IN THE MATTER OF

ILLINOIS CONTINENTAL MACHINE CORPORATION ET AL.

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

Docket 6615. Complaint, Aug. 20, 1956—Decision, Nov. 15, 1957

Order dismissing for lack of proof complaint charging two corporate promoter-sellers located in Chicago and Laguna Beach, Calif., and their common officer, with making false representations in advertising in magazines and periodicals of national circulation designed to elicit the interest of private individuals as purchasers and operators of their vending machines, and the cooperation of civic organizations as sponsors therefor.

Mr. S. F. House for the Commission.

Defrees, Fiske, O'Brien, Thompson & Simmons, by *Mr. Thomas J. Johnson, Jr.*, of Chicago, Ill., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On August 20, 1956, the Federal Trade Commission issued the complaint in this proceeding, charging the Respondents with the dissemination of various false representations relative to the easy work and high profits to be gained from the purchase and operation of Respondents' candy and chewing-gum vending machines. The specific charges may be summarized as follows:

1. That, contrary to Respondents' representations, large profits rarely, if ever, accrue to persons who purchase and operate Respondents' vending machines;

2. That, contrary to Respondents' representations, purchasers are generally not able to earn $100.00 per week in their spare time, and do not recoup their original investment in fifteen months;

3. That, contrary to Respondents' representations, purchasers are required to engage in extensive canvassing and selling;

4. That, contrary to Respondents' representations, purchasers of Respondents' machines are not required to have a car and good references in order to qualify therefor, but only to have the purchase price of the machine;

5. That, contrary to Respondents' representations, purchasers are not given exclusive sales territories;

6. That, contrary to Respondents' representations, Respondents do not give financial assistance to purchasers for expansion; that such

persons can expand only by purchasing additional machines from Respondents;

7. That, contrary to Respondents' representations, Respondents do not manufacture the vending machines sold by them; and, in effect, that such representation is misleading in that "There has long been a preference on the part of a substantial portion of the purchasing public for dealing directly with the manufacturer in the belief that lower prices, elimination of middleman's profits, superior products, and other advantages can thereby be obtained";

8. That, contrary to Respondents' representations, the vending machines are often not placed for the purchaser in a satisfactory location, and, when it becomes necessary to relocate them, the relocation must be done by the purchaser;

9. That the statement "Insured for property and liability by 'Lloyds of London'—plus fire and theft insurance and a 100% Money Back Guarantee" is false in that it fails to disclose that the purchaser of Respondents' vending machine must pay an additional sum for such insurance and for such profit guarantee.

THE ANSWER

On September 20, 1956, Respondents submitted their answer to the above charges. They admit their identity as alleged except that they assert that the address of Respondent Lawrence F. Ellison is 545, instead of 945, Diamond Street, Laguna Beach, California. Respondents, in their answer, also admit that they have been engaged for more than two years in the sale and distribution of vending machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, and that they have been in substantial competition with others so engaged.

Respondents deny that they sell their vending machines through sales representatives or agents as alleged, but aver that all sales of their products are made through independent distributors who are not agents of Respondents, but are independent contractors for whose acts and practices the Respondents are not responsible. They admit the dissemination of national advertisements, but deny any responsibility for the local advertisements disseminated by the individuals whom they call their "independent distributors." Finally, Respondents deny the dissemination of any false advertisements and the doing of any act or practice in violation of the Federal Trade Commission Act.

IDENTITY OF RESPONDENTS

Respondent Illinois Continental Machine Corporation is an Illinois corporation, with its principal office and place of business located at

105 North Clark Street, Chicago, Illinois. Respondent Copperite, Inc. is a California corporation with its principal office and place of business located in the home of Respondent Lawrence F. Ellison, 545 Diamond Street, Laguna Beach, California, and its Chicago office in the same space occupied by the other corporate respondent, but using the address, 74 West Washington Street, Chicago, Illinois, because the building is located at the corner of Washington and Clark Streets in Chicago. Individual Respondent Lawrence F. Ellison, the manager and former president of Respondent Illinois Continental Machine Corporation and the sole stockholder of Respondent Copperite, Inc., actively directs and controls the policies and practices of both the corporate respondents.

