

Decision

54 F.T.C.

IN THE MATTER OF
THE WARSON PRODUCTS CORPORATION ET AL.

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

Docket 6711. Complaint, Jan. 18, 1957—Decision, Aug. 22, 1957

Consent order requiring sellers in St. Louis, Mo., to cease disseminating advertising in newspapers and by radio and television broadcasts which represented falsely that their "Warsene Capsules" were an effective treatment for the pains and discomforts of arthritis, rheumatism, etc.; contained several active ingredients and were made like a doctor's prescription; and were a new and different treatment not theretofore available which would not cause stomach upset.

The individual respondents agreed to the same consent settlement on Jan. 22, 1958, *infra*, p. 949.

Mr. Harold A. Kennedy for the Commission.

Rogers, Hoge & Hills, by *Mr. Andrew J. Graham* and *Mr. William L. McGuire*, of New York, N.Y., and *Mr. Donald E. Fahey*, of St. Louis, Mo., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on January 18, 1957, charging Respondents with violation of the provisions of the Federal Trade Commission Act by the dissemination of false and misleading advertisements with respect to a drug preparation designated "Warsene Capsules," which Respondents sell and distribute in commerce.

On June 14, 1957, Respondent The Warson Products Corporation, by its president, Theodore E. Caruso; its counsel; and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent The Warson Products Corporation is identified in the agreement as a Missouri corporation, with its office and principal place of business located at Room 1810, 314 North Broadway, St. Louis, Missouri, its location prior to September, 1956, having been 220 North Fourth Street, St. Louis, Missouri.

The agreement specifies that it does not dispose of this proceeding as to Respondents John J. Powers, George R. Williams and Donald E. Fahey individually, and that the order contained therein does

200

Order

not prohibit the representations alleged in sub-paragraphs 5 and 6 of Paragraph Six of the complaint, regarding Respondents' product being a buffered formula and that it is the result of research, for the reason that counsel supporting the complaint is of the opinion, on the basis of the evidence now available, that such allegations cannot be sustained.

With those two exceptions, Respondent The Warson Products Corporation admits all the jurisdictional facts alleged in the complaint; agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; and waives any further procedure before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

All parties signatory thereto agree that as to that part of this proceeding which is disposed of by this agreement, the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the order to cease and desist as contained in the agreement 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; that the complaint herein may be used in construing the terms of said order; and that the agreement is for settlement purposes only and does not constitute an admission by Respondent The Warson Products Corporation that it has violated the law as alleged in the complaint.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the Hearing Examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding with respect to Respondent The Warson Products Corporation. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over Respondent The Warson Products Corporation, and over its acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Respondent The Warson Products Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of the preparation "Warsene Capsules," or any preparation of substantially similar compo-

Decision

54 F.T.C.

sition 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 means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that said preparation:

a. Is an adequate, effective, or reliable treatment for the aches, pains, or discomforts of any kind of arthritis, rheumatism, neuralgia, neuritis, bursitis, sciatica, lumbago, muscle soreness, or allied disorders; will afford immediate, complete, or permanent relief from the aches, pains, or discomforts thereof, or have any therapeutic effect on the symptoms or manifestations of any such conditions or disorders in excess of affording temporary relief of minor aches or pains thereof;

b. Contains any analgesic ingredient other than salicylamide;

c. Is made like a doctor's prescription: *Provided, however,* This shall not prohibit the making of truthful representations concerning the use of such product by physicians;

d. Is a new, or substantially different, kind of preparation or substantially different in its mode of action or analgesic effect from other commonly-used analgesics;

e. Will not cause stomach upset;

2. Disseminating or causing to be disseminated any advertisements by any means, for the purpose of inducing, or which will likely induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of such preparation which 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 22nd day of August, 1957, become the decision of the Commission; and, accordingly:

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

Findings**IN THE MATTER OF
BEN COHEN TRADING AS BENTON FURS****ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS**

Docket 6501. Complaint, Feb. 9, 1956—Decision, Aug. 23, 1957

Order requiring a furrier in Los Angeles, Calif., to cease violating the Fur Products Labeling Act by failing to comply with labeling and invoicing requirements, by setting forth on invoices the name of an animal other than that producing the fur in certain products, and by advertising which falsely represented prices of certain products as less than wholesale.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on February 9, 1956, issued and subsequently served its complaint in this proceeding upon the respondent named above charging him with the use of unfair methods of competition and unfair and deceptive acts and practices in violation of the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act. After the filing of answer by the respondent, a hearing was held before a hearing examiner of the Commission and testimony and other evidence was received into the record including evidentiary matters stipulated by agreement between counsel. On September 6, 1956, the hearing examiner filed his initial decision in which he held that certain of the complaint's charges were sustained by the greater weight of the evidence and that others should be dismissed for reasons of lack of jurisdiction or other proof.

The Commission having considered the cross-appeals filed from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and the appeal of the respondent denied and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclusions drawn therefrom and order, the same to be in lieu of said initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Ben Cohen is an individual trading as Benton Furs. He engages in the sale at retail of fur garments,

Findings

54 F.T.C.

his office and place of business being located at 714 South Hill Street, Los Angeles, California.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondent has advertised and offered for sale his fur products in commerce and he also has sold, advertised, offered for sale, transported and distributed 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.

PAR. 3. Certain of the aforementioned fur products have been 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. 4. Certain of the aforementioned fur products have been 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 mingled with non-required information on labels, in violation of Rule 29(a) of the aforesaid Rules and Regulations;

(b) Required information was not completely set forth on one side of the labels, as required by Rule 29(a) of the aforesaid Rules and Regulations;

(c) Respondent failed to set forth an item number or mark on labels assigned to fur products, in violation of Rule 40(a) of the aforesaid Rules and Regulations;

(d) Required information was set forth in abbreviated form on labels, in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 5. Certain of said fur products have been falsely and deceptively invoiced, in that they were not invoiced by the respondent 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. 6. Certain of said fur products were falsely and deceptively invoiced in that the respondent, on invoices furnished to purchasers of said fur products, set forth the name of an animal other than the name of the animal which produced the fur, in violation of Section 5(b)(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 7. Certain of the aforementioned fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling

208

Conclusions

Act, in that they were not invoiced by the respondent in accordance with the Rules and Regulations promulgated thereunder in that required information was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 8. Certain of the respondent's aforementioned fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act and of Rule 44(a) of the Rules and Regulations as heretofore promulgated thereunder. In such connection, the respondent has caused the dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of newspaper advertisements concerning his fur products which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder 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.

Illustrative thereof were advertisements of the respondent which appeared in various issues of the Los Angeles Examiner, a publication having wide circulation in the State of California and substantial circulation in areas of other States of the United States which are adjacent thereto. Certain of such advertisements have included the following statement:

* * *

OUR PRICES ARE LOWER
than the wholesale houses
COME UP AND SAVE MONEY!

Thereby, the respondent has represented that the prices at which his fur products are offered for sale are less than wholesale prices which representation was false and deceptive. The respondent himself buys at wholesale prices and sells at a profit, and his prices necessarily are in excess of wholesale prices.

PAR. 9. The respondent in the regular course of his business has been in substantial competition with other individuals, corporations, and firms likewise engaged in the sale and distribution of fur products.

CONCLUSIONS

The aforesaid acts and practices of the respondent, as herein found, have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, additionally constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Order

54 F.T.C.

Evidence also was submitted at the hearing relevant to the charges of alleged violation of Rule 44(f) of the Rules and Regulations prescribed by the Commission under the Fur Products Labeling Act incident to alleged use by the respondent of illustrations depicting more valuable fur products than those actually available at the respondent's advertised selling price. Those charges are not supported by the greater weight of the evidence, and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That respondent Ben Cohen, an individual doing business as Benton Furs or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

- (1) Failure 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 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 bleached, dyed, or otherwise artificially colored fur, when such is the fact;
 - (c) The name of the country of origin of any imported furs used in the fur products;
 - (d) 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.
 - (e) That the fur product consists of used or second-hand fur or furs, when such is the fact;
 - (f) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact.
- (2) Setting forth on labels attached to fur products:
 - (a) Non-required information mingled with required information;

208

Order

- (b) Required information in abbreviated form.
 - (3) Failing to:
 - (a) Set forth on labels attached to fur products an item number or mark assigned to such products;
 - (b) Set forth on labels attached to fur products all required information on one side of such labels.
 - B. Falsely or deceptively invoicing fur products by:
 - (1) Failing to furnish invoice to purchasers of 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 the fact;
 - (c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;
 - (d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;
 - (e) The name and address of the person issuing such invoice;
 - (f) The name of the country of origin of any imported furs contained in the fur products.
 - (2) Using on invoices the name or names of any animal or animals other than the name or names provided for in paragraph B(1)(a) above, or furnishing invoices which misrepresent the country of origin of imported furs contained in the fur product, or which contain any form of misrepresentation or deception, directly or by implication, with respect to such fur products.
 - (3) Setting forth on invoices pertaining to fur products, required information in abbreviated form.
 - C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, notice, or in any other manner which is intended to aid, promote or assist, directly or indirectly in the sale or offering for sale of fur products, and which represents, directly or by implication, that the price of any fur product is less than or equivalent to the wholesale price, when such is not the fact.
- It is further ordered,* That the charges of this proceeding relating to alleged violations of Rule 44(f) be, and the same hereby are, dismissed.
- It is further ordered,* That respondent Ben Cohen shall, within sixty (60) days after service upon him of this order file with the

Opinion

54 F.T.C.

Commission a report in writing setting forth in detail the manner and form in which he has complied therewith.

Commissioners Gwynne and Tait dissenting.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The respondent operates a store in Los Angeles for the retailing of fur garments and is charged in this proceeding with misbranding and false and deceptive invoicing and advertising of certain of his fur products and in violation of both the Federal Trade Commission Act and the Fur Products Labeling Act and of designated rules and regulations promulgated pursuant to the latter Act. Counsel for the respondent and counsel supporting the complaint have appealed from such rulings of the hearing examiner as were adverse to their respective contentions.

A brief analysis of pertinent provisions of the Fur Products Labeling Act and the pleadings is necessary since we must dispose of a procedural question presented by counsel supporting the complaint. The particular offenses relevant here are those contained in subsections (a) and (b) of Section 3 of the Fur Products Labeling Act. Subsection (a) renders unlawful the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced; and subsection (b) proscribes the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, any misbranded or falsely advertised or invoiced fur product which is made in whole or in part of fur which has been shipped and received in commerce. Thus, the legal violations which are defined in subsection (a) are limited to and concern distributional and promotional activities "in commerce," which elsewhere in the Act is defined to include commerce between any state and any place outside thereof. On the other hand, the sanctions imposed under subsection (b) do not turn upon the interstate aspects of promotional activities. Instead, violation results when the deceptive acts occur in furtherance of the marketing of fur products made in whole or in part of fur which has been shipped and received in commerce.

Paragraph Two of the complaint alleges that the "respondent has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which has been shipped and received in commerce." The five succeeding paragraphs of the complaint contain specific allegations as to the

203

Opinion

manner in which certain of the respondent's fur products in that category allegedly were misbranded and falsely invoiced. It is not disputed that the respondent's labeling and invoicing were not in accordance with requirements specified in the Act and applicable rules and regulations of the Commission as charged in the complaint.

The allegations of two additional paragraphs of the complaint (Paragraphs Eight and Nine) were directed to advertising practices relating to "Certain of said fur products . . . in violation of the Fur Products Labeling Act. . . ." Thus the complaint might be construed to concern only those fur products made in whole or in part of fur previously shipped and received in commerce. Under Paragraphs Eight and Nine, the respondent was charged in substance with the dissemination in commerce of advertisements which were alleged to be in violation of law because they were not in accordance with the provisions of Section 5(a) of the Act (which section defines false advertising of fur products and furs) and because they misrepresented the products' price and their grade, quality and value in contravention of the provisions of subparagraphs (a) and (f) of Rule 44 of the Rules and Regulations promulgated by the Commission. Hence, alleged interstate aspects of the respondent's promotional activities also were brought within the scope of the proceeding under those charges.

Counsel supporting the complaint moved that Paragraph Two of the complaint be amended to include charges more expressly challenging the lawfulness of the respondent's labeling and invoicing practices as well as his advertising practices under Section 3(a) of the Act and irrespective of the garments' legal status under Section 3(b) as fur products allegedly made from furs which had been shipped and received in commerce. It was requested that such paragraph be revised to read as follows:

Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has sold, advertised, offered for sale, transported and distributed fur products in commerce, and has sold, advertised, offered for sale, transported and distributed fur products which have been made, in whole or in part, of fur which has been shipped and received in commerce, as the term "commerce," the term "fur," and the term "fur products" are defined in the Act.

The hearing examiner denied the motion.

The requested amendment was closely related to other charges in the complaint and the general tenor of certain of the amendatory matters conformed to proof theretofore received in the record. It seems obvious that the parties regarded the issues of the case as broader than those presented under a very strict interpretation of the complaint. Both counsel appear to have regarded the issues

Opinion

54 F.T.C.

presented under the pleadings and proof to include the extent to which the distributional methods and promotional activities adopted by the respondent come within the scope of both subsections (a) and (b) of Section 3. Attesting to this is the fact that the first of various listed conclusions of law submitted by the respondent for the hearing examiner's adoption requested a finding that the respondent had not introduced or manufactured for introduction or sold or advertised for sale or transported or distributed in interstate commerce any fur product or fur "as contemplated by Section 3(a) of the Fur Products Labeling Act."

We think it would have been more appropriate had the hearing examiner granted in part the motion for amendment, pursuant to Section 3.9 of the Commission's Rules of Practice. We have decided to direct amendment of the complaint in conformity with such of the respondent's practices as the record indicates have been engaged in by him, namely, those relating to the advertising and offering for sale in commerce of the respondent's fur products.

The respondent's appeal challenges as erroneous the examiner's holding that certain of the respondent's fur products have been advertised and offered for sale in commerce within the meaning of the Act and that false advertisements which the respondent caused to be disseminated in such connection have constituted violations of Section 3(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder by the Commission. While the record does not disclose instances of actual sale and shipment by the respondent of his fur products to out-of-state customers and indicates instead consummation of sales at the respondent's place of business, the evidence establishes that the respondent's fur products were advertised on various occasions in a Los Angeles newspaper. Daily circulation (except Sunday) for that publication has represented approximately 332,000, of which 5,000 copies have gone outside the State of California; and Sunday circulation has approximated 686,000, of which some 40,000 have gone to subscribers or others outside the State. It is thus clear that the respondent has advertised his fur products in commerce. *Jacques De Gorter v. F.T.C.* (C.A. 9, Decided April 17, 1957.)

The respondent contends, however, that such advertising does not constitute advertising for sale in commerce of that merchandise within the meaning of the Act for the reason that evidence of interstate delivery or resale is absent. Section 3(a) forbids, among other things, "advertising or offering for sale in commerce" of fur products which are misbranded or falsely or deceptively advertised or invoiced. Its proscriptions are stated in the disjunctive. It, there-

fore, is impossible to reconcile with the language of the Act itself respondent's contention that Congress intended a sale in commerce as prerequisite to jurisdiction under Section 3(a). That "advertising . . . for sale in commerce," i.e., advertising in commerce for sale, is sufficient under the Act also is apparent from its legislative history. This subsection "makes unlawful the manufacture for introduction into commerce or the sale, advertising, or transportation in commerce of fur products which are misbranded or falsely or deceptively advertised or invoiced." (S. Rep. No. 78, 82nd Cong., 1st Sess. (1951, p. 3).

Since it is shown that the respondent has engaged in distributional and promotional activities in violation of Section 3(a) of the Act, our order which is being issued in lieu of that contained in the initial decision includes appropriate prohibitions with respect thereto.

Respondent's appeal also challenges the validity of the Commission's authority under the Act to promulgate Rule 44 of its Rules and Regulations prohibiting pricing misrepresentations with respect to fur products and furs. In the *De Gorter* case referred to above and decided subsequent to the filing by the respondent of its appeal in this proceeding, the Commission's authority to promulgate such rule was judicially approved, however. Considered by us also have been the exceptions additionally interposed under the respondent's appeal from the initial decision. Since they are related in vein to those discussed above, their denial is similarly warranted. The respondent's appeal is denied accordingly.

The appeal of counsel supporting the complaint except to the initial decision's ruling dismissing the charges under Section 3(b) of the Act. As previously noted, these charges allege that the respondent has sold, offered for sale, advertised and distributed fur products made in whole or in part of fur which has been shipped and received in interstate commerce and that such fur products were misbranded and falsely and deceptively advertised and invoiced. It was stipulated by the parties that the major portion of the respondent's fur garments have been obtained from sources outside the State of California. The appeal, however, does not except to the initial decision's finding that there is no showing of record that the respondent ever received fur skins in commerce.

It is conceded by the respondent that the prime issue presented under counsel's appeal concerns whether the offering for sale and sale of the respondent's misbranded and falsely invoiced fur products which were made in whole or part of skins shipped and received in commerce prior to acquisition by the respondent of such garments are within the purview of subsection (b). Included among the fur

Opinion

54 F.T.C.

products offered for sale by the respondent were garments made from peltries originating in Asia and Russia. It therefore is established for the purpose of this proceeding, and the Commission so finds, that included among the misbranded and falsely advertised and invoiced fur products offered for sale and sold by the respondent were garments made in whole or part of furs shipped and received in commerce prior to the respondent's receipt of those garments. Expressing the view that the Act's legislative history contains no clear indication of a contrary congressional intent, the hearing examiner, in effect, held that jurisdiction under Section 3(b) attaches only when the party charged with violation himself receives the fur skins in commerce and makes them into fur products. The respondent in opposing counsel's appeal concurs in this interpretation and contends that if the proscriptions of Section 3(b) with respect to intrastate sales were not limited to industry members processing skins shipped and by them received in commerce, then the subsection would represent an unconstitutional exercise of legislative authority by the Congress.

As to the latter contention, it is not within the province of this Commission to pass upon the constitutionality of legislation which it is charged with administering. *Engineers Public Service v. Securities & Exchange Commission*, 138 F. 2d 936, 952 (C.A. D.C., 1943). Beyond determining whether the statute is being properly interpreted and applied, we lack authority to declare further. *In the Matter of Blanton Company*, Docket No. 6197 (decided December 26, 1956). Had Congress elected however to declare unlawful local sales of misbranded fur products theretofore shipped and received in commerce, such a provision manifestly would be valid under the principles enunciated by the Supreme Court of the United States in its decision in *U.S. v. Sullivan*, 332 U.S. 689 (1947). In that case, the Court held it a valid exercise of legislative authority for Congress to forbid intrastate sales of misbranded drugs and that application thereof properly extended to situations in which local resale of the misbranded article occurred more than six months after its original shipment in commerce and wherein the local reseller also purchased in intrastate commerce the drug which he subsequently caused to be misbranded.

We deem the hearing examiner's interpretation of Section 3(b) to be erroneous. Subsection (b) explicitly provides that the manufacture, sale, advertising, offering for sale, transportation or distribution of any product made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded

or falsely or deceptively advertised or invoiced, within the meaning of the Act or duly promulgated rules, shall be unlawful. Section 3(b) is unequivocal and is not ambiguous. The words being clear, they are decisive, and there is nothing to construe. *Van Camp & Sons v. American Can Company*, 278 U.S. 245, 253 (1929). The plain meaning of the statute will prevail as long as it does not lead to absurd results or clash with policy behind the legislation. *U.S. v. American Trucking Association, Inc.*, 310 U.S. 534, 543 (1940).

Our consideration of the legislative history furthermore convinces us that the interpretation advocated in counsel's appeal squares with the policy behind the legislation. The Fur Products Labeling Act was enacted by the 82nd Congress and Section 3(b) in its present form appeared in the original drafts of relevant bills there introduced, including S. 508 and H.R. 2321. After disagreeing votes by the two Houses and report by duly designated conferees, H.R. 2321 with certain amendments was enacted by the Congress and approved on August 8, 1951. Both the 80th and 81st Congress had considered and held hearings, however, on legislative proposals relating to the marketing of furs.

The first bill in which the legislative approach reflected in subsection (b) appears to have been adopted was introduced in the House on June 15, 1949 (H.R. 5187, 81st Cong.), and passed by it on July 14, 1949. Prior to that action by the House, this Commission in response to invitations to comment on other pending bills had suggested that consideration be given to broadening their scope in order to cover products manufactured for local sale when made in whole or in part from furs purchased and received in commerce. (Printed Report of Hearings on H.R. 4292, H.R. 97 and H.R. 3755 before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st Session, pages 29-31.) The amendatory language proposed in the Commission's letters was identical to that contained in Section 3(b) as enacted two years later.

The House Committee Report recommending enactment of H.R. 5187 sets out a letter from the Federal Trade Commission, dated June 27, 1949, which commented on this subsection as follows (H.R. Rept. No. 919, 81st Cong., 1st Sess., p. 5):

Section 3(b) of the proposed bill brings within jurisdiction of the statute the furrier who manufactures his products from furs which he has received in interstate commerce and markets the finished products locally. Such amendment was suggested in our report on H.R. 3755 and is in our opinion desirable and necessary in placing local manufacturers on an equal competitive basis with out-of-state concerns.

