cover the activities of this particular respondent, Armour & Company, and of this particular product, oleomargarine, is also evidenced by the hearings. Congressman Voigt, an exponent of Packing legislation, stated that:

While there is a large number of meat packers in this country doing an interstate business, it is understood that this legislation is aimed at the so-called Big Five packers—Swift & Co., *Armour & Co.,* Morris & Co., Wilson & Co., and Cudahy Packing Co. There can be no question that these five concerns and their predecessors in interest for many years have had and now have a complete monopoly of the meat packing business * * *. (61st Cong. Rec. 1853.)

In recent years the packers have gone extensively into related and nonrelated lines of business. They handle a considerable proportion of the interstate trade in poultry, eggs, milk, butter, and cheese. It is said that they handle two-thirds of all cheese produced in Wisconsin.

They own large plants in South America and are interested in many foreign companies. *They are heavily interested in plants producing cottonseed oil, used in the manufacture of oleomargarine.* In 1916 Swift & Co., sold 50,000,000 pounds of butter; in *1917 Armour sold $17,000,000 worth of canned goods. The Armour Grain Co., operates over 90 country elevators, and in 1917 handled 75,000,000 bushels, or 25 percent of all grain receipts at Chicago.* The packers are very largely interested in tanneries, manufacture of fertilizers, and wool. They own in whole or in part substantially all of the leading stockyards of the country; they own over 90 percent of all refrigerator and other cars owned by interstate slaughterers; they own or control over a thousand branch houses; they are interested in dozens of banks. Up to 1920, when the injunction was issued against them, hereafter referred to, they dealt to a large extent in fish and wholesale groceries. They are interested in hundreds of subsidiary corporations which in the eyes of the public appear to be competitors. The Federal Trade Commission finds that—

"the power of the Big Five in the United States has been and is being unfairly and illegally used to manipulate live-stock markets; restrict interstate and international supplies of foods; control the prices of dressed meats and other foods; defraud both the producers of food and consumers; crush effective competition; secure special privileges from railroads, stockyard companies, and municipalities; and profiteer." (61st Cong. Rec. 1864.) [Emphasis supplied.]

While it is apparent from the above that the primary source of Congressional concern was the practices in the packing industry, the debates nevertheless indicate that there was brought to the attention of Congress the fact that these industrial giants had extended their sway into many diversified fields of endeavor and the resultant legislation was framed in language broad enough to encompass these activities. Also, it is of considerable significance that the report of this Commission played an important part in the passage of the Packers and Stockyards Act of 1921 and that the language of the Act, as finally adopted, closely parallels not only Section 5 of the Commission's organic Act, but also provisions of the Clayton Act of 1914, as well. That it was the intention of Congress to remove the activities of packers from the jurisdiction of the Commission is shown by the following excerpts from the Committee reports:

The Bill further coordinated the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of other departments of government having regulatory powers *which previously existed.* It provides for ample court review for any of the orders or regulations of the Secretary of Agriculture, so as to protect the industry from any mistakes of judgment or unwarranted use of the power thus delegated. (From the unanimous Report of the Committee on Agriculture—H. R. Report No. 77, 67th Congress, 1st session.) [Emphasis supplied.]

The House Bill took away from the Federal Trade Commission its power and jurisdiction in regard to any matter which by the Act is made subject to the jurisdiction of the Secretary of Agriculture, except where complaint has been

served before the passage of the Act. The Senate amendment, while retaining the provisions of the House Bill, continues in force the powers of the Commission, *but only so far as relating to making investigations and reports, and permits these powers to be exercised only on request of the Secretary of Agriculture.* (Rep. No. 324, 67th Cong., 1st Session, House of Representatives. [Emphasis supplied.]

As found by the hearing examiner, the complaint issued herein recognized that the Commission's authority in this proceeding arises from "* * * the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, * * *." Section 5 (a) 6 of that Act sets forth the Commission's authority as follows:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

From the above enabling provision in the Federal Trade Commission Act, it is clear that certain legal authority is vested in the Commission, and equally clear that certain legal authority is withheld therefrom. This provision of the Commission's organic Act clearly and in unambiguous words excluded from the Commission's jurisdiction "* * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921 * * *," except with reference to certain narrow exceptions not relevant to this proceeding.