Respondents are, and for more than three years last past have been, engaged in commerce in the business of promoting, selling and distributing vending machines and supplies therefor. Their course of trade therein is substantial, and they have been and now are in competition with other persons, corporations, firms and partnerships similarly engaged.

RESPONDENTS' METHOD OF OPERATION

Respondents have represented themselves to be manufacturers of vending machines, and have prepared a sales kit for use in promoting the sale of such vending machines, which contains, among other things, a photograph depicting a factory interior, entitled "One Corner of Assembly Line." In fact, however, Respondents have not operated a factory, but their machines have been manufactured for them, according to their specifications, by W. G. Parrish & Company of Chicago, Illinois. The completed machines are delivered either to the Respondents or, upon their order, to places designated by them. In promoting the sale of their vending machines, Respondents place advertisements in various magazines and periodicals, such as the Boilermakers' and Blacksmiths' Journal, the American Legion Magazine, Pilot Log, the Optimist Magazine, the V.F.W. Magazine, the U.S. Junior Chamber of Commerce Magazine, the Rotarian, and the Saturday Evening Post. These advertisements are designed to elicit the interest of private individuals as operators of Respondents' vending machines, and the cooperation of civic organizations as sponsors therefor. All of these magazines have national circulation, although most of them are directed particularly to the members of certain fraternal, civic or industrial associations. Typical of such advertisements are the following:

$$ OPPORTUNITY $$
FOR CLUB MEMBERS—OR MEMBERS'
RELATIVES AND FRIENDS

Own your own business! Earn up to $100 per week spare time; much more full time. No selling or canvassing. Operate from own home. No experience needed. Work under sponsorship of local service, civic organization. Minimum cash required: $1500 to $4950 (depending on size of operation). We extend help as you grow up to $20,000. Must furnish satisfactory references for honesty and reliability to meet civic club requirements. This plan will stand your bank's inspection. Write for complete details free!

Operate these proved MONEY-MAKERS with sponsor emblem on each unit—and watch your income soar. . . . Remember: each $1,000 sales—your profits after cost of merchandise approx. $530.00.

$1,500 to $5,000 cash starts you in this exceptional income business depending on size of operation. Immediate weekly earnings. No specialized experience necessary.

Sales of Respondents' vending machines are effected throughout the country by salesmen whom the Respondents designate as "Independent Distributors," who are supplied by Respondents with the sales kit mentioned above, containing copies of national advertisements, bank references, recommended sales talks, suggested advertisements for insertion in local newspapers, and contract and order blanks. These "distributors" are also supplied by Respondents with a sample vending machine, which they are required to purchase.

Respondents' salesmen call upon civic, fraternal, service and union organizations and propose that they sponsor the installation of Respondents' vending machines by procuring suitable locations therefor in local business establishments, and by allowing their insignia to be placed on the machines. In consideration therefor, the association or organization is offered 10% of the proceeds to be derived from the operation of the vending machine, to be donated to the association's favorite charity, which is also designated on the machine. After securing a commitment for such sponsorship, the salesman generally inserts in the local newspaper an advertisement, the format of which has been supplied to him by Respondents' offering Respondents' vending machines for sale as a business opportunity sponsored by the local civic organization. Typical of such advertisements are the following:

You will operate this business from your home without employees or office expense and you do no selling. You will be associated AND SPONSORED BY A LOCAL CIVIC ORGANIZATION TO HANDLE WHOLESALE HERSHEYS, SUCHARDS, ADAMS, DENTYNE, BEEMAN'S, BEECH-NUT, CHLOROPHYLL GUM and other world advertised brands. Business is set up for you: Only supervision needed. Requires $4,950 now. This will enable you to have 100 locations which will be secured by the sponsor. Good references, car. An all-cash, profitable, and depression-proof business. Financial assistance enables rapid expansion. High income starts immediately. Want individual capable of earning $10,000 to $20,000 yearly.