Opinion

54 F.T.C.

Though the first sentence of this comment may appear to limit the application of the proposed subsection (as then understood by the Commission) to the case of the manufacturer of fur products who *himself* receives the component furs in interstate commerce, the succeeding sentence makes it clear that the Commission then understood that the subsection would place all local manufacturers of fur products on an equal footing with out-of-State manufacturers.* Obviously such an equalization cannot be achieved if local manufacturers of fur products who do not themselves receive their raw materials in interstate commerce are to enjoy an exemption from the statute.

The above-quoted comment makes reference to a prior Commission report on an earlier fur measure, H.R. 3755. That report, dated April 21, 1949, is also included in the House Committee Report (pp. 6-7) and is, in our estimation, of equal force in determining the intended scope of Section 3(b). Proposing the addition to H.R. 3755 of language identical with Section 3(b) of H.R. 2321, as finally enacted, the Commission wrote:

During the course of hearings on the proposed legislation, however, it would be well to consider the possibility of broadening the scope of the bill to cover locally manufactured fur products made in whole or in part from furs purchased and received in commerce. Such action is fully within the power of Congress (*United States v. Sullivan*, 332 U.S. 608 [1948], and would place local manufacturers on an equal competitive basis with out-of-State concerns * * *.

The citation of *United States v. Sullivan* as precedent for extending federal jurisdiction to "locally manufactured fur products made in whole or in part from furs purchased and received in commerce" is definitive proof that the purpose of the subsection was to reach the fur products of the local manufacturer regardless of whether he himself had been party to the interstate transaction which brought the component furs into his State.

The novel point decided in the *Sullivan* case was that the Federal prohibition against misbranded foods and drugs applied to the seller of such articles even though they had passed from the hands of him who had brought them into the State. Distinguishing the facts from those of the earlier case of *McDermott v. Wisconsin*, 228 U.S. 115, but holding the rule of that case applicable, the Supreme Court said:

[I]n the *McDermott* case the possessor of the labeled cans held for sale had himself received them by way of an interstate sale and shipment; here, while the petitioner had received the sulfathiazole by way of an intrastate sale and shipment, he bought it from a wholesaler who had received it as the direct

* In discussing the applicability of the subsection to "manufacturers" there was no intention to limit it to that class of merchant, for the subsection not only applies to the "manufacture for sale" but expressly to the "sale, advertising, offering for sale, transportation or distribution" of fur products as well.

consignee of an interstate shipment. These variants are not sufficient we think to detract from the applicability of the *McDermott* holding to the present decision. In both cases alike the question relates to the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce. The reasons given for the *McDermott* holding therefore are equally applicable and persuasive here. And many cases decided since the *McDermott* decision lend support to the validity of § 301(k). See, e.g., *United States v. Walsh*, 331 U.S. 432; *Wickard v. Filburn*, 317 U.S. 111; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110; *United States v. Darby*, 312 U.S. 100; see *United States v. Olsen*, 161 F. 2d 669. [332 U.S. at 698]

There would have been no point in citing the *Sullivan* case rather than the *McDermott* case as authority for the proposed subsection if the Commission had not intended to manifest to Congress that the subsection was drawn in terms broad enough to encompass constitutionally the extreme case of the fur merchant or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another.

Later events in the Act's history which occurred more contemporaneously with final enactment of the legislation indicate that an understanding prevailed in the enacting Congress that the area of jurisdiction conferred under the subsection extended to distributional situations other than those involved in the manufacture of fur products for local sale by the person purchasing the furs in commerce. For example, in its report of June 11, 1951, on H.R. 2321 (which with amendments subsequently was enacted by the 82nd Congress), the Committee on Interstate and Foreign Commerce of the House of Representatives described the bill as requiring mandatory invoicing of furs and labeling of fur products in interstate commerce and as applicable to furriers who manufactured fur products from furs received in interstate commerce. The report significantly added, however, that, when furs or fur products were advertised in commerce or were advertised after having been shipped and received in such commerce, the Act's affirmative requirements with respect to advertising were to be applicable. This clearly suggests an intention by Congress that the requirements prescribed in the Act were to extend not only to fur skins whose interstate journeys had terminated but also to fur products which were made of such fur skins.

Another subsequent aspect of the legislative history likewise indicating that a narrow construction of subsection (b) was not contemplated appears in connection with the proposal for certain amendments presented on the floor of the Senate on February 22, 1951. One of those amendments looked to authorizing an additional class

Opinion

54 F.T.C.

of resellers to substitute (under subsection (e)) their own labels for those originally placed thereon by the manufacturers, and the Senator sponsoring them presented a statement for the record which had been prepared by an organization of retailers. Included in the statement was the following in reference to subsection (b) :

* * * Section 3(B) confers jurisdiction on every fur product made in whole or in part of fur which has been shipped or received in commerce. This means that such a fur product remains subject to all of the provisions of the proposed law and to the jurisdiction of the Commission up to the time it reaches the ultimate consumer, irrespective of whether or not such garments pass in commerce when sold by the retailer.

Because it will afford the retailer a very important right without weakening the underlying purpose of the bill, it is respectfully urged that the proposed amendment be incorporated into the fur-labeling bill. (97 Cong. Rec. 1462 (1951).)

That amendment to subsection (e) relating to label substitution was later adopted by the Senate and in further revised form remained in the bill as ultimately enacted. It thus appears that legislative action respecting a companion subsection ensued after the advisability of such revision was urged on grounds that the sweep of subsection (b) included "every" fur product made in whole or in part of fur which had been shipped and received in commerce and on assurances that, the amendment notwithstanding, retailers would continue to be bound by the disclosure requirements of the Act. These matters occurred almost contemporaneously with the statute's enactment and their import refutes conclusions that the scope of the subsection was to be restricted to local marketing activities of furriers processing garments from furs shipped and by them received in commerce.

The express language of the subsection and the Act's legislative history support the conclusion that subsection (b) confers jurisdiction over the local marketing of every fur product processed from furs which theretofore have moved in commerce. The order issued by the Commission *In the Matter of Jacques De Gorter, et al.*, Docket No. 6297 (decided May 11, 1956), was based on this interpretation. That order was affirmed on review. *Jacques De Gorter v. Federal Trade Commission, supra*.

The hearing examiner erred in failing to make appropriate findings relating to the respondent's violation of Section 3(b) of the Fur Products Labeling Act and we are granting this aspect of the appeal of counsel supporting the complaint. The errors urged in counsel's appeal incident to denial of the motion to amend the complaint in interests of broadening its charges under Section 3(a) to conform to the proof of record have been discussed previously. Those exceptions are being granted, including counsel's additional exceptions to

the scope of the initial decision's order to cease and desist. Our findings as to the facts, responsive to the allegations of the complaint as amended, and conclusions and order to cease and desist, are separately issuing herein.

Commissioners Gwynne and Tait dissented to the decision herein.

DISSENTING OPINION

By TAIT, Commissioner:

The majority errs in holding that the jurisdiction of the Commission is likewise established under Section 3(b).

The record does not support the majority finding "that included among the misbranded and falsely advertised and invoiced fur products offered for sale and sold by the respondent were garments made in whole or part of *furs shipped and received in commerce* prior to the respondent's receipt of those garments." (Emphasis supplied.) The evidence supports nothing more than a conclusion that some of the fur products sold by respondent *contained fur of animals having normal habitat in Asia and Russia*. Whether the pelts were, in fact, from animals raised in Asia and Russia, whether the pelts themselves were subsequently shipped from these geographical areas, or whether the pelts were first made into garments and the garments subsequently shipped therefrom is purely conjectural. To infer from the mere fact that these animals normally have a foreign habitat the further fact that the pelts were shipped and received in commerce is an unwarranted assumption.

There is no evidence in this record establishing that any furs, as such, were ever "shipped and received" in commerce by anyone. It should be kept in mind, of course, that the Fur Products Labeling Act consistently distinguishes between furs and fur products.

Secondly, even if the Commission's determination as to the source of the fur were supported by the record, which it is not, there is no finding and corresponding proof that respondent was engaged in "[t]he manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce * * *."

As more fully demonstrated below, applicability of Section 3(b) hinges on local manufacture of fur products made in whole or in part of fur (the skins) which has been received in commerce by the manufacturer who distributes such garments locally. Yet the majority view is satisfied that the requirements of Section 3(b) are met as long as anyone is found to have marketed or advertised fur prod-

Opinion

54 F.T.C.

ucts (the finished garment) made from out-of-state fur by another party.

The majority rests its conclusion principally on the legislative history of that subsection; however, the comfort which the Commission seeks to derive therefrom is quite illusory. My examination of the pertinent data does, in fact, lead to a wholly different conclusion.

Above all, it was the Commission which suggested the enactment of Section 3(b) to Congress. Consequently, the reasons for the Commission's recommendation will be given great weight by the reviewing court. *United States v. American Trucking Association, Inc., et al.*, 310 U.S. 534, 549 (1940).

The need for legislative action relating to the marketing and advertising of fur products was considered by the 80th and 81st Congresses, which held hearings on various proposals. During the 81st Congress, the following bills were introduced: H.R. 97, H.R. 3755, and ultimately H.R. 5187.

In response to an official request to comment on H.R. 97, the Commission by letter of February 15, 1949, suggested to the Committee on Interstate and Foreign Commerce of the House of Representatives the advisability of expanding the purview of the legislative proposal by:

* * * broadening the scope of the bill to cover locally manufactured fur products made in whole or in part from furs purchased and received in commerce. Such action is fully within the power of Congress. (*United States v. Sullivan*, 332 U.S. 689 [1948]) and would place local manufacturers on an equal competitive basis with out-of-state concerns and might easily be accomplished by amending section 3 of the proposed bill by inserting immediately following section 3(a) the following subsection:

"(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the Rules and Regulations prescribed under Section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act." Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess., May 1949, p. 29.

And when the Commission was asked to present its views on H.R. 3755, it repeated in its letter of April 21, 1949, word for word the above-quoted February statement (Id. at 31).

The attention of the majority centers on the *Sullivan* decision, which the Commission had cited to indicate the full range of Congressional power to legislate in that twilight area of commerce where the distinction between interstate and intrastate activities often be-

comes blurred. But this is a far cry from the majority's position that the mere citing of the *Sullivan* decision manifested an intent to include under Section 3(b) "all" local manufacturers irrespective of whether they or other parties received the out-of-state fur which was to become a component part of the finished product.

Moreover, in a strained effort to push the ambit of the subsection beyond reasonable bounds, the majority seeks to bring within the scope of the provision "the fur merchant [presumably meaning the retailer] or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another."

Such a misconception should definitely and can easily be dispelled by presenting the events of 1949, as they relate to the subsection, in chronological sequence and considering them consequently in their proper perspective. Following the April letter of the Commission H.R. 5187 was introduced on June 15, 1949, and passed by the House on July 14, 1949. This bill incorporated *verbatim* subsection (b) as it had appeared in the proposed amendment to H.R. 91 and H.R. 3755; the wording of that subsection is identical with present Section 3(b). The Committee which favorably reported H.R. 5187 (Report No. 919, 81st Cong., 1st Sess.) appended a letter from the Commission dated June 27, 1949, stating in part:

Section 3(b) of the proposed bill brings within jurisdiction of the statute *the furrier who manufactures his product from furs which he has received in interstate commerce and markets the finished products locally*. Such amendment was suggested in our report on H.R. 3755 and is in our opinion desirable and necessary in placing *local manufacturers on an equal competitive basis with out-of-State concerns*. (Emphasis supplied.)

The difference between the language of the statements in the February and April letters, on the one hand, and the language of the above-quoted excerpt from the June letter, on the other hand, is striking. The February and April pronouncements merely related to local manufacturers whereas the final June response specified the local manufacturers whom the Commission intended as the target of the recommendation, i.e., those who received the out-of-state fur and subsequently marketed locally the finished products made by them. And it was the *fur-receiving* local manufacturer whom the Commission sought to place "on an equal competitive basis with out-of-State concerns."

The omission, in the above-quoted extract from the June letter, of any reference to the *Sullivan* case is also significant. If the citation of the *Sullivan* case in a previous letter is definitive proof of a sig-

Opinion

54 F.T.C.

nificant purpose, as claimed by the majority, why was this reference omitted? Clearly it would not have been omitted if it were of such importance as is now claimed.

In the June letter the emphasis conspicuously was on the words "received in interstate commerce" which the majority now simply reads out of the statute. As distinguished from Section 3(b), the focal point of the *Sullivan* provision (§ 301(k) of the Food, Drug, and Cosmetic Act of 1938) was an article "held for sale after shipment in interstate commerce." Section 3(b), however, concerns a commodity, not alone shipped but both shipped and received in interstate commerce. Thus, the language used in Section 3(b) had the effect of contracting the reach of the *Sullivan* decision which was based on the statutory term "shipment" without reference to the receipt of goods in commerce.

The Commission's proposal as embodied in Section 3(b) was submitted in order to close a loophole through which manufacturers who did not market, in commerce, fur products made of out-of-state fur received by them but who disposed of such products locally could slip away from the jurisdiction of the Commission.

The argument of the majority that its point has been proved by the Commission's citing of the *Sullivan* rather than the *McDermott* case (*McDermott v. Wisconsin*, 228 U.S. 115 (1913)) in the first two letters is misleading, for Mr. Justice Black merely discussed the *McDermott* decision in the context of the constitutionality of the Food, Drug and Cosmetic Act. The incidental fact that respondent in the *McDermott* case had received the article in commerce was not the decisive issue since only shipment, not receipt, in commerce was the test under the 1938 Act as well as under the 1906 Act, which was attacked in the *McDermott* case. Nevertheless, the majority concludes that since the Commission did not mention the *McDermott* case but did cite the *Sullivan* decision, there was evidence of the intent "to encompass constitutionally the fur merchant or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another." One can only express astonishment at such a strained deduction.

If the majority is correct, any manufacturer who would acquire out-of-state pelts through a chain of preceding purchasers years after the furs had entered the state would come within the purview of the provision. The majority contends that this effect—and I cannot possibly accept such reasoning—flows from the fact that "the subsection not only applies to the 'manufacture for sale' but expressly to the 'sale, advertising, offering for sale, transportation or distribu-

tion' of fur products as well." Does the majority seriously believe that a manufacturer does not intend to sell, does not intend to advertise, does not intend to offer for sale, does not intend to transport or distribute his product?

Be that as it may, it is simple logic that any goods shipped in commerce must likewise be received in commerce unless they are lost or destroyed in transit. It is therefore inconceivable that the words "and received" [in commerce] were added purely as linguistic embellishments of a redundant nature. It follows that neither Congress nor the Commission could have aimed indiscriminately at all consignees without considering whether or not they received the fur in commerce. Thus, the objective of Section 3(b) must have been, and continues to be, to cover exclusively those consignees who not only receive fur in commerce but also use such fur to manufacture products for marketing purposes, receipt alone being insufficient to come within the purview of that subsection.

In a further effort to bolster its contention that the scope of Section 3(b) goes beyond the statutory language and intent, the majority draws for support on a statement made in Report No. 546 of June 11, 1951, 82d Cong., 1st Sess., p. 2, which accompanied H.R. 2321, i.e., the bill finally enacted by the 82d Congress. There it is said:

It [the bill] further requires that when fur or fur products are advertised *in such commerce, or after having been shipped or received in such commerce,* these vital facts be truthfully stated in the advertising. (Emphasis supplied.)

I fail to see any reasonable relation between the above statement and the instant question of whether only a local manufacturer who made a finished garment from out-of-state fur received by him in commerce is subject to Section 3(b).

Next, the majority seeks to strengthen its view with a statement by a private organization of retailers submitted through Senator Lodge, for the record, to explain a proposed amendment to subsection (e), not subsection (b), of Section 3 dealing with label substitution and relating to S. 508, the companion bill to H.R. 2321. In the course of their presentation, the retailers incidentally mentioned that Section 3(b) conferred jurisdiction over every fur product made of fur shipped and received in commerce and that such product remained subject to all the mandatory requirements of the law regardless of whether or not such garments passed in commerce when sold by a retailer.

The majority has chosen to quote, in addition to the foregoing paraphrased version, the paragraph immediately following the re-

Opinion

54 F.T.C.

tailers' reference to Section 3(b) thus giving the impression that the latter paragraph would likewise relate to Section 3(b). Read in its proper context, that paragraph unequivocally relates not to subsection (b) but to the amendment to subsection (e) proposed by the retailers.

It is plain that the view expressed by the retailers, a private organization, was nothing more than their interpretation, to which we cannot attach any weight. In any event, the amendment which was adopted pursuant to the request of this trade group was confined to subsection (e).

Moreover, the very same subsection (e), which was the object of the amendment proposed by the retailers, clearly identifies them (certainly for present purposes) as the "person(s) selling, advertising, offering for sale or processing a *fur product** which has been shipped and received in commerce," not as persons selling, advertising, offering for sale or processing a fur product *made from fur* which has been shipped and received in commerce. The distinction between the two classes of persons is so obvious and the dissimilarity between the language of subsection (e) and the language of subsection (b) so startling as to lead to the inescapable conclusion that the latter subsection cannot and does not cover retailers. Retailers are covered by other subsections of Section 3.

Not even in the mainstay of the majority's argument, namely the February and April letters, was there the slightest intimation that Congress and the Commission intended to include retailers in the purview of Section 3(b). Throughout the legislative history of that subsection reference was made only to manufacturers.

Finally, in basing the Commission's jurisdiction on Section 3(b) as well as on Section 3(a), the majority relies on the recent decision of the Circuit Court of Appeals for the Ninth Circuit in *Jacques De Gorter and Suze C. De Gorter as individuals and as co-partners, trading as Pelta Furs v. Federal Trade Commission*, No. 15, 184 decided April 17, 1957, D. 6297 (hereinafter called the *Pelta* case).

The reason for the majority's leaning on the *Pelta* decision is the Court's unqualified affirmance of the Commission's order, which, without supporting findings to that effect, included as jurisdictional grounds Section 3(b). Yet, the reasons for assuming jurisdiction over *Pelta*, as stated in the Commission's findings, were:

* * * the activities of the respondents in procuring fur products from sources outside the State of California, and thereafter advertising and offering for sale, in newspapers of interstate circulation, and then selling and shipping and de-

* Emphasis supplied.

203

Opinion

livering such fur products in commerce clearly bring their business activities within the concept of "commerce" under the Fur Products Labeling Act. (p. 2 of the Findings As to the Facts)

And, though omitting the acts of selling and shipping and delivering fur products *in commerce*, the Commission's opinion confirmed the existence of these jurisdictional grounds as follows:

* * * Since the record clearly discloses that respondents procured fur products outside of California and thereafter advertised them in newspapers with interstate circulation, their business activities clearly come "within the concept of commerce under the Fur Products Labeling Act." We are of the opinion that the Hearing Examiner's conclusion that respondents' business activities come within the ambit of both acts is correct and is substantiated on the record.

Our conclusion that respondents are *engaged in interstate commerce*, both as defined by the Fur Products Labeling Act and by the Federal Trade Commission Act, as indicated above, and our rulings hereinafter on respondents' second plea on appeal and on the appeal of counsel in support of the complaint render it unnecessary specifically to discuss in this opinion respondents' exceptions on appeal as such. (Emphasis supplied; p. 2 of Commission's opinion)

(Respondents' first plea was that they "were not engaged in interstate commerce." Their second plea and the plea of counsel supporting the complaint related to Rule 44 matters).

The determination of the Commission is prominently characterized by the fact that its findings and its opinion, as far as they relate to the issue of jurisdiction, concerned interstate business activities. Thus for the purpose of establishing the Commission's jurisdiction, the practices which the *Pelta* respondents were charged with and found to have engaged in were violations of Section 3(a) and not Section 3(b), and the Court's findings and conclusions did not go beyond that.

The attention of the Court was focused solely on Section 3(a) when it described the object of the Act as making unlawful:

* * * the introduction, or manufacture for introduction, into commerce or the sale, advertising or offering for sale in commerce, or the transportation or the distribution in commerce, of any fur product which is misbranded or deceptively advertised or invoiced. (p. 9 of the Court's decision)

The Court, just like the Commission, did not refer anywhere in the opinion to the provisions of Section 3(b).

Nothing could more effectively reveal the Court's thinking on the question of jurisdiction than the very language of its decision:

The sales to persons residing outside California, the advertising in newspapers of interstate circulation, and the out-of-state origin of approximately one-fourth of the *products* sold, taken together, establish the fact that the petitioners were engaged *in interstate commerce* as that term is defined in the special Act under consideration and in the Federal Trade Commission Act. (Emphasis supplied; p. 16 of the Court's decision)

Opinion

54 F.T.C.

This determination follows in every respect the Commission's findings quoted above. Neither that determination nor those findings* contain the slightest reference to fur products made from fur shipped and received in commerce.