Consistent with the above exception and preceding it in point of time, Section 406 (b) of the Packers and Stockyards Act provided that:

On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties * * *" * * * and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case. (August 15, 1921, Chap. 64, Sec. 406, 42 Stat. 169; 7 U.S. Code, Sec. 227.)

Thereafter, in 1938, when the Wheeler-Lea Amendment added Sections 12, 13, 14, and 15 to the Federal Trade Commission Act, expanding the Commission's powers and responsibilities to include the advertising of foods, drugs, devices and cosmetics, Section 5 of the Federal Trade Commission Act was amended to its present form, excluding packers and stockyards from the Commission's jurisdic-

tion. The Oleomargarine Act, which amended Section 15 of the Wheeler-Lea Act states that:

> In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.

However, in passing this amendment, Congress left undisturbed the exemption given to "packers" under Section 5 (a) (6) of the Federal Trade Commission Act, nor is there any evidence in the hearings on the Bill to indicate a contrary intention.

As indicated in our Drew opinion on May 5, 1955,[2] the oleomargarine-butter controversy, which culminated in the Oleomargarine Act of 1950, had been waged in the halls and chambers of Congress for the better part of a century. The Act of August 2, 1886, for example, defined "butter" and "oleomargarine" and imposed upon the latter discriminatory excise taxes as well as labeling and packaging requirements. It was clear from the beginning that this exercise of the taxing power was not designed to raise revenue but to achieve certain regulatory effects in the field of competition between oleomargarine and butter.[3]

The difference in tax treatment between yellow and white oleomargarine was first inserted in the law by the Act of May 9, 1902 (32 Stat. 193), which Act imposed a 10¢ per pound tax on oleomargarine which was artificially colored to look like butter. This action was amplified and embellished by the Act of May 4, 1931.

The 1950 bill as it passed the House and as it was reported to the Senate, continued to regulate oleomargarine under the Federal Food, Drug and Cosmetic Act, but provided for the repeal of all Federal taxation on oleomargarine. The Senate Committee in reporting the bill attempted to forestall some of the arguments of the Senators from the dairy states by pointing out that the Federal Trade Commission already had jurisdiction, under existing law, to prevent misrepresentation of oleomargarine as butter; also to prohibit the advertising practices which were in any way deceptive or which might confuse oleomargarine with butter. These arguments failed to satisfy the opposition that confusion might, in any event, result and therefore during the course of the floor debate an amendment was offered to the Federal Trade Commission Act. This amendment, Section 15 (a) (2), in effect made it a per se

[2] Docket 6126.

[3] Senate Report 309, Cong. Rec., Jan. 4, 1950, p. 44.

violation of the Federal Trade Commission Act to represent or suggest that oleomargarine is a dairy product.[4] It did not amend Section 5 of the Federal Trade Commission Act so as to disturb or alter the traditional exceptions or exemptions from the Commission's jurisdiction; nor can we glean from the debates any Congressional intention to change or eliminate these exemptions.

It is our conclusion, from a consideration of the legislative history and from the lack of ambiguity in the provisions of the statutes, that both the Commission and the Secretary of Agriculture are charged with responsibility for proscribing deceptive practices in their respective fields. It is our further conclusion, from the above comparison of the respective authority granted by Congress to the Commission and the Department of Agriculture, that the Secretary of Agriculture is empowered to enforce honesty and fair dealing by respondent, Armour & Company, in its advertising of oleomargarine.[5] We believe that the hearing examiner correctly held that the Oleomargarine Act did not disturb the jurisdictional provisions of either the Federal Trade Commission Act or the Packers and Stockyards Act, and therefore that the Commission has no jurisdiction over respondents herein in their advertising of oleomargarine.