A BUSINESS OF YOUR OWN
WITH 100%
MONEY BACK GUARANTEE

Victoria and most cities in Texas. You will operate this business from your home without employees or office expenses, and you do no selling. You will be associated with and sponsored by a local civic organization. Insured for property and liability by "LLOYDS OF LONDON" * * * plus fire and theft insurance, and a 100% MONEY BACK GUARANTEE! To handle Wholesale HERSHEY'S, PETER PAUL, DENTYNE, BEECH-NUT, and other world advertised brands. Business is set up for you. Only supervision needed. Required $4000 to $8000 now. Good references, car. An all cash, profitable and depression-proof business. Income starts immediately. Thereafter will assist you in financing up to $20,000 for expansion. Write giving full details of yourself and telephone number to P.O. Box 11601, Dallas, Texas.

When a prospective "operator" answers this advertisement, the sales plan is described to him, and, if he agrees to purchase Respondents' vending machines, a three-party sponsorship contract is entered into by the salesman as "independent dealer of the Illinois Continental Machine Corporation," the sponsoring organization, and the prospective "operator." In this contract the contractual obligations of each are set forth. The sponsor agrees to obtain suitable locations for the installation of the vending machines to be purchased by the "operator," and, if relocation is necessary, to procure such new locations, for which service the sponsor is to receive 10% of the proceeds derived from each machine. The "dealer" agrees to sell to the "operator" a certain number of machines, together with supplies therefor. The "operator" agrees to purchase the machines and to service them and pay the sponsor 10% of the proceeds.

Upon completion of such sponsorship contract, the "operator" is required to sign a purchaser order agreement whereby he purchases from the "independent dealer" a certain number of vending machines for which he is required either to make a payment in full with order, or to pay one-half with order and the remainder C.O.D. The order is signed by the purchaser, by the "independent dealer," and by one of the respondent corporations, and a copy is forwarded to the respondent corporation for its signature. Payment is required to be made to one of the respondent corporations, and must be in the form of cash or its equivalent.

At the time of purchase the "operator" is offered the option of obtaining insurance as offered in the advertisement, for an additional sum. If he applies for this insurance, the application therefor is sent to one of the respondent corporations, and thereafter transmitted by it to the insurance company.

The machines purchased are delivered from Respondents' establishment in Chicago to the city in which the "operator" resides. Thereafter the "operator" may either install the machines himself in locations of his own selection, or they may be installed for him

by the "independent dealer" in locations procured by the sponsor, for which service $3.00 per machine is withheld by the Respondents out of the purchase price of the machines. This money is refunded to the "operator" by Respondents if he declines to avail himself of this service, and instead installs his own machines.

After the machines are installed, a form, styled "Completion Sheet," must be signed by the purchaser or "operator," listing the locations of his machines and stating that with the instruction and assistance he has received from the "independent distributor," he "feels capable of following through with" his "Coin Automatic Merchandising Machine operations." A copy of this completion sheet is forwarded to Respondents, and by Respondents to the insurance company in the event that the "operator" has purchased such insurance. The insurance does not become effective until the insurance company receives this form. Thereafter, Respondents have no further contact with the "operator" unless such "operator" desires to "expand" by purchasing additional vending machines, in which event the Respondents will, if desired, assist him in such expansion by extending him credit up to the amount of $20,000.00.

THE ISSUES ANALYZED AND RESOLVED

Analysis of the complaint, the answer, and the evidence raise factual and legal issues as hereinafter set forth. In considering and resolving these issues, we must remember that counsel supporting the complaint bears the burden of proof and must sustain each allegation of the complaint by reliable, probative and substantial evidence. Substantial evidence has been judicially defined as meaning

> * * * such reliable evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter, * * * It implies a quality and character of proof which induces conviction and makes a lasting impression upon reason" (*Carlay Company*, 153 F. 2d 493, 496).

Therefore all the evidence in the record must be evaluated in the light of this basic definition, and in consonance with the rule relating to the burden of proof. Should the evidence fail to meet the requirements enunciated therein, the burden of proof has not been sustained, and the allegations of the complaint remain unproven. Only by firm and faithful observance of this cardinal principle can justice be dispensed in administrative law.

Thus, we now proceed to the consideration and resolving, seriatim, of the issues herein.

1. Are Respondents accountable, under the Federal Trade Commission Act, for the representations contained in the advertisements and sales talks disseminated by the salesmen of their vending machines, who are designated by Respondents as "independent distributors" or "independent dealers"?