The legislative history of Section 3(b) which was not called to the attention of the Commission and the Court in the *Pelta* case and, indeed, was not presented to the Commission in the instant case, makes it eminently clear that shipping alone does not satisfy the statutory requirements for the Commission's jurisdiction. The fur must also be received in commerce by the manufacturer—the paramount condition precedent which must exist in order to invoke the application of Section 3(b).

The practice of receiving fur in commerce by local manufacturers who marketed the finished product improperly within their community was the evil at which the Commission sought to strike and was the sole reason for causing the enactment of Section 3(b).

The foregoing review and evaluation of the majority's position leave no alternative but to conclude (1) that Section 3(b) jurisdiction can be established only on a finding (absent in the instant case) that respondent has locally manufactured and distributed fur products made from fur which was received by him in commerce and (2) that violations of Section 3(b) constitute a basis for the Commission's jurisdiction wholly independent of, and entirely apart from the grounds enumerated in Section 3(a). Infractions occur under Section 3(a) in the event of interstate promotion and distribution of fur products by retailers, manufacturers and others; and under Section 3(b) in cases of intrastate advertising and marketing by only local manufacturers who make their products from fur which they receive in interstate commerce.

Chairman Gwynne concurs in this dissent.

* As well as opinion.

Decision

IN THE MATTER OF

ARTISTIC MODERN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6784. Complaint, Apr. 22, 1957—Decision, Aug. 23, 1957*

Consent order requiring a seller in New York City to cease advertising falsely that the price of chairs which regularly sold for \$124.95 and \$99.95 had been reduced to \$44.95 and \$39.95, respectively, with consequent savings to purchasers, when in fact the latter were the usual selling prices; and that the quantity of the chairs was limited.

Mr. Charles W. O'Connell for the Commission.

Artistic Modern, Inc., Harry Shapiro and Cyril Shapiro, of New York, N.Y., pro se.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the making of certain misrepresentations in connection with furniture sold by them. An agreement has now been entered into by counsel supporting the complaint and respondents which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; 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, respondents 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; that the complaint may be used in construing the terms of the order; and that the 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 hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the agree-

Decision

54 F.T.C.

ment is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Artistic Modern, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 157 East 38th Street, New York, New York. Respondents Harry Shapiro and Cyril Shapiro are individuals and officers of said corporation with their office and principal place of business the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondent Artistic Modern, Inc., a corporation, and its officers, and respondents Harry Shapiro and Cyril Shapiro, 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 sale, offering for sale, or distribution of chairs or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That any amount is the regular or usual price for merchandise when it is in excess of the price at which the merchandise offered is regularly and customarily sold in the normal course of business.
2. That any savings are afforded on the sale of merchandise, unless the represented savings are based upon the price at which the merchandise offered is regularly and customarily sold in the normal course of business.
3. That the supply of merchandise offered for sale is limited, unless such is the fact.

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 23rd day of August, 1957, 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.

Decision

IN THE MATTER OF
FREE STATE PRODUCTS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6621. Complaint, Aug. 28, 1956—Decision, Aug. 24, 1957*

Consent order requiring a manufacturer in Baltimore, Md., to cease selling punchboards and push cards to manufacturers and dealers who assembled them with assortments of candy, cigarettes, clocks, razors, cosmetics, clothing, etc., and thereafter sold the merchandise by means of the lottery devices.

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

Mr. Horace J. Donnelly, Jr., of Washington, D.C., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes hereinafter referred to as the Commission), on August 28, 1956, issued its complaint herein under the Federal Trade Commission Act against the above-named respondents, Free State Products, Inc., a corporation, and Allen B. Tabakof and Jules J. Greenspan, individually and as officers of said corporation, charging said respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondents were duly served with process. Respondents' answer was filed October 3, 1956. After several continuances for good cause had been granted upon the several or joint applications of counsel for the parties, the initial hearing was held April 12, 1957, in Washington, D.C., and a further hearing ordered to be held was subsequently canceled pending the negotiation by the parties of an agreement containing a consent order to cease and desist.

On July 2, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between each of the respondents and John W. Brookfield, Jr., counsel supporting the complaint, and Horace J. Donnelly, Jr., counsel for respondents, under date of June 21, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by the Director and Assistant Director of the Commission's Bureau of Litigation.

Decision

54 F.T.C.

On due consideration of the said Agreement Containing Consent Order To Cease And Desist, the hearing examiner finds that said agreement both in form and content is in accord with said Section 3.25 of the Rules of Practice and Procedure of the Commission and that by said agreement the parties have specifically agreed that:

1. Respondent, Free State Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 425 Eastern Avenue, in the City of Baltimore, Maryland. Respondent, Allen B. Tabakof is president and respondent, Jules J. Greenspan is vice-president and secretary of said corporate respondent. Said individual respondents formulate, direct and control the policies, acts and practices of respondent corporation and have their office and place of business at the same address as that of corporate respondent.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 28, 1956, issued its complaint in this proceeding against respondents and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

- a. Any further procedural steps before the hearing examiner and the Commission;
- b. The making of findings of fact or conclusions of law; and
- c. All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. 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.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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 parties have further specifically agreed that the proposed order to cease and desist included in said agreement may be entered in this proceeding by the Commission without further notice to respondents; 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.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That the respondent Free State Products, Inc., a corporation, and its officers, and respondents Allen B. Tabakof, Jules J. Greenspan, individually and as officers of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punch boards, or other lottery devices which are designed or intended to be used in the sale and distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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 24th day of August, 1957, become the decision of the Commission; and, accordingly:

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

Decision

54 F. T. C.

IN THE MATTER OF

JACOB SCHACHTER TRADING AS J. SCHACHTER

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS*Docket 6762. Complaint, Apr. 4, 1957—Decision, Aug. 24, 1957*

Consent order requiring a manufacturer in New York City to cease labeling bed comforters falsely as to the wool and other fiber content and failing to label them as required, in violation of the Wool Products Labeling Act; and to cease representing falsely on advertising streamers and inserts enclosed in individual containers of the comforters that the filling was 100% new material, that the comforters were treated with Westinghouse ultra-violet ray lamps, and that a fictitious and excessive figure was the usual retail price.

Mr. Harry E. Middleton, Jr., for the Commission.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that Jacob Schachter, erroneously referred to in the complaint as "Jacob Schachter," trading as J. Schachter, hereinafter called respondent, violated the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act, and the Rules and Regulations promulgated thereunder, in the operation of his business.

After issuance and service of the complaint, counsel supporting the complaint and the respondent entered into an agreement for a consent order. The agreement has been approved by the Director and Assistant Director of the Bureau of Litigation. The order corrects the misspelling of respondent's name and disposes of the matters complained about.

The material provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement; and the signing of said agreement is for settlement purposes only and does not consti-

tute 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 the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. The respondent Jacob Schachter, erroneously referred to in the complaint as Jacob Schacter, does business under the name of J. Schachter, and his office and principal place of business is located at 115 Allen Street, New York, New York.

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 Jacob Schachter, an individual trading as J. Schachter or trading under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of bed comforters or other "wool products," as such products are defined in and subject to said Wool Products Labeling Act, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool" as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

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

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

Decision

54 F. T. C.

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

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

It is further ordered, That respondent Jacob Schachter, trading as J. Schachter or trading under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bed comforters or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Representing in any manner that bed comforters or other products are "Westinghouse Ultra-Violet Treated" or treated in any other manner, when such is not the fact.

2. Representing, on labels or in any other manner, that certain amounts are the usual and regular retail prices of products when such amounts are in excess of the prices at which the products are usually and regularly sold at retail.

3. Putting into operation any plan whereby retailers or others may misrepresent (a) the regular and usual retail price of merchandise, and (b) the character, quality or treatment of the materials in such merchandise.

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 24th day of August, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Jacob Schachter (erroneously referred to in the complaint as Jacob Schacter), an individual trading as J. Schachter, 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.

Decision

IN THE MATTER OF
NUSSBAUM AND DONNENFELD, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 6782. Complaint, Apr. 18, 1957—Decision, Aug. 27, 1957*

Consent order requiring a furrier in New York City to comply with the labeling and invoicing requirements of the Fur Products Labeling Act.

Mr. Michael J. Vitale and *Mr. Thomas A. Ziebarth* for the Commission.

Mr. Milton Horowitz, of New York, N.Y., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on April 18, 1957, charging Respondents with misbranding and falsely and deceptively invoicing their fur products, in violation of § 4(2) and § 5(b)(1) of the Fur Products Labeling Act, Rule 40(a) of the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act.

On June 18, 1957, Respondents, their counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent Nussbaum and Donnenfeld, Inc. is identified in the agreement as a New York corporation, with its office and principal place of business located at 135 West 29th Street, New York, New York, and individual Respondents Harry Nussbaum and Max Donnenfeld, respectively, as president and treasurer thereof, having the same address.

Respondents admit all the jurisdictional facts alleged in the complaint and agree 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, waive any further procedure before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Com-

mission shall be based consist solely of the complaint and the agreement; that the order to cease and desist as contained in the agreement 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; that the complaint herein may be used in construing the terms of said order; and that the 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.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the Hearing Examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Nussbaum and Donnenfeld, Inc., a corporation, and its officers, and Harry Nussbaum and Max Donnenfeld, 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 manufacture for introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of any fur product which has 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. 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 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, 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;
 - (g) The item numbers or marks assigned to the fur products as required under Rule 40(a) of the Rules and Regulations;
- B. Falsely or deceptively invoicing fur products by:
- 1. Failing to furnish invoices to purchasers of 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 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;
 - (g) The item numbers or marks assigned to fur products as required under Rule 40(a) of the Rules and Regulations.

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 August, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Nussbaum and Donnenfeld, Inc., a corporation, and Harry Nussbaum and Max Donnenfeld, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Decision

54 F.T.C.

IN THE MATTER OF

ALLEN WAUGH TRADING AS ALLEN WAUGH

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

Docket 6777. Complaint, Apr. 16, 1957—Decision, Aug. 28, 1957

Order requiring a furrier in San Francisco, Calif., to cease violating the Fur Products Labeling Act by falsely identifying furs in advertising and labeling with respect to the animals producing them, and failing to conform to labeling and invoicing requirements of the Act; by advertising which failed to disclose the names of animals producing certain furs or that certain products were composed of used or artificially colored fur, and which falsely represented prices as reduced and misrepresented percentage savings; and by failing to maintain adequate records on which the pricing claims were based.

*Daniel J. Murphy, Esq., for the Commission.
Respondent, pro se.*

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On April 16, 1957, the Federal Trade Commission issued its complaint against Allen Waugh (hereinafter called respondent), charging him with misbranding and falsely and deceptively invoicing and advertising certain fur products in violation of the provisions of the Fur Products Labeling Act (hereinafter called the Fur Act), 15 U.S.C. 69(a), *et seq.*, and the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint, together with a notice of hearing, were duly served upon respondent.

Thereafter, pursuant to the provisions of Sec. 3.7(a)(2) of the Commission's Rules and Regulations promulgated under the Act and also set forth in the complaint, respondent filed an answer admitting all the material allegations of the complaint and waiving hearing, but reserving the right to submit proposed findings and conclusions and to appeal from the initial decision under § 3.22 of said Rules.

Pursuant to leave granted, proposed findings of fact, conclusions of law, order and reasons in support thereof were received from counsel supporting the complaint but not from respondent.¹

¹ All of the findings and conclusions proposed by counsel supporting the complaint have been adopted herein. 5 U.S.C. § 1007(b).

Upon the entire record in the case, the undersigned makes the following:

FINDINGS OF FACT

Respondent is an individual trading as Allen Waugh, with his office and principal place of business located at 51 Grant Avenue, San Francisco, California.

Subsequent to the effective date of the Fur Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which were made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce," "fur" and "fur products" are defined in the Fur Act.

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

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

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

(a) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder was set forth in abbreviated form in violation of Rule 4 of the aforesaid Rules and Regulations.

(b) Respondent affixed labels to fur products which did not comply with the minimum size requirements of $1\frac{3}{4} \times 2\frac{3}{4}$ inches in violation of Rule 27 of the aforesaid Rules and Regulations.

(c) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder was mingled with non-required information in violation of Rule 29(a) of the aforesaid Rules and Regulations.

(d) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder was not completely set forth on one side of the labels in violation of Rule 29(a) of the aforesaid Rules and Regulations.

(e) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder was set forth in handwriting on

Findings

54 F.T.C.

labels in violation of Rule 29(b) of the aforesaid Rules and Regulations.

(f) An item number was not set out on the label of each fur product, in violation of Rule 40 of the aforesaid Rules and Regulations.

Certain of said fur products were misbranded in violation of § 3(e) of the Fur Act in that respondent, following receipt thereof in commerce, removed the original manufacturer's label and thereafter substituted his own, which substituted labels were false and deceptive in that they failed to include all of the information required by § 4(2) of the said Act.

Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by § 5(b)(1) of the Fur Act and in the manner and form prescribed by the Rules and Regulations thereunder.

Certain of said fur products were falsely and deceptively invoiced in that respondent on invoices, furnished to purchasers of said fur products, set forth the name of an animal other than the name of the animal that produced the fur, in violation of § 5(b)(2) of the Fur Act and the Rules and Regulations thereunder.

Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Act in that they were not invoiced in accordance with the Rules and Regulations thereunder in that:

(a) Information required under § 5(b)(1) of the Fur Act and the Rules and Regulations thereunder was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations.

(b) The term "blended" was used as part of the required information to describe the pointing, bleaching, dyeing or tip-dyeing of furs, in violation of Rule 19 of the aforesaid Rules and Regulations.

Certain of said fur products were falsely and deceptively advertised in violation of the Fur Act in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of § 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid and did aid, promote and assist, directly and indirectly, in the sale and offering for sale of said fur products.

Among and included in said advertisements, but not limited thereto, were advertisements of the respondent published in the January 18 and March 25, 1956 issues of the Oakland Tribune, a newspaper

published in the City of Oakland, State of California and having a substantial circulation in said State and various other States of the United States.

By means of said advertisements, as well as others of similar import not specifically referred to herein, respondent falsely and deceptively advertised his 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 product as set forth in the Fur Products Name Guide, in violation of § 5(a)(1) of the Fur Act;

(b) Failed to disclose that fur products were composed of used fur when such was the fact, in violation of § 5(a)(2) of the Fur Act;

(c) Failed to disclose that certain fur products contained or were composed of bleached, dyed, or otherwise artificially colored fur, when such was the fact, in violation of § 5(a)(3) of the Fur 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 § 5(a)(5) of the Fur Act;

(e) Failed to use the term "secondhand used fur," where applicable, in violation of Rules 21 and 23 of the Rules and Regulations;

(f) Represented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondent in the recent regular course of his business, in violation of § 5(a)(5) of the Fur Act and Rule 44(a) of the Rules and Regulations promulgated thereunder;

(g) Used comparative prices and percentage savings claims which were not based on current market values and which failed to give a designated time of a *bona fide* compared price, in violation of § 5(a)(5) of the Fur Act and Rule 44(b) of the Rules and Regulations thereunder;

(h) Represented "\$100,000 of furs now priced at \$50,000" when such representation was not true in fact, in violation of § 5(a)(5) of the Fur Act and Rule 44(d) of the Rules and Regulations promulgated thereunder.

Respondent in making the pricing claims and representations, referred to in subparagraphs (f), (g) and (h) of the foregoing paragraph herein, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44(e) of the aforesaid Rules and Regulations.

Order

54 F.T.C.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of his business in commerce, as "commerce" is defined in the Fur Act.

2. The acts and practices of respondent hereinabove found are in violation of the Fur Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Act.

3. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondent.

ORDER

It is ordered, That respondent Allen Waugh, an individual doing business as Allen Waugh or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of fur products, 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 Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured;

2. Failing to affix labeling to fur products showing:

(a) The name or names of the animal or animals 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 the fact;

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

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

236.

Order

commerce, sold it in commerce, advertised or offered it for sale, or transported or distributed it in commerce;

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

3. Setting forth on labels attached to fur products:

(a) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder in abbreviated form or in handwriting;

(b) Information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder mingled with non-required information;

4. Affixing labels to fur products which do not comply with the minimum size requirements of $1\frac{3}{4}$ inches by $2\frac{3}{4}$ inches;

5. Failure to show on labels attached to fur products all of the information required under § 4(2) of the Fur Act and the Rules and Regulations thereunder on one side of such labels;

6. Failure to set forth on labels pertaining to fur products an item number or mark assigned to such products;

B. Falsely or deceptively invoicing fur products by:

1. Failure to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals 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 the fact;

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

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

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

(f) The name of the country of origin of any imported fur contained in a fur product;

2. Setting forth information required under § 5(b)(1) of the Fur Act and the Rules and Regulations thereunder in abbreviated form;

3. Using the term "blended" to describe the pointing, bleaching, dyeing or tip-dyeing of furs;

C. 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:

Decision

54 F. T. C.

1. Fails to disclose:

(a) The name or names of the animal or animals 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 the fact;

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

(d) That the fur product is composed of "secondhand used fur," when such is the fact;

2. Contains the name or names of any animal or animals other than the name or names provided for in Paragraph 5(a)(1) of the Fur Act;

3. Represents directly or by implication:

(a) That the regular or usual price of any fur product is any amount which is in excess of the price at which such products were sold in the recent regular course of his business;

(b) The value of fur products when such claims and representations are not true in fact;

4. Makes use of comparative prices or percentage savings claims unless such compared prices or percentage savings are based upon current market values or unless a *bona fide* price at a designated time is stated;

5. Makes pricing claims and representations of the types referred to in subparagraphs 3(a) and (b) and 4 above, unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based, as required by Rule 44(e) of the Rules and Regulations;

D. In substituting labels affixed to fur products which have been shipped to and received by respondent in commerce, misbranding such products in any of the respects set forth in Paragraph A 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 28th day of August, 1957, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF
THE CARL COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6787. Complaint, Apr. 30, 1957—Decision, Sept. 3, 1957*

Consent order requiring sellers in Lisbon, Ohio, of printed matter for use by creditors and collection agencies, to cease using forms or letters which did not clearly state that their purpose was to obtain information concerning delinquent debtors, using the name "Meridian Reserve Fund" to describe their business, and representing falsely that money was being held for persons concerning whom information was sought.

Mr. C. W. O'Connell for the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 30, 1957, issued and subsequently served its complaint in this proceeding against respondents The Carl Company, a corporation existing and doing business under and by virtue of the laws of the State of Ohio, Joyce L. Tuseck and Frank J. Tuseck, individually and as president and secretary-treasurer, respectively, of the corporate respondent. The office and principal place of business of said corporate respondent and said individual respondents is located at 108 West Washington Street, Lisbon, Ohio.

On July 10, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official

Order

54 F.T.C.

record unless and until it becomes a part of the decision of the Commission; that the 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; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it 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.

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

1. Respondent The Carl Company is a corporation existing and doing business under the laws of the State of Ohio, with its office and principal place of business located at 108 West Washington Street, Lisbon, Ohio. Respondents Joyce L. Tuseck and Frank J. Tuseck are individuals and officers of said corporation, with their office and principal place of business the same as that of the corporate respondent.

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

ORDER

It is ordered. That respondent The Carl Company, a corporation, and its officers, and respondents Joyce L. Tuseck and Frank J. Tuseck, 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 business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distribution of forms, or other materials, for use in obtaining information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, any forms, letters, questionnaires, or material printed or written, which do not clearly and expressly state that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.

2. Using thereon the name "Meridian Reserve Fund" or using any other name of similar import to designate, describe, or refer to respondents' business.

3. Representing, or placing in the hands of others any means of representing, directly or by implication, that money is being held for persons concerning whom information is sought, or is collectible by such persons, unless money is in fact due and collectible by such persons and the amount of such money is accurately stated.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of September, 1957, 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.

Complaint

54 F.T.C.

IN THE MATTER OF

ARKANSAS CITY COOPERATIVE MILK
ASSOCIATION, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(a) OF THE CLAYTON ACT*Docket 6639. Complaint, Sept. 24, 1956—Decision, Sept. 4, 1957*

Consent order requiring a cooperative marketing association of some 2,000 dairy farmers in Kansas and Oklahoma to cease discriminating in the price of fluid milk in violation of Sec. 2(a) of the Robinson-Patman Act by charging wholesale customers in Arkansas City prices ranging from 1¢ to 3¢ less per quart than it charged their competitors—mostly retail grocers—throughout the rest of its territory comprising a 50-mile radius of Arkansas City; and by reducing by 13¢ per gallon the price of milk it delivered to private homes, in which retail sale it was in competition with two local cash-and-carry dairies and with retail grocery stores.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and more particularly designated and described hereinafter, have violated and are now violating the provisions of Section 2(a) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Arkansas City Cooperative Milk Association, Inc., sometimes hereinafter referred to as respondent Co-op, is a cooperative marketing association organized and existing under the laws of the State of Kansas with its principal office and place of business located at 615 West Chestnut Avenue, Arkansas City, Kansas. Respondent Co-op is composed of approximately 2,000 members who are dairy farmers located in the States of Kansas and Oklahoma.