Accordingly, the appeal of counsel supporting the complaint is denied and the complaint is dismissed.

ORDER DENYING APPEAL FROM INITIAL DECISION AND DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint herein, and the Commission having heard the appeal on briefs of counsel; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the appeal of counsel supporting the complaint should be denied and that the complaint should be dismissed:

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

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

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[4] Docket 6228, *Reddi-Spred Corp.*, 3rd Cir., Dec. 22, 1955.

[5] Section 402 of the Packers and Stockyards Act provides for enforcement by stating that "the provisions (including penalties) of Section 6, 8, 9 and 10 of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, are made applicable to the jurisdiction, powers and duties of the Secretary in enforcing provisions of this Act and to any person subject to the provisions of the Act whether or not a corporation."

IN THE MATTER OF

MILLARD, INC., ET AL.

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

Docket 6427. Complaint, Oct. 17, 1955—Decision, Mar. 30, 1956

Order vacating and setting aside—for the reason that respondents were out of business and had no intention of resuming—initial decision prohibiting false advertising in connection with the sale of hair and scalp preparations and a "new" method of treatment for baldness or thinning hair for use by persons in their homes.

Mr. Morton Nesmith for the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondents in this proceeding are charged with violating the Federal Trade Commission Act by the dissemination of false and deceptive advertising pertaining to a suggested course of treatment and the use of certain medical and cosmetic preparations sold by them to induce hair growth and prevent baldness. The complaint was issued October 17, 1955, mailed October 20, 1955, and served on respondents October 24, 1955. No answer was filed by respondents and no appearance was made by any of them at the initial hearing held January 10, 1956. They are, therefore, in default. Under the rules of the Commission and in accordance with the Notice, which is attached to and part of the complaint duly served upon respondents, the hearing examiner is authorized to and does find the facts to be as alleged in the complaint. All the transactions at the hearing, including the submission by counsel supporting the complaint of a proposed cease and desist order, were duly recorded and the transcript thereof filed in the office of the Commission. No request for the submission of proposed findings and conclusions has been received, and the proceeding before the hearing examiner has been closed.

Upon this record, the following findings of fact are made:

1. Respondent Millard, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, having its office and principal place of business located at 2511 East 75th Street, Chicago, Illinois.

Individual respondents, E. V. Safranski and Eugene J. Dooley, are president and secretary-treasurer, respectively, of the corporate respondent, Millard, Inc. These individual respondents formulate,

direct and control the advertising and sales activities and policies of said corporate respondent.

3. Respondents are now and for the past year have been engaged in the business of selling and distributing various cosmetic and medicinal preparations for external use in the treatment of conditions of the hair and scalp by self-application in the home. Respondents have their said preparations compounded for them by others in Chicago, Illinois, and cause said preparations to be transported from the place of their manufacture to the respondents' office and to individual purchasers located in various States of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said cosmetic and medicinal preparations in commerce among and between various States of the United States.

3. In the course and conduct of their business the respondents, by means of newspaper advertisements and otherwise, solicit members of the general public to submit to a free hair and scalp examination by a Millard specialist, designated as a "trichologist." The diagnosis is followed by a suggested course of treatment which employs the use of medicinal and cosmetic preparations sold by the respondents. The contents of home treatment kits are determined by the "trichologist" making the examination and consist of the following ingredients, which are included in various rations and combinations in respondents' products:

Duponol WAT,
Lanolized soap with Hexachlorophene,
Hyamine,
Mercapto-benzo-thiazole,
Oxyquinoline sulphate,
G–1441 Atlas water-soluble lanolin (Derivative),
Boric Acid,
Propylene glycol,
Isopropyl alcohol,
Oil Bay Terpeneless,
Mineral oil.

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

dissemination of, advertisements concerning their said preparations, by various means, including but not limited to advertisements inserted in newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements are the following:

This new method of home treatment for saving and growing thicker hair will be demonstrated in Ft. Wayne, Wednesday, Feb. 3 only.