Respondents insist that their vending machines are sold through independent dealers who are not their agents or employees, and for whose acts and practices in the promotion of such sales they are not responsible. They emphasize the fact that all the contracts with which we are here concerned refer to the local salesman as Respondents' "independent dealer"; that such dealers are paid no salaries; that Respondents make no deductions from their earnings for social security or income tax purposes; and that such salesmen conduct their business in an independent manner.

To the contrary, the facts are that the so-called "independent dealers," except for the sample machines which they are required to buy, purchase no vending machines from Respondents. The title, when a vending machine is sold, is actually transferred directly from Respondents to the ultimate purchaser. The consideration therefor, in the form of the purchase price, also passes directly from the purchaser to Respondents. No vending machines are kept in stock by the salesmen; they have no fixed place of business; they are supplied by Respondents with advertising material for insertion in local newspapers; and the evidence indicates that they do not deviate from the advertising script furnished by Respondents. They also receive from Respondents a sales kit, and detailed directions as to their selling activities. Furthermore, Respondents' salesmen present themselves to prospective purchasers as representatives of Respondents, and, according to testimony in the record, are so regarded by such prospective purchasers. Accordingly, we must conclude that the persons styled by Respondents as "independent dealers" are not such in reality, but that in truth and in fact they are sales representatives or agents of the Respondents, for whose acts and practices in promoting the sale of Respondents' vending machines Respondents are accountable under the Federal Trade Commission Act.

2. Have Respondents falsely represented that large profits generally accrue to operators of their vending machines; that earnings of $100 per week will generally accrue to such operators; or that they will recoup their investment within fifteen months?

Undisputed testimony indicates that if cost and maintenance of Respondents' vending machines be disregarded, profits from their operation run from 45% to 60% of the cost of the candy and gum

dispensed by the machines. The exact extent to which such profit must be reduced to recoup the original cost of the machine, and provide for depreciation and servicing thereof, has not been shown. The evidence shows, however, that seven purchasers of Respondents' vending machines who testified in support of the complaint expressed dissatisfaction with the operation of such machines; some because they did not like the locations of their machines; others because they blamed the Respondents for inducing false hopes of large profits; and all because they did not make what they considered a sufficient profit.

Their testimony establishes, however, that large profits, in the sense of large net returns, do not always accrue to purchasers or operators of Respondents' vending machines. On the other hand, Respondents have presented evidence showing that numerous purchasers of such machines have expressed satisfaction with their business venture by buying additional vending machines from Respondents. At least one of the witnesses called in support of the complaint was shown, on cross-examination, to have written glowing letters of commendation of Respondents' machines, and of the profits to be derived therefrom. On this point, even the complaint itself implies, by the assertion, "Large profits *rarely*, if ever, have accrued to purchasers," that such profits may sometimes so accrue. Likewise, the complaint alleges that "Purchasers *generally* are unable to earn $100 a week in their spare time, or to recoup their original investment within 15 months," adding the admission that "The quoted figures are theoretically possible, but only under perfect conditions."

In the light of the emphasis thus placed by the complaint upon the words "rarely" and "generally" in the allegations concerning possible profits, and the proposed findings of facts submitted by counsel supporting the complaint, we are asked to find that large profits "*rarely*" accrue to purchasers, and that purchasers "*generally*" are unable to earn $100 a week in their spare time or to recoup their original investment within fifteen months. We have not, however, been furnished with any sound basis for such a conclusion. The record contains no evidence of the relation, percentagewise, of dissatisfied purchasers to the total number of purchasers of Respondents' vending machines, nor is there any evidence therein tending to show how many purchasers made what they considered satisfactory profits, as implied by the evidence in the record showing repeat purchases of vending machines. In the absence of such evidence, or some evidence competent to serve as a basis for comparison, we must conclude that there is no substantial, probative and reliable evidence

in the record to support the conclusion that Respondents' representations relative to large profits or an income of $100 per week are false and misleading. Accordingly, the allegations of the complaint in that respect have not been proven.

3. Did Respondents falsely represent that the "operators" of their vending machines would not be required to engage in extensive canvassing and selling?