The control, direction and management of respondent Co-op's affairs, policies, practices and actions are vested in respondent Co-op's officers, directors and members. Respondents Homer S. Call, Carl Fitzgerald, Ivan J. Scott and John Weir, Jr., are officers, directors and members of respondent Co-op and are sometimes hereinafter referred to as respondent officials.

The membership of respondent Co-op constitutes a class so numerous and changing as to make it impracticable to specifically name each member as a party respondent herein. Therefore, there

are named and included as respondents herein the respondent officials in their individual and official capacities and since they are likewise members of respondent Co-op and are fairly representative of the entire membership, they are also named as representative of all the members of respondent Co-op as a class so that those members not specifically named are also made parties respondent herein.

The principal office and place of business of each of respondent officials is in care of respondent Arkansas City Cooperative Milk Association, Inc., 615 West Chestnut Avenue, Arkansas City, Kansas.

PAR. 2. Respondent Co-op was organized in 1933 and has been and is now engaged in the purchase of fluid milk and in the processing, sale and distribution of milk and other dairy products. It is primarily engaged in the production and sale of dairy products, including, but not restricted to, butter, cheese and ice cream. It sells bottled and packaged Grade "A" milk, having a butter fat content of approximately 3.5, at both wholesale and retail and it operates and maintains home delivery service to consumer customers in Arkansas City only, which is located three miles north of the Kansas-Oklahoma line. Its wholesale customers, to whom it also makes delivery, consist primarily of grocery stores reselling to the public.

For the past 4 years the total annual sales of respondent Co-op for all products have ranged between \$2,500,000 and \$3,000,000, with sales of bottled milk amounting to approximately \$450,000 to \$500,000.

PAR. 3. Respondent Co-op, in the course and conduct of its said business, is engaged in commerce as "commerce" is defined in the Clayton Act in that it sells and distributes fluid milk and other dairy products to purchasers thereof located in states other than the state of origin of shipment and causes such products when sold to be shipped and transported from its place of business in the State of Kansas to purchasers located in the State of Oklahoma. There is now and has been a constant course and flow of trade and commerce in such products between respondent Co-op in the State of Kansas and purchasers located in the State of Oklahoma, as well as in the State of Kansas.

Respondent Co-op is an instrumentality in the current of interstate commerce and is subject to the jurisdiction of the Federal Trade Commission.

Respondent officials, through the medium of respondent Co-op, in formulating the policies and directing the operations and activities thereof, are engaged in interstate commerce and are subject to the jurisdiction of the Federal Trade Commission.

PAR. 4. In the course and conduct of its said business respondent Co-op has been and is now in competition with others in the sale

Complaint

54 F.T.C.

and distribution in commerce of fluid milk and other dairy products, except as such competition has been substantially lessened by the pricing practices of respondent Co-op, as hereinafter alleged.

Some of the customers of respondent Co-op are in competition with each other and with customers of competitors of respondent Co-op in the purchase and resale of fluid milk and other dairy products.

PAR. 5. Respondent Co-op has been for several years last past, and is now, directly or indirectly, discriminating in price between different purchasers of its bottled or packaged fluid milk by selling such products to some purchasers at substantially higher prices than it sells such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products.

Respondent Co-op has charged and now charges prices for the sale of fluid milk in various places in its area of operations in the States of Kansas and Oklahoma, which have been and are now substantially higher than those charged by respondent for the same grade and quality of milk sold and distributed in Arkansas City. Such lower prices in Arkansas City have been and are to the injury of competitors of respondent Co-op and also to the injury of those purchasers who are charged the higher prices and are in competition in the resale of such products with the purchasers receiving the benefit of the lower prices.

PAR. 6. The respondent Co-op has priced and sold its bottled and packaged fluid milk in quart, half gallon and gallon size containers in the trade area of Arkansas City to purchasers thereof at wholesale prices ranging from 1¢ to 3¢ per quart less than is charged for the same product in the same size and kind of containers sold at wholesale to other purchasers located in places as near as 3 miles to Arkansas City and to still other purchasers located in various places in Kansas and Oklahoma within a radius of approximately 50 miles of Arkansas City, with most of such purchasers being engaged in the retail grocery business.

PAR. 7. Among the competitors of respondent Co-op is an independent dairy located in Arkansas City. Such competitor has been for several years last past and is now engaged in the sale of fluid milk and other dairy products on a cash and carry basis, as well as on a delivery basis at wholesale. In or about August 1954 respondent Co-op reduced its prices for bottled or packaged fluid milk for sale in Arkansas City only, to the extent of 3¢ per quart. At the same time respondent sold its fluid milk of the same grade and

quality to purchasers located in all other places within its sphere of operations at wholesale prices amounting to 3¢ per quart higher than those at which it sold milk of the same grade and quality to its Arkansas City purchasers.

Respondent Co-op, while maintaining one schedule of prices for bottled or packaged fluid milk in all the various places within the States of Kansas and Oklahoma in which it does business, has, at the same time, in the area of Arkansas City only, substantially reduced the prices of such products.

Respondent Co-op has continued to maintain a differential between the prices at which it sells its fluid milk at wholesale to purchasers in Arkansas City and those at which it sells the identical products in places other than Arkansas City. Such differential has been from 2¢ to 3¢ per quart below this respondent's prices at which it sold the identical products at wholesale in all other towns and places within its sphere of operations.

PAR. 8. In addition to its wholesale business, respondent Co-op sells its dairy products, including fluid milk, at retail only in Arkansas City. There it operates and maintains a delivery service to private homes. In so selling the respondent Co-op is in competition with two local dairies in that these competitors also sell fluid milk to the consuming public but on a cash and carry basis. Furthermore, said respondent, in this phase of its business, competes with retail grocery stores who resell to the public in Arkansas City and nearby areas. In 1954 respondent Co-op reduced its retail fluid milk prices in Arkansas City by 13¢ per gallon delivered to the purchaser which price was less than its competitors' prices for the sale of fluid milk on a cash and carry basis.

PAR. 9. The discriminations in price on the part of respondent Co-op being substantial, it is alleged that the effect thereof may be substantially to lessen competition and to tend to create a monopoly in the respective lines of commerce in which respondent and the purchasers receiving the preferential prices are engaged and to tend to injure, destroy, and prevent competition between respondent and its competitors and between and among purchasers of the afore-described products from respondent.

Furthermore, the aforesaid discriminatory pricing practices of respondent Co-op have an additional tendency of adversely affecting the business of those dairy farmers who supply fluid milk to the competitor or competitors of respondent Co-op who are also engaged in the sale of milk in the Arkansas City area.

Decision

54 F.T.C.

PAR. 10. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Lewis F. Depro for the Commission.
Templar, Wright and Templar, by *Mr. George Templar*, of Arkansas City, Kans., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on September 24, 1956, charging Respondents with violation of the provisions of § 2(a) of the Clayton Act (U.S.C. Title 15, § 13) as amended by the Robinson-Patman Act, approved June 19, 1936, by unlawful discrimination in price in the sale of their bottled and packaged fluid milk.

On June 4, 1957, Respondent Arkansas City Cooperative Milk Association, Inc., by its President, Homer S. Call; Respondent Carl Fitzgerald; their counsel; and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent Arkansas City Cooperative Milk Association, Inc. is identified in the agreement as a Kansas corporation, with its office and principal place of business located at 615 West Chestnut Avenue, Arkansas City, Kansas, and Respondent Carl Fitzgerald as an individual and manager of the respondent corporation, and having the same address as the respondent corporation.

As to Respondents Homer S. Call, Ivan J. Scott, and John Weir, Jr., named in the complaint individually, as representative of all the members of the corporate respondent cooperative, and as officers and directors thereof, the agreement sets forth a stipulation that the complaint be dismissed insofar as it relates to these three Respondents in their individual and representative capacities. The parties to the agreement state therein that the reason for such dismissal of the complaint as to these Respondents is the belief that adequate relief will be secured by an order directed to the corporation, its officers, directors, representatives, agents and employees, and to Respondent Carl Fitzgerald, who personally directed the operations of the respondent corporation.

Respondents Arkansas City Cooperative Milk Association, Inc., and Carl Fitzgerald admit all the jurisdictional facts alleged in the complaint; agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; and waive any further procedure before the Hearing Examiner

and the Commission, the making of findings of fact or conclusions of law, and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

All signatory parties 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 the agreement; that the order to cease and desist as contained in the agreement 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; that the complaint herein may be used in construing the terms of said order; and that the 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.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the Hearing Examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That respondent Arkansas City Cooperative Milk Association, Inc., a corporation, its officers, directors, representatives, agents, and employees, and respondent Carl Fitzgerald, individually and as manager of respondent Arkansas City Cooperative Milk Association, Inc., directly or through any corporate or other device, in connection with the sale of fluid milk in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in price by selling fluid milk of like grade and quality to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce:

(1) where such lower price undercuts the price at which the purchaser charged the lower price may purchase fluid milk of like grade and quality from another seller; or

(2) where any purchaser who does not receive the benefit of the lower price does in fact compete in the resale of such product with the purchaser who does receive the benefit of the lower price.

It is further ordered, That the complaint herein, insofar as it relates to respondents Homer S. Call, Ivan J. Scott, and John Weir, Jr., be, and the same hereby is, dismissed as to them individually

Decision

54 F.T.C.

and as representative of the entire membership of Arkansas City Cooperative Milk Association, Inc.

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 4th day of September, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Arkansas City Cooperative Milk Association, Inc., a corporation, and respondent Carl Fitzgerald, individually and as manager of respondent Arkansas City Cooperative Milk Association, Inc., 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.

Complaint

IN THE MATTER OF
THE VENDO COMPANYCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT

Docket 6646. Complaint, Oct. 11, 1956—Decision, Sept. 5, 1957

Consent order requiring the nation's largest manufacturer of soft drink vending machines, with main office in Kansas City, Mo., to make available to competitors the patents for coin-operated vending machines which it acquired by absorbing a major competitor, Vendorlator Manufacturing Company, of Fresno, Calif.; prohibiting it from acquiring for 10 years the capital stock or assets of any company in the United States making or selling vending machines built to dispense bottled drinks; and prohibiting it, after one year, from manufacturing vending machines under the Vendorlator patents except for replacement purposes, and from using on goods it makes or sells the trade-mark "VMC", to which it is to retain title and which it is to permit others to use on machines produced under the Vendorlator patents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent The Vendo Company (hereinafter referred to as "respondent") is a corporation organized and existing under the laws of the State of Missouri with its office and principal place of business at 7400 E. 12th Street, Kansas City, Missouri.

PAR. 2. Vendorlator Manufacturing Company (hereinafter referred to as "Vendorlator") is, or at all times pertinent herein was, a corporation organized and existing under the laws of the State of California with its office and principal place of business at 2550 S. Railroad Avenue, Fresno, California.

PAR. 3. Respondent is engaged in the production and sale of a variety of products in commerce, as "commerce" is defined in the Clayton Act. In the year ending December 31, 1955, respondent's sale of all products aggregated approximately \$20,700,000. Such production and sale in commerce included the production and sale of coin operated vending machines built to dispense bottled soft drinks. In the year ending December 31, 1955, respondent's sales of these products aggregated approximately \$11,500,000. Respondent

is, and prior to the acquisition described in Paragraph 5 hereof was the largest manufacturer of coin operated vending machines built to dispense bottled soft drinks in the United States.

PAR. 4. Prior to September 18, 1956, Vendorlator was engaged in the production and sale of a variety of products in commerce, as "commerce" is defined in the Clayton Act. In the year ending June 30, 1955, Vendorlator's sales of all products aggregated approximately \$11,000,000. Such production and sale in commerce included production and sale of coin operated vending machines built to dispense bottled soft drinks. In the year ending June 30, 1955, Vendorlator's sale of these products aggregated approximately \$7,000,000.

PAR. 5. There are approximately 16 companies in the United States engaged in the manufacture and sale of coin operated vending machines built to dispense bottled soft drinks. The combined sales of the respondent and Vendorlator for the year 1955 and for many years last past have accounted for over 50% of the market involved.

PAR. 6. On or about September 18, 1956, respondent acquired all the outstanding capital stock, assets and business of Vendorlator, including its patents and good will, in exchange for 267,464 shares of common stock of Vendo. The former shares of common stock of Vendorlator were eliminated and cancelled and Vendorlator was merged into The Vendo Company. Prior to said acquisition respondent and Vendorlator were competitors in the production and sale of coin operated vending machines built to dispense bottled soft drinks in the United States.

PAR. 7. The acquisition of the stock and assets of Vendorlator by respondent, as above described, may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of coin operated vending machines built to dispense bottled soft drinks in the United States.

PAR. 8. The foregoing acquisition, acts and practices of respondent as hereinbefore alleged and set forth constitute a violation of Section 7 of the Clayton Act. (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. John T. Walker and Mr. Joseph P. Dufresne for the Commission.

Covington & Burling, by *Mr. Harry L. Shniderman*, of Washington, D.C., and *Gage, Hillix, Moore, Park & Jackson*, of Kansas City, Mo., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act, Section 7, (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and Sec. 11 of said act (U.S.C. Title 15, Sec. 21), the Federal Trade

Commission on October 11, 1956, issued and subsequently served its complaint in this proceeding against respondent The Vendo Company, a corporation existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 7400 East Twelfth Street, Kansas City, Missouri.

After a number of hearings for the reception of evidence in support of the allegations of the complaint, all counsel jointly moved for a suspension of further hearings under the provisions of 3.25 of the Rules of Practice, which motion was granted for two weeks and thereafter, on July 24, 1957, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; waives the making of findings of fact and conclusions of law; and waives all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; 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.

Said agreement provides that it stems from disclosures at hearings before the hearing examiner in this proceeding to the effect that the acquisition questioned in the complaint arose out of the patent controversy between respondent and the former Vendorlator Manufacturing Company (now Fresno V Company), and that prior to the acquisition by respondent of the assets of the former Vendorlator Manufacturing Company, the latter had committed most of its production facilities to producing machines infringing a basic patent owned by Vendo and had actually manufactured and sold infringing machines in substantial quantities.

Said agreement provides that it is contended by respondent that the Vendorlator Manufacturing Company successfully competed in the manufacture and sale of vending machines built to dispense bottled drinks only because of its infringement of a basic patent

Decision

54 F. T. C.

held by The Vendo Company and, that upon prosecution of its rights under the patent Vendo would have eliminated Vendorlator as a significant competitive entity in this line of commerce. Although the validity of respondent's patent and the claimed infringement by the Vendorlator Manufacturing Company were not adjudicated, a showing was made in the record that the Vendorlator Manufacturing Company probably had infringed upon a basic patent of respondent for a period of about two years, and at the time of the acquisition, more than eighty percent of the production of the Vendorlator Manufacturing Company was of such machines, and it, therefore, appears that the only assets that respondent should be required to divest are those relating to the production of non-infringing machines by the Vendorlator Manufacturing Company. The only important assets which are in this category and which would be of significant value to an actual or potential competitor of respondent are believed to be the patents dealt with in the order herein contained.

The following order requires the respondent to make available to the public all the patents acquired from Vendorlator Manufacturing Company. In the light of all the circumstances it would appear that the order is in the public interest and that competition would be stimulated by requiring the respondent to license to interested parties, whether they are existing competitors or new entries in the field, the former Vendorlator patents rather than sell them under an order of divestiture, which would have the effect of again limiting the availability of these patents to a single manufacturer.

Such agreement provides that the following order may be entered in this proceeding by the Commission without further notice to respondent. When so entered it 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.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide the best possible basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent The Vendo Company, is a corporation existing and doing business under the laws of the State of Missouri, with its office and principal place of business located at 7400 East Twelfth Street, Kansas City, Missouri.

The Vendorlator Manufacturing Company, a wholly-owned subsidiary of The Vendo Company, is a corporation existing and doing

258

Order

business under the laws of the State of California, with its office and principal place of business at 2550 South Railroad Avenue, Fresno, 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

Respondent, The Vendo Company, *Is hereby ordered and directed* as follows:

1. *Divestiture of Patents.* Respondent shall divest itself of the exclusive right to manufacture, use or sell machines under the teachings of the following three groups of patents acquired in the purchase of assets challenged by the complaint:

(a) Patents relating to models based on the opensided cylinder design (Models VMC-149, VMC-190, VMC-231, VMC-242, VMC-302, and VMC-340) :

<i>Patent Number</i>	<i>Title</i>
2,290,275 -----	Bottle Vending Machine
2,597,290 -----	Retainer for Vendable Merchandise
2,693,300 -----	Vending Machine
2,680,049 -----	Delivery and Retaining Mechanism for Merchandise Dispensing Apparatus

(b) Patent relating to models based on the rotating basket design (Models VMC-27 and VMC-33) :

<i>Patent Number</i>	<i>Title</i>
2,610,100 -----	Coin Controlled Vending Machine

(c)

<i>Patent Number</i>	<i>Title</i>
2,307,450 -----	Vending Machine
2,391,866 -----	Circuit Controller
2,482,245 -----	Dispensing Apparatus
2,633,958 -----	Dispensing Apparaus
2,648,417 -----	Coin-Controlled Mechanism
2,667,880 -----	Coin Changing Mechanism
2,675,901 -----	Coin Control Protective System for Vending Machines
2,727,654 -----	Coin Conditioned Selective Vending Machine

Respondent shall accomplish such divestiture by offering any applicant, for any one or more of the above patents or group of patents, a non-exclusive license to make, use and sell machines under the teachings of the patent or patents involved. Upon receipt of a written request for a license under the provisions of this paragraph, respondent shall advise the applicant in writing of the royalty which

it deems reasonable for the patent or group of patents involved in the request. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date the written request is received by respondent, the applicant therefor shall have the right to submit the question of reasonable royalty to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect, and the respondent shall consent to such arbitration. Unless the parties to the arbitration proceeding agree upon an arbitrator within thirty (30) days after the applicant has initiated the arbitration proceeding, a single arbitrator shall be appointed by the American Arbitration Association in accordance with its rules then obtaining; the award of the arbitrator shall be final and binding upon both parties. The reasonable royalty, as once finally determined by the arbitrator, shall apply to all licenses of the same patent or group of patents thereafter granted, and any licensee who had previously obtained a license under the patent or group of patents shall have the right, at his option, to have the royalty rate determined by the arbitrator applied retroactively to the date of the application to the arbitrator which resulted in such determination.

(d) Beginning one year after the effective date of this order, respondent shall discontinue manufacturing any vending machines, or parts thereof, except those made specifically for replacement use, under any of the patents listed above in parts (a) and (b).

2. *Divestiture of Exclusive Use of Trade-mark.* Beginning one year after the effective date of this order, respondent shall not employ the trade-mark "VMC" on goods which it manufactures or sells. Respondent shall retain title to the trade-mark "VMC," and shall permit any licensee under the provisions of paragraph 1 above to employ such trade-mark on the vending machines built to dispense bottled soft drinks which are produced under either group of patents listed in parts (a) and (b) of paragraph 1 above. Respondent, in granting such a license, shall permit the licensee to inform the trade that the vending machines produced under the license are manufactured and sold under patents formerly owned by Vendorlator Manufacturing Company of Fresno, California, and the trade-mark may be used to identify the patented machines.

3. *Prohibition Against Future Acquisitions.* Respondent shall cease and desist for a period of ten (10) years after the effective date of this order from acquiring, directly or indirectly, through subsidiaries or otherwise, by merger, consolidation, purchase of physical assets, or acquisition of stock or other share capital, any interest in

253

Decision

any company in the United States which manufactures and sells vending machines built to dispense bottled drinks.

4. *Effective Date.* The provisions of this order shall become effective immediately upon entry of the order by the Commission.

5. *Retention of Jurisdiction.* Jurisdiction of this proceeding is retained so that respondent may at any time hereafter petition the Commission for construction or modification of this order, which the Commission will consider, and upon proper showing by respondent, allow to the extent it finds such construction or modification to be warranted and consistent with Section 7 of the Clayton Act.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 5th day of September, 1957, become the decision of the Commission.

Decision

54 F.T.C.

IN THE MATTER OF

MAXWELL DISTRIBUTING COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6745. Complaint, Mar. 22, 1957—Decision, Sept. 5, 1957*

Order requiring sellers in Newark, N.J., of perfumes, toilet waters, and colognes to cease representing falsely in advertisements on the labeling of their products that fictitious and excessive "list prices" were the usual retail prices and that their products were compounded in France.

Mr. Harry E. Middleton, Jr., for the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of the Federal Trade Commission Act, as amended, it being charged, in substance, that the respondents have committed unfair and deceptive acts and practices and unfair methods of competition in commerce by misrepresenting the origin and prices of cosmetics, such as perfumes, colognes, and toilet waters which it sells directly or indirectly to the purchasing public. This decision is rendered against all respondents upon the default of all such respondents.