First the Millard specialists are quick to tell hopeless cases that they cannot be helped. But the "hopeless" cases are few. Only if a man is completely, shiny bald is he in this last category.

If there is fuzz, no matter how light, thin, or colorless, the Millard people can perform wonders.

We have no cure-all for slick, shiny baldness, "Safranski emphasis." If there is fuzz, the root is still capable of creating hair and we can perform what seems to be a miracle.

There is one thing Safranski wants to be certain every man and woman knows. If a recession appears at the temples or a spot begins to show up on the crown of the head, there is something wrong and it should be given immediate attention.

If clients follow our directions during treatment, and after they finish the course, there is no reason why they will not have hair all the rest of their lives, "Safranski said."

Famous trichologist tells truth about saving and improving hair.

How's your hair—If it worries you call Trichologist E. J. Dooley at the Hotel Keenan * * *.

5. Through the use of the statements in the aforesaid advertisements and others similar thereto, respondents represented, directly and by implication, that their method of treatment of the hair and scalp is a new method; that the use of their preparations in accordance with their method of treatment by persons in their homes will prevent baldness and cause a regrowth of hair in cases of thin hair and partial baldness; will cause fuzz on the scalp to develop into a normal head of hair and will assure a normal head of hair during the lifetime of the user.

6. The aforesaid advertisements were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, respondents' method of treatment is not new. The most common type of baldness or partial baldness has its origin in heredity, endocrine balance and aging. The use of respondents' preparations, singly, or in any possible combination or combinations, and by any method, will not prevent baldness of this type. When so originated, such use will not cause a regrowth

of hair in cases of thin hair and partial baldness. Such use will not cause fuzz on the scalp to develop into normal hair or be effective in causing or maintaining a normal head of hair, under any circumstances, for the lifetime, or any other specified period of time, of the users.

7. Respondents by the use of the designation of "Trichologist" in their advertisements thereby represent that they and certain of their employees have had competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp diseases affecting the hair. In truth and in fact, neither of the respondents nor any of their employees have had such training.

CONCLUSIONS

The use by the respondents of the foregoing false, deceptive and misleading statements, disseminated as aforesaid, has had and now has the capacity and tendency to mislead and deceive a substantial portion of the public into the erroneous and mistaken belief that all such statements were and are true, and to induce a substantial portion of the purchasing public to purchase respondents' preparations.

The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Therefore,

It is ordered, That the respondent Millard, Inc., a corporation, and its officers, and the respondents E. V. Safranski and Eugene J. Dooley, individually and as officers of respondent corporation, and respondents' representatives, agents or employees, directly or through any corporate or other device, in connection with the offering for sale and sale of the various cosmetic and medicinal preparations, as set out in the findings herein, for use in the treatment of conditions of the hair and scalp in accordance with any method, or any other preparations of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from, directly or indirectly:

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

(*a*) That their method of treatment of the hair and scalp is a new method;

(*b*) That the use of their method of treatment, or any other like method of treatment, and their preparations, singly or in any combination or combinations, will:

(1) Prevent baldness, unless expressly limited to that type of baldness having its origin other than in heredity, endocrine balance and aging;

(2) Cause a regrowth of hair in cases of thin hair or partial baldness, unless expressly limited as in (1) above;

(3) Cause fuzz on the scalp to develop into normal hair;

(4) Be effective in causing or maintaining a normal head of hair of users for any specified period of time;

2. Disseminating or causing to be disseminated by any means, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparations in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that respondents or any of their employees or other persons who have not had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, is a trichologist, or which advertisement contains any of the representations prohibited in Paragraph 1 of this order.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter having come before the Commission upon its review of the initial decision of the hearing examiner, filed January 23, 1956; and

It appearing from the record that respondents are out of business and have no intention of resuming business; and

The Commission having duly considered the matter, and being of the opinion that, under these circumstances, the public interest does not require further corrective action at this time:

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

It is further ordered, That the complaint herein be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to take such further action against the respondents at any time in the future as may be warranted by the then existing circumstances.