The evidence shows that Respondents' advertisements did contain representations to the effect that the "operators" of Respondents' vending machines would not be required to engage in any canvassing or selling. There is no evidence in the record to indicate that these words, as used in Respondents' advertisements, have any meaning except in the usual and ordinary sense in which they are customarily used and understood by the public generally. Thus, the word "selling" must be accepted as meaning simply the transfer of title to property for a consideration; and the word "canvassing" must be taken as meaning a seeking of the opportunity to sell. As so interpreted, Respondents' advertisements necessarily indicate that the "operators" of their vending machines would not have to engage in a door-to-door solicitation, or other type of personal contact between seller and prospective purchaser, in the vending of candy and gum by means of Respondents' machines. There is evidence in the record that some operators of Respondents' vending machines found it necessary to seek new locations therefor. The obtaining of such new locations, however, cannot reasonably be equated with canvassing or selling. There is no valid basis, therefore, for the conclusion that Respondents falsely represented that no canvassing or selling would be necessary in operating their vending machines. In truth and in fact, none is necessary. Accordingly, this charge of the complaint has been disproved and must fail.

4. Did Respondents falsely represent that prospective purchasers of their vending machines would be required to have a car, good references, and a specified sum of money in order to qualify for the purchase of such machines?

The evidence shows that Respondents in their advertisements did represent that prospective purchasers of their vending machines were required to have a car, good references, and a specified sum of money to qualify therefor. One salesman testified that he did not ask a prospective purchaser if he had a car. All of the operators, however, who testified in this proceeding stated that an automobile was necessary to their business. We believe that we are justified in assuming that one of the purposes of Respondents' advertisements was to acquaint those interested therein with the general require-

ments of Respondents' proposal. It follows, therefore, since the use of a car was a necessity for operators, that the representation of such necessity cannot be false, as alleged.

Under Respondents' sponsorship plan, each prospective purchaser was required to be accepted for sponsorship by the local civic or fraternal organization. Without good references on the part of the prospect, it may be assumed that the organization would not have pledged its sponsorship to him. The mere fact that the proposed operator was accepted by the sponsoring organization implies its approval of him. We must conclude, therefore, that in one form or another, prospective purchasers were required to have good references.

Since the complaint admits that a specified sum of money was required of the purchaser of Respondents' vending machines, we must conclude that the representation concerning the money requirement, as well as those concerning a car and good references, was true. It follows that the charge concerning all three requirements fails because it is contrary to the facts as shown by the evidence.

5. Did Respondents falsely represent that purchasers of their vending machines would be given an exclusive sales territory?

The record shows that Respondents' advertisements contain no representation concerning exclusive sales territories. In fact, the purchase order provides as follows:

> 4. OPERATING PROVISION * * * It is easy to place equipment on a consignment basis, and the purchaser has the privilege of operating equipment in all available locations * * * COPPERITE, INC. assumes no responsibility for securing locations and assignment of territories.

The sponsorship contract makes no mention of exclusive sales territory. There is evidence that when this contract is forwarded to the Respondents, it is checked to determine that there are no riders attached thereto giving exclusive territories, and if such a rider is found, the sale is rejected.

The evidence shows, however, that one witness, Anderson, testified that the salesman who sold him Respondents' vending machines promised him an exclusive sales territory, and that such salesman also promised the same exclusive territory to one Bennett. The salesman, Johnson, who supposedly made these promises testified that he did promise Anderson an exclusive sales territory, and that the sponsorship contract was amended to indicate Vigo County, Indiana, as such exclusive territory. The salesman further testified that he also promised Bennett, who lived in Sullivan County, an exclusive territory, consisting of that county. This testimony reveals that the same exclusive territory was not given to two dif-

ferent purchasers, but rather that separate territories were given to two purchasers. The only relevant evidence, therefore, shows that only one salesman made the representation that exclusive territories would be given: an oral representation by one of Respondents' agents. This representation is, by the same evidence, shown to be true, because the exclusive territory so promised was duly granted. The evidence also shows that this promise of exclusive territory was made without the actual knowledge and consent of Respondents. We must conclude, therefore, that the representation of exclusive territory was true in the one instance in which it was shown to have been made, and that therefore the allegation of false and deceptive representation against Respondents in connection therewith fails because the evidence shows that the representation, as made, was true.