From the record it appears that each of the respondents, other than Hyman Greenglass, was duly served with a copy of the complaint, either on March 29, 1957, or on March 30, 1957, and that the respondent Hyman Greenglass was duly served therewith on April 29, 1957. Although each of such respondents, other than Hyman Greenglass, were in default of answer, other pleading or other appearance, either in person or by counsel, because of delay in obtaining service on said respondent Hyman Greenglass, the initial hearing as set in the "Notice" portion of the complaint for May 28, 1957, in Newark, New Jersey, was indefinitely postponed on May 14, 1957, by an order providing for a subsequent resetting of such hearing on at least ten days' notice to the parties, as provided by Section 3.16(e) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, with the precise time and place thereof to be designated therein. On June 3, 1957, each and all of the respondents then being in default of answer, other pleading or other appearance, either in person or by counsel, the hearing examiner issued an order setting a hearing for June 21, 1957, at ten o'clock a.m. (local time), in Room 358, Federal Trade Commission Building, Sixth and Pennsylvania Avenue, N.W., Washington, D.C., for the purpose of

conducting a hearing to hear the evidence to be presented by the attorney for the Commission, to find whether the facts are as alleged in the complaint, to make proper findings on the evidence presented, and to determine the form of order to be issued under said complaint and evidence in the initial decision thereafter to be entered. Each of the foregoing orders was duly and timely served upon each of the respondents. On June 21, 1957, at the time and place designated therefor, the hearing examiner conducted such a hearing. No appearance was entered or made at or prior to such hearing by any of the respondents, either in person or by counsel, and on motion of counsel for the Commission, their respective defaults were each taken and entered of record by the hearing examiner. Hearing then proceeded upon the evidence presented by the attorney for the Commission, who also presented a proposed form of order to the hearing examiner, and the proceeding was then taken under advisement.

Upon due consideration of the whole record herein and the hearing examiner being fully advised in the premises, it is found as follows:

The Federal Trade Commission has jurisdiction of the person of each of the respondents Maxwell Distributing Company, Inc., a corporation, and Morris Siegel, Abe Goldberg, Selma Siegel, Hyman Greenglass, and Max Greenglass, individually and as officers and directors of said corporation, and each of them are found and adjudged to be in default of answer, other pleading, or other appearance, either in person or by counsel; and the material facts set forth in the complaint are true as hereinafter specifically found.

Respondent Maxwell Distributing Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business located at 161 Washington Street, Newark, New Jersey. Individual respondents, Morris Siegel, Abe Goldberg and Selma Siegel, are president, vice-president and secretary-treasurer, respectively, of the corporate respondent, with their office and principal place of business at the same address as the corporate respondent. In addition to being officers, individual respondents Morris Siegel and Abe Goldberg, together with respondents Hyman Greenglass and Max Greenglass are the directors of the corporate respondent. All five of the individual respondents formulate, direct and control the policies, acts and practices of said corporate respondent.

Respondents are now, and have been for more than two years last past, engaged in the business of selling various perfumes, toilet waters and colognes, which are "cosmetics" as that term is defined and used

Decision

54 F.T.C.

in the Federal Trade Commission Act, as amended. The cosmetics offered for sale and sold by respondents, among others, are designated as: Discovery, Caprichio, Sables and Pearls, Pagoda, White Christmas Perfume, White Christmas Toilet Water, La Vie en Rose and Scheme.

Respondents cause their said products when sold to be transported from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce among and between the various States of the United States and the District of Columbia.

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

In certain of their advertisements, respondents represented that certain of their cosmetics were sold or had been sold at various list prices; thereby representing that such prices were the usual and customary retail prices, and further represented, through the use of such statements as "The fragrance created in France," "blended in the French Tradition," "Paris-New York," "Perfume essence compounded in France expressly for Saravel" and through the use of brand names such as "La Vie en Rose" and "Le Couturier," that said cosmetics were compounded in France. The said advertisements, statements, and representations were misleading in material respects and constituted "false advertisements" as that term is defined and used in the Federal Trade Commission Act, as amended. In truth and in fact, the list prices as set out in the advertisements were and are fictitious and greatly in excess of the prices at which respondents' products usually or customarily sold at retail, and further, respondents' products were not compounded in France but were manufactured or compounded in the United States. While some imported ingredients may have been contained in the essence used in compounding some of the respondents' products, the major portion of the ingredients thereof was of domestic origin.

In addition to the foregoing, and for the purpose of inducing the sale of their products in commerce, respondents have set forth on the labels or in the labeling of their products certain amounts or prices, thereby representing, directly or by implication, that such amounts or prices were the usual and customary retail prices of said products; and they have also used on the labels or in the labeling of some of their products French names or words, such as "La Vie en Rose" and "Le Courrier" and the word "Paris" and the Tricolor of France, thereby representing, directly or by implication, that said products were compounded in France.

Like the statements and representations made in the advertisements above referred to, these statements and representations were false, misleading and deceptive. In fact, the amounts or prices set out on the labels or in the labeling were fictitious and greatly in excess of the prices at which said products were usually and customarily sold at retail; and, further, the products in connection with which the representations were made were not compounded in France, but were compounded in the United States. While some imported ingredients may have been contained in the essence used in compounding some of the said products, the major portion of the ingredients thereof was of a domestic origin.

There is a preference on the part of the purchasing public for perfumes, colognes, and toilet waters manufactured or compounded in foreign countries and imported into the United States. This is particularly true regarding cosmetics which are manufactured or compounded in France.

In the course and conduct of their said business, respondents are now and have been at all times mentioned herein in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of like products.

By means of the said labeling practices of respondents they have furnished means and instrumentalities to dealers and others through and by which they may mislead and deceive the public with respect to the origin and retail prices of their products.

The dissemination by respondents of the advertisements containing the said false, misleading and deceptive statements and representations, and their use of the said labeling practices have had and now have the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such statements and representations were true and such public has thereby been induced to purchase substantial quantities of the respondents' products. As a result of the said practices, trade has been and is being unfairly diverted to respondents from their competitors and

Order

54 F.T.C.

substantial injury has been done and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over all of the respondents' acts and practices hereinbefore found to be unlawful.
2. The public interest in this proceeding is clear, specific, and substantial.
3. The aforesaid acts and practices of respondents, as hereinbefore found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act, as amended.

On the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That the respondents, Maxwell Distributing Company, Inc., a corporation, Morris Siegel, Abe Goldberg, Selma Siegel, Hyman Greenglass and Max Greenglass, individually and as officers and directors, or as officers, or as directors, of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of perfumes, toilet waters, colognes, or any other cosmetic, as "cosmetic" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement:

(a) Contains or lists prices or amounts when such prices or amounts are in excess of the prices at which the products are usually and customarily sold at retail;

(b) Uses the statements or words "The fragrance created in France," "blended in the French tradition," "Paris-New York," "Perfume essence compounded in France expressly for Saravel" in connection with any product not manufactured or compounded in France; or which otherwise represents, directly or by implication, that any such product was manufactured or compounded in France;

(c) Uses any French name or word as a trade or brand name, or as a part thereof, or any name, word, term, or depiction indicative

260

Order

of French origin in connection with any product manufactured or compounded in the United States, unless it is clearly and conspicuously revealed in immediate connection and conjunction therewith that such product was manufactured or compounded in the United States.

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

It is further ordered, That said respondents and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of perfumes, toilet waters, colognes or any other cosmetic in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Setting out prices or amounts on the labels or in the labeling of their products when such amounts are in excess of the prices at which such products are usually and customarily sold at retail.

2. Using any French name or word as a trade or brand name, or as a part thereof, or the word "Paris," or the Tricolor of France, or any other name, word, term, or depiction indicative of French origin on the label or in the labeling of any product manufactured or compounded in the United States, unless it is clearly and conspicuously revealed in immediate connection and conjunction therewith that such product was manufactured or compounded in the United States.

**ORDER MODIFYING INITIAL DECISION AND DIRECTING
REPORT OF COMPLIANCE**

The hearing examiner having filed an initial decision in this proceeding on June 27, 1957, containing his findings of fact, conclusions drawn therefrom, and order to cease and desist, and this case having been placed on the Commission's own docket for review and having come on for final consideration by the Commission; and

It appearing that whereas the complaint charges the respondents with having misrepresented the retail prices and the place of compounding of their cosmetic products, in part, through the dissemination of false advertisements, in violation of Section 12 of the Federal Trade Commission Act, and, in part, through the use of statements and representations on labels and in labeling, in violation of Section 5 of said Act, the initial decision deals with the case as though all of the charges had arisen under Section 5; and

Order

54 F.T.C.

The Commission being of the opinion that in this respect the initial decision is deficient and should be modified:

It is ordered, That the initial decision be, and it hereby is, modified as follows:

1. By striking the words "and labels," appearing in the first line, and the words "and the words 'Paris' and a portrayal of the Tricolor of France," appearing in the tenth and eleventh lines, of the first full paragraph on page 4;
2. By inserting the following two paragraphs between the first and second full paragraphs on page 4:

"In addition to the foregoing, and for the purpose of inducing the sale of their products in commerce, respondents have set forth on the labels or in the labeling of their products certain amounts or prices, thereby representing, directly or by implication, that such amounts or prices were the usual and customary retail prices of said products; and they have also used on the labels or in the labeling of some of their products French names or words, such as 'La Vie en Rose' and 'Le Couturier' and the word 'Paris' and the Tricolor of France, thereby representing, directly or by implication, that said products were compounded in France.

"Like the statements and representations made in the advertisements above referred to, these statements and representations were false, misleading and deceptive. In fact, the amounts or prices set out on the labels or in the labeling were fictitious and greatly in excess of the prices at which said products were usually and customarily sold at retail; and, further, the products in connection with which the representations were made were not compounded in France, but were compounded in the United States. While some imported ingredients may have been contained in the essence used in compounding some of the said products, the major portion of the ingredients thereof was of a domestic origin."

3. By striking the six lines of the second paragraph on page 5, beginning with the words "There being jurisdiction" and ending with the words "conclusions of law;" and inserting in lieu of said lines the subheading "Conclusions of Law."

4. By substituting the following order for the order contained on pages 5 and 6:

It is ordered, That the respondents, Maxwell Distributing Company, Inc., a corporation, Morris Siegel, Abe Goldberg, Selma Siegel, Hyman Greenglass and Max Greenglass, individually and as officers and directors, or as officers, or as directors, of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offer-

260

Order

ing for sale, sale or distribution of perfumes, toilet waters, colognes, or any other cosmetic, as 'cosmetic' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce as 'commerce' is defined in the Federal Trade Commission Act, any advertisement for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement:

"(a) Contains or lists prices or amounts when such prices or amounts are in excess of the prices at which the products are usually and customarily sold at retail;

"(b) Uses the statements or words 'The fragrance created in France,' 'blended in the French tradition,' 'Paris-New York,' 'Perfume essence compounded in France expressly for Saravel' in connection with any product not manufactured or compounded in France; or which otherwise represents, directly or by implication, that any such product was manufactured or compounded in France;

"(c) Uses any French name or word as a trade or brand name, or as a part thereof, or any name, word, term, or depiction indicative of French origin in connection with any product manufactured or compounded in the United States, unless it is clearly and conspicuously revealed in immediate connection and conjunction therewith that such product was manufactured or compounded in the United States.

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

"It is further ordered, That said respondents and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of perfumes, toilet waters, colognes or any other cosmetic in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"1. Setting out prices or amounts on the labels or in the labeling of their products when such amounts are in excess of the prices at which such products are usually and customarily sold at retail.

"2. Using any French name or word as a trade or brand name, or as a part thereof, or the word 'Paris,' or the Tricolor of France, or any other name, word, term, or depiction indicative of French origin on the label or in the labeling of any product manufactured

Order

54 F.T.C.

or compounded in the United States, unless it is clearly and conspicuously revealed in immediate connection and conjunction therewith that such product was manufactured or compounded in the United States."

It is further ordered, That the initial decision of the hearing examiner, as modified herein, did on the 5th day of September become the decision of the Commission.

It is further ordered, That the respondents, Maxwell Distributing Company, Inc., Morris Siegel, Abe Goldberg, Selma Siegel, Hyman Greenglass and Max Greenglass, 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 terms of said order.

Findings**IN THE MATTER OF
AZOME UTAH MINING COMPANY, INC., ET AL.****ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT**

Docket 6475. Complaint, Dec. 6, 1955—Decision, Sept. 6, 1957

Order requiring sellers in Sterling, Utah, to cease disseminating in commerce false advertising concerning the value and effectiveness of their "Azomite" product, a natural rock-like substance mined or collected from the surface of the land in central Utah and processed and sold by them for use in the feeding of poultry and other animals and also as a soil conditioner.

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

Mr. George E. Steinmetz and *Mr. Terral A. Jordan* for the Commission.

Mr. Dilworth Woolley, of Manti, Utah, for respondents.

FINDINGS OF FACT, CONCLUSION AND ORDER

The complaint in this matter, issued December 6, 1955, and subsequently served on all the respondents named therein, charged said respondents with the dissemination of false advertisements, as that term is defined in the Federal Trade Commission Act, and with otherwise misrepresenting the value and effectiveness of a product sold by them known as "Azomite," all in violation of said Federal Trade Commission Act. After the filing of respondents' answer admitting in part and denying in part the various allegations in the complaint, hearings were held at which testimony and other evidence, both in support of and in opposition to the complaint, were received. Proposed findings and conclusions having been submitted by the parties, the hearing examiner, on May 23, 1957, filed his initial decision in which he found that certain of the respondents' representations were erroneous and misleading and included an order to cease and desist.

No appeal from said initial decision having been filed, the Commission, by order issued July 3, 1957, placed the case on its own docket for review, and having subsequently vacated and set aside the initial decision, makes the following findings of fact, conclusion and order in lieu of those contained in said initial decision:

FINDINGS OF FACT

1. Respondent Azome Utah Mining Company, Inc., is a corporation organized and doing business under the laws of the State of Utah, with its principal office and place of business located in Sterling,

Findings

54 F.T.C.

Utah. Respondents Rollin J. Anderson, Alyce T. West and Elsie M. Anderson are president, vice-president and secretary-treasurer, respectively, of the corporation. Respondents Donald K. Jensen and Sherman C. Anderson are directors of the corporation. The address of the individual respondents is the same as that of the corporation, with the exception of respondent Sherman C. Anderson, whose address is 237 Trinity Avenue, Berkeley, California.

The individual respondents have formulated, controlled and put into effect the policies, acts and practices of the corporate respondent, including those hereinafter referred to.

2. Respondents are engaged in the sale and distribution of a product known as "Azomite," which they recommend for use in the feeding of poultry and other animals, and also as a soil conditioner. To the extent that said product is used in the feeding of poultry and other animals, it is a food and drug as those terms are defined in the Federal Trade Commission Act. There is no issue as to the interstate character of respondents' business, substantial quantities of their product being regularly sold by them to purchasers located in various states of the United States other than the State of Utah.

3. Respondents' product is a rock-like substance which is found at certain places in the central part of Utah. It is mined or collected by respondents from the surface of the land. It is processed by respondents into particles of various sizes, depending upon the use to which it is intended to be put. According to an analysis supplied by respondents, the product contains the following ingredients:

	<i>Percent</i>
Silica -----	66.66
Ferrous Oxide -----	0.62
Ferric Oxide -----	0.18
Aluminum Oxide -----	15.92
Titanium Oxide -----	0.02
Calcium Oxide -----	5.74
Magnesium Oxide -----	0.35
Sodium Oxide -----	2.00
Potassium Oxide -----	1.81
Moisture at 105° C. -----	1.72
Combined Water & Organic Matter -----	4.33
Manganese Oxide -----	0.02
Chromium Oxide -----	Trace
Strontium Oxide -----	0.03
Barium Oxide -----	0.04
Carbon Dioxide -----	0.20
Sulphuric Anhydride -----	0.11
Phosphoric Anhydride -----	Trace
Boric Anhydride -----	0.01

	<i>Percent</i>
Chloride -----	0.01
Arsenic Oxide -----	1 ppm
Copper Oxide -----	0.02
Zirconium Oxide -----	0.04
Lead Oxide -----	Trace
Gallium Oxide -----	Trace

4. 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, as "commerce" is defined in the Federal Trade Commission Act, including circulars entitled "AZOMITE * * * Natural Minerals for Particular Poultry Producers" and "AZOMITE Soil Ayd * * * Natural Minerals for Normal Agriculture," for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and respondents have also disseminated and caused the dissemination of advertisements by various means, including the circulars above mentioned, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

By means of statements appearing in said advertising with respect to the feeding of the product to poultry, respondents have represented, among other things,

- (a) That poultry will consume minerals whenever they are needed for nutrition.
- (b) That the addition of Azomite to feed will furnish poultry with needed minerals.
- (c) That the use of Azomite will lower the cost of production.
- (d) That Azomite is a stimulator of appetite.
- (e) That the use of Azomite will reduce "picking" and "cannibalism" in poultry, increase profits, increase growth of poultry, and increase egg production.
- (f) That Azomite will accelerate growth in poultry.
- (g) That Azomite will satisfy "hidden hunger" of poultry for minerals.

5. In addition to the foregoing, and in connection with the use of the product Azomite as a soil conditioner, respondents in the advertising matter hereinabove referred to have made the following representations:

- (a) That Azomite will aid in growing plants on poor soil and increase the resistance of plants to disease.
- (b) That the use of Azomite on soil will keep the soil healthy and restore needed minerals to worn-out soil.

Findings

54 F.T.C.

(c) That the use of Azomite on soil will result in fewer insects on plants.

6. Three members of the faculty of the Utah State Agricultural College at Logan, Utah, were called as witnesses in support of the complaint. The first is head of the Poultry Department in this institution and is a specialist in poultry nutrition and husbandry. The second is an agronomist, being a professor of Agronomy and head of that department. The third is a veterinarian, being a professor and head of the Department of Veterinary Medicine. There appears to be no doubt that all of the witnesses are well qualified in their respective fields.

Respondents called as their expert witness a biochemist of Los Angeles, California, who, like the Commission's experts, appears to be well qualified in his field. There was also extended testimony from respondent Rollin J. Anderson who, while claiming no qualifications from the viewpoint of formal scientific education, has devoted the past twenty years to the study of minerals and their effects on plant and animal life. Finally, there was testimony from five laymen, primarily poultrymen, relating to their use of Azomite.

The findings and conclusions which follow have been reached after consideration of all of the evidence. As to some of the issues there is little or no conflict in the evidence. On those points where there is conflict, the findings and conclusions are in accord with what the hearing examiner and the Commission consider to be the greater weight of the evidence.

7. Respondents' statement that poultry will consume minerals whenever they are needed is substantially true. On the other hand, it is not true that the addition of Azomite to feed will furnish poultry with needed minerals. For example, it will not supply adequate amounts of calcium, manganese, phosphorus, chlorine or sodium. While these minerals are present in Azomite, they are not present in quantities sufficient to be of significance in the feeding of poultry. Nor will Azomite stimulate the appetite, accelerate or increase the growth of poultry, satisfy "hidden hunger" for minerals, lower the cost of production, increase egg production, or increase profits.

With respect to "picking" and "cannibalism," picking is the tendency of poultry, when irritated due to overcrowding or overheating, to pick at the feathers of one another. If a feather is pulled out and bleeding results, the other birds in the pen or coop are attracted by the blood and are likely to attack or cannibalize the victim. As indicated, all of this is usually due to overcrowding or overheating, and the use of Azomite is incapable of affecting it.

269

Order

Accordingly, it is found that the representations referred to in paragraph 4 concerning the feeding of Azomite to poultry have been and are misleading in material respects, and the advertisements wherein such representations are made are "false advertisements" as that term is defined in the Federal Trade Commission Act.

8. Insofar as the use of Azomite as a soil conditioner is concerned, most soils already contain essential minerals in sufficient amounts, and in such cases the addition of Azomite will serve no useful purpose. Speaking generally, therefore, the use of Azomite will not aid in growing plants in poor soil, increase the resistance of plants to disease, or restore needed minerals to the soil. Azomite might, however, be of some benefit to the soil in those exceptional cases in which the soil is deficient in the minerals which are found in Azomite, provided sufficient quantities of the product are used to supply such deficiencies. In no event will the use of Azomite keep the soil healthy or result in fewer insects on plants.

Respondents' representations to the contrary as set forth in paragraph 5 have been and are false and deceptive.

9. At the hearings it was found that certain of the advertising referred to in the complaint had not in fact been disseminated or authorized by respondents, and in consequence a number of the charges in the complaint have not been sustained.

CONCLUSION

The use by respondents of the representations found to have been false has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents' product and the results which may be expected from its use, and to cause such members of the public to purchase the product as a result of the erroneous and mistaken belief so engendered. The present proceeding is, therefore, in the public interest. Respondents' acts and practices are to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Azome Utah Mining Company, Inc., a corporation, and Rollin J. Anderson, Alyce T. West and Elsie M. Anderson, individually and as officers of said corporation, and Donald K. Jensen and Sherman C. Anderson, individually and as directors of said corporation, and the respondents'

Order

54 F.T.C.

agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their product designated "Azomite," or any other product of substantially similar composition or possessing substantially similar properties, under whatever name sold, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product, which advertisement represents, directly or by implication:

(a) That the addition of said product to poultry feed will supply poultry with needed minerals.

(b) That the use of said product will accelerate or increase the growth of poultry, stimulate the appetite, satisfy hidden hunger of poultry for minerals, lower the cost of production, increase egg production or increase profits.

(c) That the use of said product will reduce "picking" or "cannibalism" in poultry.

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

It is further ordered, That the respondents, Azome Utah Mining Company, Inc., a corporation, and Rollin J. Anderson, Alyce T. West and Elsie M. Anderson, individually and as officers of said corporation, and Donald K. Jensen and Sherman C. Anderson, individually and as directors of said corporation, and the respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the product "Azomite," or any other product of substantially similar composition or possessing substantially similar properties, under whatever name sold, do forthwith cease and desist from representing, directly or by implication:

1. That the addition of said product to the soil will keep the soil healthy or result in fewer insects on plants.

2. That the addition of said product to the soil will restore needed minerals to the soil, aid in growing plants on poor soil, or increase the resistance of plants to disease, unless such representations are

limited to those cases in which the soil is deficient in the minerals contained in said product and said product is used in quantities sufficient to supply such deficiencies.

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

ON REVIEW OF INITIAL DECISION

By KERN, Commissioner:

This case has been fully tried before the hearing examiner who, on May 23, 1957, filed his initial decision consisting of certain findings of fact, conclusions and an order to cease and desist. Neither the respondents nor counsel in support of the complaint appealed the decision, but the Commission, acting pursuant to § 3.21 of its Rules of Practice, on July 3, 1957, issued its order placing the matter on its own docket for review.

The proceeding involves the respondents' advertising claims for a natural rock-like substance which they sell under the trade name "Azomite" and which they recommend for use in the feeding of poultry and other animals, and also as a soil conditioner.

In separate paragraphs, the complaint charges the respondents, in part, with having disseminated and caused to be disseminated certain false advertisements of the product as a food or drug for poultry and other animals, and, in part, with having misrepresented in advertising the value of the product as a soil conditioner. In so doing, the complaint clearly recognizes the distinction between a violation of Section 12 of the Federal Trade Commission Act, under which it is unlawful to disseminate any false advertisement, through the mails or by any means in commerce, for the purpose of inducing or which is likely to induce the purchase of food, drugs, devices or cosmetics, or to disseminate any such advertisement, by any means, for the purpose of inducing or which is likely to induce the purchase in commerce of such commodities, and a violation of Section 5, which broadly proscribes "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." The initial decision, however, does not take into account this distinction, but, on the other hand, deals with the case just as though all of the charges arose under the general provisions of Section 5, thus limiting somewhat the permissible scope of the order to cease and desist.

In view of the fact that the record supports the broader approach, insofar as concerns the respondents' claims in connection with the

Opinion

54 F.T.C.

feeding of their product to poultry, the Commission feels that the initial decision is deficient and should be modified.

We have noted also that the initial decision does not find, as alleged in the complaint and admitted in the respondents' answer, that the individual respondents have formulated, controlled and put into effect the policies, acts and practices of the corporate respondent, including those which are alleged to be unlawful. Such a finding should have been made as a basis for the order to cease and desist against these respondents.

The initial decision is vacated and set aside, and the Commission's findings of fact, conclusion and order to cease and desist will be issued in lieu thereof.

Decision

IN THE MATTER OF
ANHEUSER-BUSCH, INC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(a) OF THE CLAYTON ACT*Docket 6331. Complaint, Apr. 19, 1955—Decision, Sept. 10, 1957*

Order requiring one of the nation's leading breweries, with manufacturing plants in St. Louis, Mo., Newark, N.J., and Los Angeles, Calif., to cease reducing beer prices in any market where it competes with others unless it proportionally reduces prices everywhere, following findings that in 1954, while maintaining its price elsewhere in the nation, it had reduced the price on its Budweiser beer in the St. Louis area to match its regional competitors' price, with general adverse effect on the local market and in violation of Sec. 2(a) of the Clayton Act as amended.

Mr. Francis C. Mayer and Mr. Philip R. Melangton for the Commission.

Mr. Dwight Ingamells, of St. Louis, Mo., *White & Case*, by *Mr. Edgar Barton* and *Mr. Howard J. Aibel*, all of New York, N.Y., and *Gravelle, Whitlock & Markey*, by *Mr. Harold F. Baker*, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Formal complaint herein, issued April 19, 1955, charged respondent with price discrimination in violation of Section 2(a) of the Clayton Act, as amended (15 U.S.C. 18), in drastically cutting its price of beer in St. Louis and St. Louis County, while maintaining it elsewhere in the Nation, thereby causing substantial competitive injury to respondent's competitors in the reduced area through loss of sales to them and consequent gain to it. Respondent's answer, filed June 17, 1955, admitted descriptive and jurisdictional facts, the reductions and their amounts, denied discrimination and the effects alleged therefrom, and affirmatively pleaded that such price reductions were made in good faith to meet the equally low prices of competitors; were made to meet changing market conditions and were justified by differences in the cost of manufacture, sale and delivery as between areas. After ten hearings, resulting in 1118 pages of transcript, and 73 exhibits for the proponent, 217 for the respondent (one of the latter being 15 feet long), the trial wound up on May 15, 1956, after which proposed findings of fact, conclusions

Findings

54 F.T.C.

of law and briefs were filed with me by all counsel. Upon these and the remainder of the record in this case, I make the following:

FINDINGS OF FACT

1. Anheuser-Busch, Inc. (hereinafter referred to as A.B.) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 721 Pestalozzi Street, St. Louis, Missouri.

2. A.B. is primarily engaged in the distribution and sale of alcoholic malt beverages under the brand names of "Budweiser," "Busch Bavarian," "Busch Lager" and "Michelob." "Michelob" is distributed solely as a draught beer, "Busch Bavarian" solely as a packaged beer, while "Budweiser" and "Busch Lager" are distributed both as a draught beer and as a packaged beer—in bottles and in cans. A.B. in the sale of packaged beer employs the basic unit of a case, the number of individual containers therein varying as to size and type. A.B. produces these beers in breweries located at St. Louis, Missouri, Newark, New Jersey, and at Los Angeles, California.

3. A.B. now occupies, and for many years has occupied, a major position in the brewing industry on a nation-wide basis, as illustrated by the following comparative table:

	Total paid tax withdrawals U.S.	A.B. gross sales	Percentage of total	National rank
<i>Buckets</i>				
1952.....	84,836,480	6,034,443	7.11	2
1953.....	86,045,116	6,711,222	7.8	1
1954.....	83,305,402	5,828,760	7.0	1
1955.....	84,974,175	5,616,793	6.61	2

NOTE.—A.B.'s assets in 1954 were \$165,000,000.

4. A.B. has been, and is now, selling its beers in a constant stream of commerce, as "commerce" is defined in the Clayton Act, from the states and places of manufacture to customers and purchasers located in other states, and there is now, and has been, a constant current of trade in such commerce between and among some of the various states of the United States and the District of Columbia in substantial competition with other brewers similarly selling and distributing beer in such commerce.

5. A.B. sells and distributes approximately 75% of its beers through some 700 wholesaler-distributors who resell to licensed dealers and dispensers in their individual trading areas, and approximately 25 percent through 18 branches of respondent, located in

various metropolitan areas directly to bars, liquor stores, chain grocery stores and other retailers.

6. Beer production is widely diffused, primarily because it is a bulky product with high shipping costs relative to unit value. Other contributing factors are the great variety of laws and other regulations in the various states for licenses, the size of containers, the use and amount of advertising, and taxes. This has resulted in the creation and functioning of many local competitive trading areas, usually centering around one or more localized breweries, whose orbit of competition varies directly with the public acceptance of the taste, body, and effect of its particular brand, plus, of course, its financial resources and selling drive. Thus, there are beers which are sold only in one city, or one county, or only one state, or within a small mileage radius from the brewery which may cover parts of several states. These have been referred to in the record as "local" beers. Others sell throughout a multiple state area, but not nationally, in significant volume. These have been referred to as "regional" beers. Five brewers—A.B., Schlitz, Pabst, Miller and Blatz—because they sell and ship into all states in significant volume are referred to as "national" beers, and there are a few others. It is true, as respondent's counsel insist, that a given beer may be classed as regional in one place, local in another, and national in another and, therefore, the three terms have no fixed or constant meaning, competitively or price-wise. Nevertheless, they are handy, if loose, descriptions of their sales orbit, geographically, and the respondent itself in its sales surveys, memoranda and general business operations uses them. For the purposes of this decision a "local" beer will mean one which is sold in substantial volume in three states or less, a "regional" beer, one which is sold in more than three but less than 48 states in substantial volume, and a "national" beer, one which is sold in such volume in all 48 states.

7. Retail distribution is through two distinct channels—off-premise and on-premise consumption—package stores and supermarkets on the one hand—taverns, bars, and restaurants on the other. Practically all draught beer is consumed on-premise, and in 1934 after the repeal of prohibition, 75 percent of all beer produced in the United States was for on-premise consumption. However, since then, due perhaps to the increasing movement to the suburbs, television, and the broadcasting of sporting events, the decline of the tavern as a community social and recreation center, and the shorter work week, the flow had been almost reversed so that in 1954 only 35 percent of the beer produced was consumed on the premises. In 1934 there was only an insignificant amount of beer sold by grocery

Findings

54 F.T.C.

stores. Today more than 50 percent of all packaged beer consumed off-premise is bought in grocery stores.

8. All of the above distributive characteristics directly affect price and competition in any given market. There are many more. Most brewers price f.o.b. the brewery. To this must be added varying freight costs, taxes by states, counties and cities, and varying mark-ups by distributor and retailer. Local social and economic conditions also have their effect. All of them are beyond the control of the brewers, yet the price to the consumer is controlled by them.

9. The complaint in this proceeding alleges that "historically, A.B. has sold and distributed beer on the basis of regularly established premium prices generally substantially higher than those prices charged by the various local and regional competing breweries located throughout the U.S." This allegation is denied and vigorously contested by respondent, which introduced voluminous statistical data to show the contrary. Counsel supporting the complaint do not claim this allegation to mean that there is a uniform or constant differential in price obtained by A.B. over prices obtained by regional and local beers. They concede it varies from market to market in amount, that it varies on the various markets from time to time, and that there may be more than one differential in any given market; but they insist that in the great majority of markets there is some premium obtained by A.B. over the prices of its regional and local competitors. The record amply sustains this position. According to a survey conducted by respondent itself, of 78 major markets, considered by it to be a representative cross section of the country, out of 113,305 price comparisons between A.B.'s Budweiser beer and all other regional or local beers (so characterized by A.B.), 100,392, or 88.6%, showed a differential of 5¢ per bottle or can, or more, higher for Budweiser. Over local beers only, 93.2% of the price comparisons showed a differential up to 10¢ per bottle in favor of Budweiser. This same survey, comparing differentials as between May 1954 and October 1953, show many shifts and changes from no differential to a differential and vice versa, as well as many shifts in the amount of differential, but the fact remains that in the overwhelming majority of instances there was some differential. A September 1955, pendentelite new survey by A.B. reduces the above percentages in some degree, depending on the classification of one or more beers, nevertheless it does not change the picture that in by far the greater majority of markets and instances, on both the price to the consumer and to the retailer, Budweiser commands a higher price than local and regional beers. This statistical evidence is confirmed, particularly in its historical aspect, by the testimony of the qualified officials of A.B.'s three most competitive St. Louis

competitors; who sell regionally over wide areas, and by a representative number of beer retailers, called by respondent for other purposes. All of these testified categorically to that effect, and none of them could recall a single instance where Budweiser sold at the same price as the brands put out by the three St. Louis breweries adverted to above—always commanding some differential. Finally and conclusively, A.B. itself has published large advertisements, at the time of the St. Louis price reduction hereinafter described, stating:

Now you can enjoy Budweiser at ordinary beer prices;
The same Budweiser that still sells at premium prices around the world; and
The same Budweiser that outsells any other beer.

Such assertions broadcast by respondent to obtain or increase sales cannot now be gainsaid or watered down by respondent. The finding on this point, accordingly, is that most of the time, and in the large majority of the nation's markets, Budweiser was sold by A.B. at some favorable price differential or differentials over beers of local or regional distribution.

10. In the spring of 1953, the brewery workers' union struck all the plants of the national shipping Milwaukee brewers—Schlitz, Pabst, Millers, and Blatz—most of the "national" beers. The strike was drawn out until August of 1953, the settlement being for increased wages. A.B. was not struck and enjoyed substantial sales increases nationally with its national shipping Milwaukee competitors out of production. Although A.B. was not struck, it, too, signed a wage-increase contract, and, as a result, on October 1, 1953, it and its Milwaukee "national" beer shipping competitors increased prices generally in varying amounts, depending upon locality. The three St. Louis brewer competitors of A.B.—Falstaff Brewing Corporation (hereinafter referred to as Falstaff), Griesedieck Western Brewery Company (hereinafter referred to as G.W.), and Griesedieck Brothers Brewery Company (hereinafter referred to as G.B.) did not follow this raise in prices or make any increase in prices, continuing to sell in the St. Louis market (St. Louis and St. Louis County) at \$2.35 per 24, 12-oz. case of bottles, although many other regional and local brewers in other sections of the United States did so. There was, as a result, a decline in sales for the industry generally, and a sales decline for A.B. specifically from 418,667 barrels in November 1952, to 404,908 barrels in November 1953, nationally. Comparable figures for December of 1952, were 478,647 barrels as against 457,640 barrels in 1953. A sales graph comparing A.B. sales with industry sales, month by month, 1953 with 1952, shows industry sales in October 1953 even with October 1952, but A.B. sales 44% greater in October 1953 than in 1952, whereas in

Findings

54 F.T.C.

November 1953, A.B. sales were only 5% greater than in the same month of 1952, and industry sales 5% less, but in December 1953, industry sales were off only 8% compared with December 1952, whereas A.B. sales were 30% under 1952. In some states A.B.'s sales declines ranged as high as 83%. This, however, was not the picture in the St. Louis market, where A.B. and Falstaff gained in 1953 over 1952, as shown by the following table:

	<i>Barrels</i>			
	1952		1953	
	November	December	November	December
A.B.....	15,841	18,148	17,306	20,239
Falstaff.....	20,796	24,973	24,547	29,218
G.B.....	14,003	16,559	12,491	14,177
G.W.....	30,715	35,471	26,731	32,509

11. As of January 3, 1954, A.B. was selling its standard 24/12 oz. cases of regular returnable bottles out of its direct-to-retailer branches at the following prices net to the retailer:

St. Louis, Mo.	\$2.93	Washington, D.C.	\$3.65
Chicago, Ill.	3.44	Detroit, Mich.	3.55
Cincinnati, Ohio	3.75	Boston, Mass.	3.69
Houston, Texas	3.70	Kansas City, Mo.	3.15
Bronx, New York	3.68	St. Paul, Minn.	3.53
Kearney, Nebr.	3.68	Sioux Falls, S. Dak.	3.50
St. Joseph, Mo.	3.17	Denver, Colo.	—
Buffalo, N.Y.	3.60	San Francisco, Calif.	3.79
Baltimore, Md.	3.62	Los Angeles, Calif.	3.80

12. On January 4, 1954, on this same unit of sale, A.B. reduced its price from \$2.93 to \$2.68 in the St. Louis market, and again on June 21, 1954, cut its prices on the same unit of the same beer to \$2.35, which was and had been the price on the same unit charged and received by A.B.'s three above-named St. Louis brewer competitors, A.B.'s price changes are shown by the following table:

	<i>Net to Retailer</i>		
	Dec. 31, 1953	Jan. 4, 1954	June 21, 1954
BOTTLES			
24/12 oz. Ret. Reg.	2.93	2.68	2.35
24/12 oz. N.R. Reg.	3.29	3.16	2.81
24/12 oz. N.R. 4/6.	3.29	3.16	2.83
12/32 oz. Ret. Rep.	3.41	3.41	2.96
12/32 oz. N.R. Reg.	3.80	3.65	3.11
36/7 oz. Ret.	2.90	2.75	2.60
CANS			
12/12 oz.	1.67	1.60	1.51
48/12 oz. 8/6.	6.68	6.40	6.08
24/12 oz. Reg.	3.34	3.20	2.99
DRAUGHT			
Budweiser.....	12.98	12.98	12.48
Michelob.....	13.98	13.98	13.98

Nowhere else except in the St. Louis market did A.B. make the same or any comparable reduction in price.

13. From this, the complaint charges, and counsel in support thereof contends, that A.B. discriminated in price among its customers, namely, that by cutting and eliminating the price differential to its customers in the St. Louis market, it discriminated against its customers in other markets by continuing to charge them higher prices. Respondent contests this, claiming that because its prices vary from market to market, and are not level or uniform throughout the rest of the nation, that because the amounts by which its prices exceed those of local and regional brewers in those markets likewise vary, that in some few markets there is no excess differential, that these differentials may change momentarily, and A.B. cannot alone maintain them, there can be no discrimination. These arguments are all specious on this record. The fact is that in more than 80% of its markets, A.B. did set its prices to obtain such differentials—that it was obtaining them—that it did not cut its prices anywhere so as to eliminate or materially diminish them except in the St. Louis market, a situation which is the classic regional price discrimination, with competitively unimportant embroidery. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234; *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d 511; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *In re Maryland Baking Company*, Docket 6327; *In re General Foods Corp.*, Docket 5675; and others. The finding, accordingly, is that on January 4, 1954, and until June 21, 1954, and on June 21, 1954, and subsequent thereto until 1955, respondent did discriminate in the price of its beer, between its customers located in the St. Louis market and elsewhere by the price reductions in that market, above set out.

14. The St. Louis breweries distribute and sell as follows: A.B. in all 48 states; G.B. in 13 states, Alabama, Arkansas, California, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, Mississippi, Oklahoma, Tennessee and Texas; Falstaff in 26 states in the West, Midwest, South, and Southeast; G.W. in 20 states, west to California, east to Pennsylvania, south to Georgia, and north to Wisconsin and Michigan. As of January 1, 1954, G.B. sold about 24% of its output in the St. Louis market, Falstaff about 14%, G.W. about 25%, and A.B. about 3½%.

15. For the year 1953, the respective shares of the St. Louis market in packaged beer by these four St. Louis brewers were: A.B. 12.5%, G.B. 14.4%, Falstaff 29.4%, and G.W. 38.9%. For the first six months of 1954, following and including the first price reduction by A.B. on January 4, 1954, but not including, to any appreciable extent, sales after the second price reduction on June 21, 1954, these

Findings

54 F.T.C.

market shares changed as follows: A.B. 16.55%, G.B. 12.58%, Falstaff 32.05%, and G.W. 33%, or, in terms of rank, G.W. remained first, Falstaff remained second, but A.B. replaced G.B. as third, the latter becoming fourth. During this time the total packaged beer sales for the first six months of 1954, as compared with the comparable 1953 period, increased from 5,947,144 to 6,110,326 statistical cases, or 2.7%. However, 122,991 of the cases, represented the increased sales of "all other beers," that is, beers shipped into the St. Louis market by breweries located elsewhere, such as Milwaukee, so that the increase in total market package beer sales of 163,182 (6,110,326 minus 5,947,144) is in fact reduced to 40,191 cases, or an increase in total local brewery packaged sales of only .68%. With "all other [outside] beers" thus increasing in sales, it is obvious that A.B.'s increase in market share from 12.5% to 16.55% must have come from corresponding losses by G.B. and G.W. of 1.82% and 5.9% respectively. This first price reduction was accompanied by changes in, and a stepping up of, sales activity by A.B. by changing from telephone solicitation of orders to a route-wagon system of solicitation and delivery which converted every driver into a personal-solicitation salesman, and a great expansion of its advertising in the St. Louis market.

16. It was, however, after the June 21, 1954, price reduction by A.B. that the roof really fell in on the St. Louis market. As above set out, this reduction was from the January 4, 1954, price of \$2.68 per case of 24/12 oz. regular returnable bottles to \$2.35, exactly the same price, for the same unit, as G.B., Falstaff and G.W. had been selling at for a number of months. This reduction remained in force until March 1, 1955, shortly before formal complaint herein was issued, at which time A.B. increased its price to \$2.80 for the same unit. Shortly thereafter G.B., G.W., and Falstaff increased their beer prices on the St. Louis market for the same sales unit from \$2.35 to \$2.50. The differentials between A.B. and the other three mentioned brewers in the St. Louis market were thus 58¢ prior to January 4, 1954; 33¢ from January 4, 1954, to June 21, 1954; no differential from June 21, 1954, to March 1, 1955; and 30¢ thereafter, all differentials being in favor of A.B.

17. The impact of this second price reduction by A.B. on its own sales was to increase A.B.'s share of the St. Louis market progressively to the following percentages: July 37.6%; August 37.3%; September 37.5%; October 35.7%; November 34.1%; December 38.1%; January 1955 33.2%; February 1955 39.3%, whereas Falstaff's percentage share of the same market decreased from 29.6% in June of 1954 to 25.7% in July, 26.1% in August, 26.8% in September, 28.1% in October, 29.4% in November and December, 30.2%

Findings

in January 1955, and 29.1% in February 1955. More striking decreases were suffered by the other two. G.B. declined from 11.2% in June 1954 to 8.3% in July, 8% in August, 7.9% in September, 7.8% in October, 8.8% in November, 7.9% in December, 5.3% in January, and 4.8% in February of 1955. G.W. had 29.3% of the St. Louis market in June 1954; slid to 21.3% in July, 22% in August, 21.3% in September, 22.5% in October, 22.9% in November, 21.7% in December, 27% in January of 1955, and 23.1% in February of 1955. In rank A.B. jumped into first place by a wide margin and held that position throughout the eight-months' period. The St. Louis market, on the other hand, in total sales increased about 9.2% (9,174,278 [July 1954 through February 1955], as against 8,397,770 [same period 1953-1954]) or an increase of 776,508 cases. A.B., on the other hand, sold only 1,121,065 cases in the same period 1953-1954, but 3,380,648 cases during the comparable period July 1954-February 1955, an increase of 201.5%, or a tripling of case sales.

18. The full statistical and sales volume picture for both price reductions is shown by the following tabulations:

ST. LOUIS AND ST. LOUIS COUNTY-PACKAGE BEER
ANHEUSER-BUSCH, INC.

	Statistical cases	Share of total	Percent change previous year	Area total sales		
				Statistical cases	Share of total	Percent change previous year
1954						
Jan.	107,283	14.0	+25.1	766,088	100	+0.8
Feb.	121,620	14.5	+36.8	837,225	100	+5.6
Mar.	130,663	13.8	+31.3	949,409	100	+5.1
Apr.	165,853	15.6	+41.3	1,069,655	100	+10.2
May	165,526	15.5	+16.5	1,070,765	100	-3.5
June	320,127	22.6	+56.0	1,417,184	100	+6.3
July	542,779	37.6	+206.7	1,412,573	100	+0.5
Aug.	475,897	37.3	+190.9	1,277,121	100	+10.2
Sept.	457,966	37.5	+199.6	1,220,501	100	+3.8
Oct.	374,994	35.7	+183.2	1,050,467	100	-1.6
Nov.	335,326	34.1	+196.7	981,968	100	+11.0
Dec.	421,575	38.1	+194.3	1,105,990	100	+3.2
Total	3,619,609	27.4	+126.5	13,188,946	100	+3.5
1955						
Jan.	274,513	33.2	+155.9	827,783	100	+8.1
Feb.	497,598	39.3	+309.1	1,267,875	100	+51.4
Mar.	193,478	24.5	+48.1	790,909	100	-16.7
Apr.	182,651	19.5	+10.1	930,458	100	-12.5
May	217,584	19.0	+31.5	1,146,239	100	+7.0
June	257,641	21.0	-19.5	1,226,733	100	-13.4
July	233,561	21.9	-47.8	1,297,051	100	-10.1
Aug.	266,729	19.8	-44.0	1,316,587	100	+5.4
Sept.	233,420	20.0	-49.0	1,165,395	100	-4.5
Oct.	172,962	19.0	-53.9	911,094	100	-13.3
Nov.	183,602	19.1	-45.2	959,035	100	-2.3
Dec.	219,226	20.7	-48.0	1,061,488	100	-4.0
Total	2,982,962	23.0	-17.6	12,936,647	100	-1.9

Findings

54 F.T.C.

FALSTAFF

	1954			1955		
Jan.	250,712	32.7	+16.6	250,185	30.2	-0.2
Feb.	279,860	33.4	+27.0	369,373	29.1	+32.0
Mar.	312,598	32.9	+24.0	233,447	29.5	-25.3
Apr.	349,016	32.6	+27.8	351,055	37.5	+6
May	346,504	32.3	+9.1	431,846	37.7	+24.6
June	419,739	29.6	+4.5	361,963	37.7	+10.1
July	371,790	25.7	-8.2	498,260	38.4	+34.0
Aug.	332,896	26.1	-9.7	529,218	39.3	+59.0
Sept.	326,809	26.8	-9.4	472,019	40.5	+44.4
Oct.	295,031	28.1	-12.0	380,130	41.7	+28.8
Nov.	289,066	29.4	-0.3	401,112	41.8	+35.8
Dec.	324,994	29.4	-7.2	442,964	41.7	+36.3
Total.	3,899,015	29.6	+3.9	4,821,572	37.3	+23.7

GRIESEDIECK BROS.

	1954			1955		
Jan.	99,493	13.0	-14.7	44,140	5.3	-55.6
Feb.	107,151	12.8	-12.7	60,354	4.8	-43.7
Mar.	123,552	13.0	-10.3	68,314	8.6	-44.7
Apr.	142,410	13.3	-1.3	67,932	7.3	-52.3
May	137,814	12.9	-16.2	84,108	7.3	-39.0
June	158,098	11.2	-21.9	89,437	7.3	-43.4
July	120,201	8.3	-46.2	87,713	6.8	-27.0
Aug.	101,682	8.0	-32.7	94,746	7.0	-6.8
Sept.	96,171	7.9	-39.4	78,320	6.7	-18.6
Oct.	81,672	7.8	-42.8	60,488	6.6	-25.9
Nov.	86,667	8.8	-30.5	62,782	6.6	-27.6
Dec.	87,256	7.9	-39.8	69,068	6.5	-20.8
Total.	1,342,167	10.2	-26.8	867,402	6.7	-35.4

GRIESEDIECK WESTERN

	1954			1955		
Jan.	273,193	35.7	-12.3	223,736	27.0	-18.1
Feb.	291,829	34.9	-11.6	293,226	23.1	+.5
Mar.	328,061	35.6	-10.3	206,696	26.1	-38.9
Apr.	352,193	32.9	-10.5	271,067	28.9	-23.0
May	347,192	32.4	-22.6	332,132	29.0	-4.3
June	414,170	29.2	-28.9	340,930	27.8	-17.7
July	307,126	21.3	-47.1	348,354	26.8	+13.4
Aug.	280,749	22.0	-32.3	362,833	27.0	+23.2
Sept.	260,146	21.3	-40.3	309,354	26.6	+18.9
Oct.	236,158	22.5	-36.7	242,325	26.6	+2.6
Nov.	224,497	22.9	-29.7	251,380	26.2	+12.0
Dec.	239,697	21.7	-37.7	271,543	25.6	+13.3
Total.	3,565,011	27.0	-28.0	3,453,576	26.7	-3.1

I have rarely seen such a dramatic exhibition of economic power and price sensitivity in so short a time. Apparently the beer-consuming populace in the St. Louis market equates premium quality with premium price. The tremendous switch from other beers to Budweiser when the premium price was eliminated cannot, on this record, be otherwise accounted for. Apparently also it is the first 30¢ or less of premium or differential in price which touches off the reaction in the St. Louis market. Comparison of results from the January 4, 1954 and June 21, 1954 reductions shows this.

19. This is further illustrated and confirmed by the reaction to the March 1, 1955, increase in price from \$2.35 to \$2.80—45¢, the almost immediate increase of G.B., G.W. and Falstaff to \$2.50, or 15¢ increase—the differential then and since being 30¢. Gain and loss in market shares is shown by the following tabulation:

	Dec. 31, 1953	June 30, 1954	March 1, 1955	July 31, 1955
A.B.....	12.5	16.55	39.3	21.03
G.B.....	14.4	12.58	4.8	7.36
Falstaff.....	29.4	32.05	29.1	36.62
G.W.....	38.9	33	23.1	27.78
All others.....	4.8	5.82	3.94	7.21

It is obvious that A.B.'s gains during the "price experiment" came from G.B. and G.W. Respondent claims that if market statistics are run through February 1956, almost a year after the complaint was filed, they show A.B. down to 17.9%. Regardless of what cut-off date is used, A.B. had only 12.5% of the market just before its first price reduction, but wound up after a price differential was re-established with from 18% to 21%, a gain of 5½% to 8½%. This, respondent characterizes as *de minimis*. But the record shows that such a percentage of market share in nearly every area of the United States is regarded by A.B. as highly significant if favorable, and highly dangerous if it is a loss.

20. This picture, counsel for the complaint contend, amply supports the effect charges of the complaint. Respondent's counsel, of course, contends the opposite. Their position boils down in reality to two points:

1. That the sales losses of competitors in the St. Louis market were caused by other factors than A.B.'s price reductions—factors unconnected therewith, and that the required effect has not been shown as a matter of law.

2. That A.B.'s price reductions were merely a meeting of the equally low prices of its competitors in good faith—that it was simply "testing the market" or "price experimenting" in good faith to find answers to its loss of national off-premise sales.

21. Before discussing these points some comment seems necessary on the basic charge in this case. Counsel seem to be solely preoccupied with the sites of injury—the St. Louis market—and to forget that the charge here is price discrimination and necessarily involving price differences between that St. Louis market and all other markets for A.B.'s products. The cutting of its premium in the St. Louis market, and its subsequent elimination are not violations per se, they are violations only in comparison with the maintenance of higher

Findings

54 F.T.C.

prices elsewhere, whether premium or not, because such maintenance enables A.B. to continue profitable operation in more than 90% of its business to subsidize less profit or even no profit on its operations in the St. Louis market, and if competitor injury occurs there, violation of the charging law is *prima facie* made out.

22. Counsel supporting the complaint contend, of course, that the above statistical and market picture, together with the testimony of responsible officials of the three St. Louis breweries, attributing all or the major part of their substantial sales losses in the eight months' period to A.B.'s price reduction amply sustains the charge that the latter diverted business to A.B., substantially lessened competition in the St. Louis market among these brewers, tended to create a monopoly in A.B. and injured, destroyed or prevented competition with A.B. The latter's counsel contend the negative of this factually and as a matter of law.

23. Factually they insist and have proved that G.W. had been progressively losing sales in the St. Louis market prior to 1954, that the management had likewise been maintaining a highly liquid cash position at the expense of renewal or replacement of productive facilities, that it sold out to Carling Brewing Company in October 1954, at a price which reflected the good will to be about one-fifth of realizable net worth, and that therefore it was not injured. Of course, good will being an intangible depends on many other things than sales potentiality alone. As to G.B., respondent has shown that its sales too were progressively declining in the St. Louis market from a share thereof in 1950 of 18% to 14.4% in 1953, that in March 1954, G.B. replaced the beer it had theretofore been selling with an entirely new product which was badly named, poorly merchandised, bitter in taste and "wild"—that is, with an unstabilized air content, and offered the testimony of eleven saloon-keepers and storekeepers that this new beer was disliked by the consumer, with the result that consumer sales thereof dropped sharply during the latter part of 1954, according to their testimony. None of this testimony was from retailers in the St. Louis market (which did and does seem most peculiar to me), but counsel assumes the same thing took place there—that the public taste was the same, or that the product defects were the same. Hence they claim G.B.'s sales loss was its own fault, not that of A.B.

24. Respondent prepared and introduced in evidence a sales graph showing actual packaged-beer sales in the St. Louis market for itself and its three principal competitors there for the years 1952, 53, 54, down to August 1955, and drew a "trend" line, averaged, equated or weighted, showing what would have been the average

sales of each had no price upheaval taken place. This "trend" for 1954 and 1955 belies the contention that causes other than A.B.'s price reductions are the sole explanation for its competitors' sales losses. According to it, G.W. would have normally had, and in fact did have, in March of 1954, a market share of 35%; that absent price raids, and based on the previous 27 months' performance, its share would have decreased from 35% to 30.75% by February 1955. In fact, however, G.W. sank precipitately to about 26% in July 1954, and never thereafter approached its projected trend until after the price increase in March 1955. The same thing is true for G.B., although in less exaggerated fashion. There the losses ranged from about 3% below trend in July 1954, to about 6% below trend in February 1955. Furthermore, prior to the June 1954 price reduction of A.B., G.B.'s largest sales decrease over the same month or year previous had been 16.2%, but thereafter the comparable percentage loss ranged from a low of 30.5% to a high of 55.6%. The argument of counsel for respondent that the testimony of eleven retailers from outside the St. Louis market of their customers' dissatisfaction with G.B.'s new beer and the falling off in sales thereof for that reason was the real reason for G.B.'s sales losses in the St. Louis market, rather than A.B.'s price reductions, is refuted by a comparison of G.B.'s sales losses as between the St. Louis market and the rest of its selling area. Thus exhibits show sales losses of G.B. in the St. Louis market for the last six months of 1954 at 38.44% of the last six months of 1953, whereas a comparable figure for the rest of G.B.'s territory was only 19.32%. Comparable figures for the first six months of 1955 were 45.90% for the St. Louis market and 29.49% for outside St. Louis. The conclusion is that A.B.'s price reductions in the St. Louis market were not the insignificant factor counsel contends, but greatly accelerated an existent slow but steady sales decline in that area of G.B. and G.W. It is one thing to descend several flights of stairs yourself; it is quite another to get thrown down the last flight by others. Murder is none the less murder, even though the victim, medically, may not have long to live.

25. As to the third major St. Louis competitor, Falstaff, respondent seems to argue that because it has eight breweries strategically located in six states, and was, prior to 1954, progressively selling more beer each year and only lost about 4% market share during A.B.'s price reductions, no injury can be found, since Falstaff only had about 14.4% of its business in the St. Louis market. But this record abundantly shows that a much smaller percentage of business in any market is regarded as vastly important to A.B. Why then assume that 14.4%, 20% or 25% of total business are not vital to its

Findings

54 F.T.C.

competitors? It is significant that July of 1954 was the first month in 18 in which Falstaff showed a decrease in sales over the corresponding month of the previous year, and that decreases consistently continued throughout 1954, reaching a 32% loss in February of 1955. After A.B. again raised its price on March 1, 1955, Falstaff's interrupted upward march was resumed. The conservative sales estimates of Falstaff, projected for 1954 by Falstaff, as to what it expected for 1954, based on immediate past performance, show them far more than realized after A.B.'s price reductions, with the exception of one month, December 1954. Unlike G.B. and G.W., Falstaff is a picture of arrested and reversed progress, rather than acceleration of decline; but nevertheless fulfills the prescribed statutory requirement of effect, just as fully, although perhaps not as vividly. Since these three brewers, excluding A.B., account for the overwhelming volume of beer sold in the St. Louis market, the picture is one not only of injury to competitors but of injury to their line of commerce. As a factual matter, then, the finding is that A.B.'s successive price reductions, which discriminated price-wise against its customers in other markets, did divert substantial business to A.B. from its competitors in the St. Louis market; did substantially lessen their competition in their line of commerce, and did tend to create a monopoly, and had the potentialities to continue to do so.

26. Respondent contends, however, that as a matter of law, such a finding cannot be made, and carefully reviews seven area price-discrimination cases, four by the courts, three by the Commission, which have dealt with territorial price discriminations. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 284; *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d 511; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Maryland Baking Company*, F. T. C. Docket 6327; *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp., 231 F. 2d 356; *Purex Corp., Ltd.*, F. T. C. Docket 6008; *General Foods Corp.*, F. T. C. Docket 5675. Balian, Purex, and General Foods were dismissed, no causal relationship between price discrimination or price differences and competitive injury being shown; the remainder resulted in orders to cease and desist or decrees or judgments. Respondent's counsel contends these latter are no precedents because (a) they all involved a single injuree, whereas here there was more than one competitor in the area of reduction; (b) they all involved a demonstrated intent to eliminate that single competitor; (c) the price reduction was either below that of the intended eliminee, or below the eliminator's cost; and (d) the discrimination was continued long enough to cause serious injury to or destruction of the intended eliminee. I am unable to agree that the scope of the statute

is limited to injury to just one competitor. True, the resultant contraction of competition is clearer in such a situation, but the statute contemplates injury to the line of commerce in which respondent is engaged, and that is present here. All of A.B.'s major competitors lost substantial business. Furthermore, there were a number of smaller competitors involved in the General Foods case—that case was not dismissed because of that, but solely because the Commission found that instead of losing business, a number of them had gained. Intent to eliminate a competitor, not being required to be shown, is immaterial here. Undercutting, or selling below cost, furnish a clearer picture of injury and predatory intent, but no case holds it to be a *sine qua non* of injury, actual or potential, or tendency to monopoly. Similarly, no case holds complete destruction of a competitor necessary before injury is found—neither death nor mayhem are essential. The facts here show a distinct probability of the one, if not the other, if A.B.'s price raid had continued longer, or indefinitely; and we are here concerned not only with actual injury but with potential injury as well, and there is nothing in this record to show that what A.B. did in the St. Louis market, could not or would not be done by it, in the future, in other markets as well. Respondent's reliance on quotes from the General Foods opinion is misplaced, since the targets of the respondent's discriminations there were found to have gained business and not to have been injured, that being the sole ground of dismissal. Furthermore, in line with those cases is the economic strength here of the respondent. A.B. has total assets of more than twice those of its three St. Louis brewery competitors, and, selling nation-wide as it does, is able, although there is no proof that it did, to use income or profit from the rest of its business to stabilize losses, if any, incurred in such a price raid. I repeat, there is no showing that it did, but the record shows it could—the potentiality is there. The fact that the St. Louis market produced only a small fraction of its total business is immaterial in the face of its over-all size and strength, but the fact that its St. Louis competitors were dependent on the St. Louis market for a substantial segment of their business points up not only the size disparity but the extent of the injury.

27. Taking up now respondent's second contention, it is true that lower prices to consumers is the goal of a free-enterprise system, but it must not be done so as to discriminate and benefit some customers at the expense of others, except under stipulated circumstances, such as meeting the equally low price of a competitor. As construed by the Supreme Court in *F.T.C. v. A.E. Staley Mfg. Co., et al*, 324 U.S. 746, Section 2(b) places emphasis on "individual competitive

Findings

54 F.T.C.

situations, rather than upon a general system of competition," and further, in *Standard Oil Company v. F.T.C.*, 340 U.S. 231, that "wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that price." From these, proponent's counsel argue that since A.B.'s price action was admittedly aggressive rather than defensive, its defense must fail. Respondent's counsel rely on the Balian case cited above, which seems to reject this interpretation. But the factual setting in that case was markedly different. I believe there is a fair implication in Staley and Standard Oil, that Section 2(b) was intended not to absolve price discrimination for aggressive purposes but is limited to and available only to retain business. Such is not the case here. Instead of losing sales to competitors by reason of their lower prices, A.B. had been slowly but steadily gaining, prior to the price raid of 1954. Thus, from 1945 on it had shown, except for 1947, a consistent gain in its share of the St. Louis market from a low of 5.8% to 12.5% for 1953, and a comparable gain, of course, in absolute numbers of cases sold. Market rank had advanced from a very poor sixth to a close fourth. There is nothing in this record to show, that although it was losing business nationally in the off-premise sales channel, that it was losing business in the St. Louis market or in any imminent danger of doing so. Secondly, these price reductions were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when A.B. did so in the fall of 1953. Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed A.B. up with price increases in March 1955, and were careful to keep the price difference between them and it at less than the 83 cents whose elimination had cost them so much sales volume. Thirdly, A.B. did not just meet, it beat competition. True, as counsel sarcastically comments, \$2.35 equals \$2.35 and not \$2.30; but numerical prices by themselves can be misleading because they can be superficial. A.B.'s beer at \$2.35 was in the same quantity as its competitors', and selling at the same dollars-and-cents figure, but at \$2.35 it was selling more value than its competitors were, by the ultimate test of any market—the consumer himself. Whether it be called "public acceptance" or "superior public acceptance," the consumer has proved, and A.B. is profiting thereby, that the former will, in most markets, pay more for Budweiser than it will for many other beers—clear proof that such consumer believes that he is getting more in quality, taste, effect or what not, from Budweiser than from others in the same product category for the same money. The

tremendous sales surge to Budweiser away from G.B., G.W., and Falstaff in the St. Louis market, after June 21, 1954, when the consumer could buy all of them at the same price, is dramatic evidence of this. The statistical picture set out above in Paragraphs 17, 18, and 19 also shows that this switching to Budweiser, in the St. Louis market at least, starts at a premium of about 35¢ a case of 24/12 oz. bottles. Below that spread consumers evidently think, in substantial numbers, whose substantiality increases as the spread decreases, that they are getting more, cent for cent, from Budweiser than they are from the beers of G.B., G.W., and Falstaff. Counsel cites *Standard Oil Co. v. F.T.C.*, 233 F. 2d 649, as rejecting and "laying to rest" this reasoning. Without discussing whether the language does in fact fully reject, suffice it to say that that case is on appeal and not yet finally decided. Support for such reasoning is found in *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d 511, and in *F.T.C. v. Standard Brands, Inc.*, 189 F. 2d 510, in neither of which was it expressly rejected, and in both of which it was an argued and briefed issue. Nor do I believe that the Court's remarks thereon were "chance." The finding on this point is that Budweiser has wide public acceptance geographically, and superior public acceptance in most markets, not because it does or has sold more than regional or local beers in any given market, but in the sense that in most markets the consumer will pay a higher price for it than for local or regional competitive beers.

28. Respondent's counsel urge that A.B.'s St. Louis price raid was "price experimentation" and "testing the market" for the purpose of finding a solution to serious competitive and distributional problems, and that this is evidence of its "good faith." These were: A.B.'s inability to match in every market the intensive advertising done there by local or regional brewers who were able to concentrate an entire budget in a small area, whereas A.B. had to scatter its shots over the nation; the freight disadvantage over local beers which had no freight to be added, and regionals with less than A.B.; decentralization, by the purchase of local breweries; and steady contraction of its principal channel of distribution—on-premise sale, which accounted for 60% of its distribution. Although A.B.'s sales nationally and through all channels were the highest in the nation, its off-premise sales, particularly through grocery stores, had been steadily declining. Whereas about 75% of industry beer sales were off-premise and the remainder on-premise, A.B.'s ratio was almost the reverse of the industry. To meet these problems, A.B. conducted various surveys and field tests to determine market conditions, and sent out questionnaires to its distributors and wholesalers, asking

Findings

54 F.T.C.

their remedial suggestions. Various solutions were considered; smaller size packages of Budweiser to sell at the same prices through off-premise outlets, particularly grocery stores; new beers to sell at, or about, the same prices as competitors' local and regional beers; and expanded advertising and sales promotion. Sometime between the fall of 1953 and early in 1954 A.B.'s management decided on a reduction in container size—10 oz. cans or bottles in place of 12 oz. to sell at or near the price of competitive local and regional 12-oz. size; in other words, to sell less beer for the same price as more beer of others. Implementing this was a long and tedious problem because of the tax, warehousing, and production problems it raised, and because of the many variant state regulations, some of which, by law, fix beer container sizes, others of which, rest discretion in Alcoholic Beverage Control Board. The 25¢ price reduction of January 4, 1954, in the St. Louis market did produce increased off-premise as well as on-premise sales, but the results were considered by A.B. as not definitive, and the June reduction was ordered. Counsel claims the spectacular results thereof made it clear to management that the solution lay in marketing the 10-oz. container wherever possible, as against a 12-oz. competitive container, but also to bring out a new and cheaper beer. This latter was determined upon in the fall of 1954 and placed on the market in March of 1955, and proved a flop. Then A.B. brought out a still different cheaper beer under different merchandising techniques in August 1955, but the record does not show its degree of success.

29. On the above basis, counsel contend that A.B.'s price reductions were to obtain market information with which to formulate a long-range marketing policy, and to "buy time" by "competing on a price basis until such new long-range policies could be placed in effect," and conclusively establish A.B.'s good faith.

30. In my opinion, however, the sales considerations which respondent alleges as the reasons for this "experiment," taken at full value, do not outweigh the contrary factors discussed in Paragraph 28 above. I cannot, however, take them at full value. The "experiment" clearly demonstrated that lower prices on Budweiser was the answer to volume, both on-premise and off-premise; but obviously A.B. did not want that answer, and certainly did not follow it. It wanted an answer which would enable it to keep Budweiser up in price, above its competitors, but still obtain more volume by other means—cheaper "fighting brand" beer or less quantity for the same price, because that is what A.B. undertook and since has done. And it is inferable from the record that these two expedients were pretty well determined upon by or before June of 1954. It is questionable whether the June reduction was in fact a seeking of an answer, as

alleged. Furthermore, why an eight months' experiment when three months' trial produced, so far as the record goes, equally as good statistical sales results as the eight months?

31. The conclusory finding is that respondent's 1954 price reductions in the St. Louis market were not made in good faith to meet the equally low prices of competitors.

The order proposed by counsel in support of the complaint, after the usual injunction against discrimination, finishes with "and where such lower prices reduce in any consequential amount the theretofore existing differential in price between respondent's product and the product of any of such other sellers, unless respondent reduces all prices in all areas by the same percentage." Entry of this order is refused because:

1. The key word "consequential" is vague and indefinite and, on the record, varies so from market to market as to have no meaning, hence would be impossible of compliance or enforcement.

2. The words "theretofore existing differential" are likewise incapable, in many instances, of definite ascertainment, and therefore incapable of compliance or enforcement. This obviously means the higher price which respondent obtains in most markets for its beer over other beers, but there are beers which command a higher price than Budweiser in some markets. That spread, too, is a "theretofore existing differential."

3. The fact that different quantities have different differentials, whether "theretofore existing" or not, makes the order as submitted unworkable.

CONCLUSIONS OF LAW

1. To reduce prices in one area, while maintaining them in all other areas, is discrimination in price within the prohibition of Section 2(a) of the Clayton Act, provided the required effects follow therefrom, regardless of whether there is a uniform price or varying prices in the unchanged areas.

2. Accelerating an existing downward sales trend, or arresting and reversing an upward sales trend of competitors, is evidence of the required statutory effect.

3. Partial recovery from competitive injury suffered during a period of price discrimination, when the latter is abandoned or partially abandoned, does not excuse its employment.

4. The good faith requirement of Section 2(b) of the Clayton Act is not met where a price discrimination, with the required resultant competitive effect, is for aggressive rather than defensive purposes.

5. The law does not require that a competitor be put out of business completely or permanently, or irretrievably crippled, by a price

Opinion

54 F.T.C.

discrimination before a finding of the prescribed competitive effect can be made.

ORDER

It is ordered, That the respondent, Anheuser-Busch, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in the sale of beer of like grade and quality, do forthwith cease and desist from discriminating, directly or indirectly, in price, between different purchasers engaged in the same line of commerce, where either, or any, of the purchases involved in such discrimination are in commerce, as "commerce" is defined in the Clayton Act, by a price reduction in any market where respondent is in competition with any other seller, unless it proportionally reduces its prices everywhere for the same quantity of beer.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The respondent in this proceeding is charged by the complaint with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13).¹ Specifically, it is alleged that respondent in connection with the sale of beer made two successive price reductions in the area of St. Louis County, Missouri, from its previously established regular premium price for that area, and that it made no similar price reductions in any other area. It is charged that by so doing respondent discriminated in price between different purchasers of its beer of like grade and quality with the effect, among other things, of diverting substantial business from respondent's competitors to the respondent.

The hearing examiner, in an initial decision filed October 25, 1956, found that the allegations of the complaint were sustained by the record and ordered respondent to cease and desist such practices. Respondent has appealed from the initial decision.

Respondent, Anheuser-Busch, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located in St. Louis,

¹ Section 2(a) provides in part as follows: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *"

Missouri, is primarily engaged in the manufacture, distribution and sale of alcoholic beverage beer under the brand names Budweiser and Michelob. Respondent distributes and sells beer nationally. It has plants located in St. Louis, Missouri, Newark, New Jersey, and Los Angeles, California, and is one of the nation's leading brewers.²

In some areas respondent sells its beer to wholesaler-distributors who resell it to licensed dealers and dispensers in their trade areas, and in other areas, including that around St. Louis, respondent sells directly to liquor stores, chain grocery stores, bars, and other outlets generally termed "retailers." Approximately 25% of respondent's beer sales are made through its branch operations, while sales to wholesaler-distributors account for the remaining 75%.

In the beer industry there is a wide dispersal of manufacturing facilities due mainly to high shipping costs relative to unit value. Thus, there is found throughout the country many beers of local or regional geographic distribution. A few brewers sell beer in every state or nearly every state. These are the so-called "national" beer shipping companies, and include Blatz, Miller's, Pabst, and Schlitz of Milwaukee, Wisconsin, as well as Anheuser-Busch, the respondent.

Throughout the country, respondent's product, Budweiser, is generally sold at some higher price than beers of local or regional distribution. While there is no uniform or constant differential, in the great majority of markets Budweiser is priced over its regional or local competition. This is established in the record by various surveys, the results of which are corroborated by the testimony of both retail and competitor witnesses. Moreover, respondent itself has advertised Budweiser as a premium priced beer. As an example, it was advertised as "the same Budweiser that still sells at the premium prices around the world."

In the St. Louis area, respondent's principal competitors are three regional brewers: Falstaff Brewing Corporation, Griesedieck Western Brewing Company, and Griesedieck Brothers Brewery Company (hereinafter referred to as Falstaff, G.W. and G.B., respectively). Prior to 1954, these competitors sold beer in the St. Louis area at prices substantially less than the price of Budweiser. The prices of

² Anheuser-Busch's national rank 1952 to 1955 is shown by the following table:

	Total paid tax withdrawals U.S.	Anheuser- Busch gross sales	Percentage of total	National rank
1952.....	<i>Barrels</i> 84,836,480	6,034,443	7.11	2
1953.....	86,015,116	6,711,222	7.8	1
1954.....	83,305,402	5,828,760	7.0	1
1955.....	84,974,175	5,616,793	6.61	2

Opinion

54 F.T.C.

the regional competing beers were in each instance \$2.35 per case.³ Respondent's price was \$2.93 per case, a differential of \$.58. Respondent first reduced its price on January 4, 1954, to \$2.68 per case, leaving a new differential of \$.33. Thereafter, on June 21, 1954, respondent again reduced its price, this time to \$2.35 per case, at which price it was exactly matching the prices of its regional competitors. The following table indicates the complete price changes made in St. Louis by the respondent in this period:

	<i>Net to Retailer</i>		
	December 31, 1953	January 4, 1954	June 21, 1954
BOTTLES			
24/12 oz. Ret. Reg.	2.93	2.68	2.35
24/12 oz. N.R. Reg.	3.29	3.16	2.81
24/12 oz. N.R. 4/6	3.29	3.16	2.83
12/32 oz. Ret. Reg.	3.41	3.41	2.96
12/32 oz. N.R. Reg.	3.80	3.65	3.11
36/7 oz. Ret.	2.90	2.75	2.60
CANS			
12/12 oz.	1.67	1.60	1.51
48/12 oz. 8/6	6.68	6.40	6.08
24/12 oz. Reg.	3.34	3.20	2.99
DRAUGHT			
Budweiser	12.98	12.98	12.48
Michelob	13.98	13.98	13.98

On January 3, 1954, respondent was selling standard 24/12 ounce cases of regular returnable bottles from its branches net to the retailer at the following prices:

St. Louis, Mo.	\$2.93	Washington, D.C.	\$3.65
Chicago, Ill.	3.44	Detroit, Mich.	3.55
Cincinnati, Ohio	3.75	Boston, Mass.	3.69
Houston, Texas	3.70	Kansas City, Mo.	3.15
Bronx, New York	3.68	St. Paul, Minn.	3.53
Kearney, Nebr.	3.68	Sioux Falls, S. Dak.	3.50
St. Joseph, Mo.	3.17	Denver, Colo.	—
Buffalo, N.Y.	3.60	San Francisco, Calif.	3.79
Baltimore, Md.	3.62	Los Angeles, Calif.	3.80

Respondent, however, made no price reductions anywhere else in the United States similar to those made in the St. Louis area. As a result of maintaining higher prices to all purchasers outside of the St. Louis area and charging the lower prices, as reduced in 1954, to only those customers in the St. Louis area, respondent discriminated in price as between purchasers differently located.

The price reductions of 1954 remained in effect until March, 1955, at which time respondent increased its price 45¢ per case. Its new

³ Case, as used herein unless otherwise indicated, refers to the standard case of 24 12-ounce regular returnable bottles.

higher price was then \$2.80 per case. Falstaff, G.B. and G.W. almost immediately increased prices to \$2.50 per case, or 15¢ over their prior prices. This resulted in a new differential of 30¢ per case.

One of the principal issues raised on this appeal is whether or not respondent's price reductions in 1954, resulting in discriminations in price between purchasers, were such as to have an injurious effect on competition within the meaning of Section 2(a). The hearing examiner found that respondent's price discriminations had the effect of diverting substantial business to Anheuser-Busch from its competitors in the St. Louis market; the effect of substantially lessening competition in the line of commerce in which Anheuser-Busch and its local competitors are engaged; and the further effect of tending to create a monopoly and having the potentialities to continue to do so.

Prior to the price reduction by respondent in January, 1954, G. W. was the leading seller in the St. Louis market followed by Falstaff, G. B. and Anheuser-Busch. Immediately thereafter, respondent rose to third in volume of sales and G.B. dropped to fourth. Following the June, 1954, price reduction, Anheuser-Busch became the leading seller in the area with Falstaff second, G.W. third and G.B. fourth. Respondent held its first place position in the market throughout the eight months of the full price reduction, from July, 1954, through February, 1955. During this period, the total market sales increased only about 9.2% as against the same period for 1953-54, while respondent, comparing its sales for the same periods, enjoyed an increase of 201.5%, a tripling of sales. On the other hand, Falstaff, G. B. and G. W. during the period of the price reductions lost in their volumes of sale as well as their respective shares of the total market in the St. Louis area. The losses of G.B. and G.W. were particularly large. Comparing the eight months of the full reduction with the same prior period, G.B.'s sales were cut by about 41% and G.W.'s about one-third. In the following table the gains made by the respondent are compared with the losses incurred by its major competition in the St. Louis market:

SALES IN STATISTICAL CASES⁴

	<i>July 1953-Feb. 1954</i>	<i>July 1954-Feb. 1955</i>
Anheuser-Busch-----	1,121,065	3,380,648
Falstaff-----	2,601,665	2,560,144
Griesedieck Brothers-----	1,152,369	678,143
Griesedieck Western-----	3,074,537	2,065,335
All Others-----	448,134	490,008
Total Market-----	8,307,770	9,174,278

⁴ A statistical case means the equivalent of the standard 24/12 oz. case.

Opinion

54 F.T.C.

The relative positions of the various competitors in the St. Louis market around the time of respondent's price reductions in 1954, as expressed in shares of the total market, may be shown as follows:

	Dec. 31, 1953	June 30, 1954	March 1, 1955	July 31, 1955
A.B.....	12.5	16.55	39.3	21.03
G.B.....	14.4	12.58	4.8	7.36
Falstaff.....	29.4	32.05	29.1	36.62
G.W.....	38.9	33	23.1	27.78
All Others.....	4.8	5.82	3.94	7.21

G.B. and G.W. had been having progressively less sales volume in the St. Louis market for several years prior to the price reductions by respondent, and thus it is reasonable to expect that their sales under ordinary circumstances would have continued downward at about the same rates. The trends of their losses, however, do not indicate that their sales reverses in the 1954-55 period would have been anywhere nearly as severe if respondent had not so sharply reduced its prices. Falstaff, on the other hand, had been showing progressive gains in sales prior to the period of the price reductions, and according to this trend but for the reductions, Falstaff would not have lost sales, as it did, but would have shown a substantial increase.

Taking into account all of the factors which may have affected the sales of the various competitors in the St. Louis market, it is evident that only respondent's price reductions could have had such a general adverse effect on the market. No other circumstance will account for the fact that, while respondent more than tripled its sales, most of its competition suffered such serious declines. This almost speaks for itself. Respondent's gains could only have been made at the expense of competition since the total sales in the St. Louis market did not increase by any such substantial amount as the sales of respondent and the small combined increase in sales by all of the other competitors could not begin to account for the losses experienced by Falstaff, G.B. and G.W. Respondent's price discriminations manifestly resulted in a substantial diversion of sales from competitors to itself. The gravity of the effect of the sales losses on these competitors is readily apparent from the showing that the St. Louis market accounted for 14% of Falstaff's sales, 24% of G.B.'s and 25% of G.W.'s. Moreover, in connection with the effect on competition, respondent's relative size in the beer industry cannot be disregarded. In 1953, the total sales of Budweiser of 6,711,222 barrels was in excess of even the combined total sales of its three leading St. Louis competitors. Their total sales in 1953 were as follows: Falstaff 2,911,393 barrels, G.W. 1,483,631 barrels, G.B. 778,142 barrels.

Clearly respondent's discriminations in price had the effect of substantially lessening competition in the line of commerce in which Anheuser-Busch, Falstaff, G.B. and G.W. are engaged. We believe that the hearing examiner's findings in respect to competitive injury are amply supported by the record and free of error.

Respondent's next contention in this appeal is that it is entitled to a finding that its price reductions were made in good faith to meet the equally low price of a competitor within the meaning of Section 2(b) of the Clayton Act, as amended.⁵ On the basis of the record in this case, we cannot agree.

The justification provided by Section 2(b) for discrimination in price contrary to the provisions of Section 2(a) is essentially a right of self-defense against competitive price attacks. *Standard Oil Co. v. F.T.C.*, 340 U.S. 231.

In this instance, respondent's purpose could not have been to protect its sales volume in the St. Louis market against an invasion by competitors. Its sales and share of the total market had been steadily increasing. None of the competitors constituted any threat at that time to respondent's relative position in the St. Louis market. In fact, the sales of two of its major competitors had been on the down grade for some time. Respondent argues that, while not losing sales in the St. Louis area, it had been having decreases in sales volume in other markets served by its St. Louis plant. This, however, would not justify the lowering of prices in the one market in which respondent had experienced no losses. The emphasis of Section 2(b) is on individual competitive situations rather than upon a general system of competition. *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746. If respondent was faced with an individual competitive situation which it had to meet, it clearly was not in the St. Louis area. However more advantageous it may have been for respondent to lower its prices there, by so doing it has no defense under 2(b).

Prior to the price reductions of 1954, Budweiser was sold at a considerably higher price in St. Louis than most of its competition and not only retained but steadily improved its sales volume in that market. After the price increases of March 1955, when there was

⁵ Section 2(b) provides as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Opinion

54 F.T.C.

again a differential in price between Budweiser and the regional beers in St. Louis, respondent's product continued to sell at a volume greater than that in the years prior to the price reductions. It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market. Clearly, therefore, respondent's reduction from the premium price to match the prices of the regional beers on the market was not a meeting of competition. The effect was to undercut competition. The huge gains which respondent made at the lower prices testifies to that fact. Under the circumstances, respondent cannot justly claim that it was meeting competition.

Considering all the factors, we conclude that the hearing examiner was warranted in finding that respondent's 1954 price reductions in the St. Louis market were not made in good faith to meet the equally low prices of competitors.

Finally, on this appeal, respondent contests the appropriateness of the order contained in the initial decision. It contends, for one thing, that since all the findings as to injury relate to the St. Louis market, the only lawful order which can be entered is one confined to that market. There is no merit in this. As to territorial extent, a respondent having been found guilty of a violation of the Act may properly be required to cease and desist such practices in all areas in which it is doing business. *The Maryland Baking Company v. F.T.C.*, 243 F. 2d 716.

Respondent also argues that the order requires a uniform percentage reduction in all markets. Such an order, it is asserted, is divorced from the realities of beer pricing. The point is made that since differentials vary from market to market, a price reduction might actually result under the order in bringing the price of Budweiser in a great many markets below that of the regional beer. This argument assumes that every price reduction necessitates reductions everywhere. In fact, the order does not preclude respondent from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos. Nor is the respondent precluded under the order, if the circumstances are not substantially similar, from lowering its price in good faith to meet an equally low price of a competitor. *F.T.C. v. Ruberoid Company*, 343 U.S. 470.

Respondent also comments in its brief that this is an extraordinary Robinson-Patman Act order in that, unlike the usual order requiring uniform prices, it allegedly requires Anheuser-Busch to charge different prices in different markets in perpetuity. As indicated above, the order does not necessarily require differences in price hereafter since the statutory provisos are implicit in the order. Moreover, since the order is directed to discriminations in price, there is nothing therein to prevent respondent from charging all of its purchasers the same or uniform prices if it so chooses. On the other hand, if the order was worded so as to require respondent to maintain uniform prices this, if anything, would be contrary to market realities. Respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discriminations charged in the complaint, are not in issue in this proceeding. This order, while in effect permitting the continuation of these price differences, serves to prevent disproportionate price reductions or discriminations in price beyond the established differences among markets, such as the price discriminations found to be unlawful. The form of the order is entirely appropriate in the circumstances. The order should be modified, however, so that it will be clear its application extends only to prices charged to purchasers engaged in the same line of commerce. Also we have inserted the term "proportionally" in lieu of "percentage" to avoid possible rigidity of interpretation.

Respondent's appeal is denied. It is directed that the order contained in the initial decision be modified in accordance with the views herein expressed.

Commissioners Anderson and Kern did not participate in the decision herein.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondent's appeal should be denied and that the order contained in the initial decision should be modified:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That the respondent, Anheuser-Busch, Inc., a corporation, and its officers, representatives, agents and employees, directly

Order

54 F.T.C.

or through any corporate or other device, in the sale of beer of like grade and quality, do forthwith cease and desist from discriminating, directly or indirectly, in price, between different purchasers engaged in the same line of commerce, where either, or any, of the purchases involved in such discrimination are in commerce, as "commerce" is defined in the Clayton Act, by a price reduction in any market where respondent is in competition with any other seller, unless it proportionally reduces its prices everywhere for the same quantity of beer.

It is further ordered, That the findings, conclusions, and order, as modified, contained in the initial decision, be, and they hereby are, adopted as those of the Commission.

It is further ordered, That the respondent, Anheuser-Busch, Inc., 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 contained in the initial decision, as modified.

Commissioners Anderson and Kern not participating.