6. Did Respondents falsely represent that purchasers of their vending machines would be given liberal financial assistance for expansion if desired?

Subparagraph 6 of Paragraph Six of the complaint alleges that the Respondents have represented that purchasers of their vending machines will:

6. Be given liberal financial assistance for expansion if desired.

Paragraph Seven of the complaint alleges that the foregoing representation is false and misleading, and, in subparagraph 6 thereof, that, in truth and in fact,

Respondents do not give financial assistance to purchasers. Such persons can expand only by purchasing additional machines from the Respondent.

The evidence establishes that Respondents have made and disseminated the representation alleged in subparagraph 6 quoted above. Uncontradicted evidence also shows that the Respondents accept repeat orders for vending machines on sale terms of one-half of the purchase price cash with order, and the balance at the rate of $1.00 per month per machine, with payments extending over a period of twenty-five months, without interest or carrying charges. These terms for the purchase of additional vending machines appear very definitely to constitute "liberal financial assistance for the purpose of expansion," and to show that Respondents' representation concerning such assistance is in fact true.

Thus the evidence in the record disproves the general allegation of Paragraph Seven of the complaint, that Respondents' representation concerning financial assistance is false and misleading.

The specific allegation set forth in subparagraph 6 of Paragraph Seven of the complaint, which asserts that "Respondents do not give financial assistance to purchasers," is not an exact denial of the

specific allegation in subparagraph 6 of Paragraph Six of the complaint, that liberal financial assistance will be given for expansion' if desired, in that subparagraph 6 of Paragraph Seven refers, not to financial assistance given for expansion, but to financial assistance given to purchasers. This appears to be an unwarranted extension of the original allegation to include all purchasers instead of only purchasers of additional vending machines.

The assertion in the complaint immediately following the allegation discussed above, that "Such persons can expand only by purchasing additional machines from the Respondent," is not in accordance with the facts. Uncontradicted evidence in the record shows that operators of Respondents' vending machines may expand their business, not only by purchasing additional new machines from Respondents, but also by purchasing used or reconditioned machines from any source, by buying up the business of another vending-machine operator, or by purchasing additional vending machines of another make.

The record contains no evidence indicating that Respondents' advertisement concerning the giving of financial assistance reasonably implies any other kind of financial assistance than the acceptance of repeat orders on credit. Possibly the author of the complaint intended to imply that by the use of the words "financial assistance," Respondents gave the impression that they were offering something more than the extension of credit to an operator for the purchase of additional vending machines. If so, the exact type of financial assistance contemplated has not been revealed.

From the foregoing analysis we must conclude that the allegation that Respondents do not give financial assistance to operators desiring to expand their vending-machine business has been disproved by evidence in the record.

7. Did Respondents falsely represent that they manufacture the vending machines sold by them?

The evidence shows that Respondents did falsely imply that they were manufacturers of the vending machines which they offered for sale, whereas, in truth and in fact, such machines were manufactured for the Respondents, in accordance with their specifications, by W. G. Parrish Company of Chicago, Illinois. In the complaint, the legal and practical significance of the foregoing misrepresentation is described by the following averment:

> There has long been a preference on the part of a substantial portion of the purchasing public for dealing directly with the manufacturer in the belief that lower prices, elimination of middleman's profits, superior products, and other advantages can thereby be obtained.

Counsel supporting the complaint states in his proposed findings as to the facts that the charge in question is "Supported by common knowledge." Although that assertion may be true, it is not self-evident. During the course of the hearing counsel supporting the complaint presented no evidence to prove such assertion. Neither did he request that judicial knowledge be taken of the existence of the alleged preference, nor that official notice be taken of any precedent to that effect. If such request had been made, we could have had the benefit of advice by opposing counsel, and the issue could have been clarified and resolved in accordance with the requirements of due process. Failing in these respects, the record contains only the bare assertion, by counsel supporting the complaint, that this allegation is true. It follows, therefore, that since the misrepresentation relative to Respondents being manufacturers is unsupported by any proof as to the practical and legal significance of that statement, the charge as to misrepresentation in this respect has failed for lack of proof.

8. Did Respondents falsely represent that vending machines purchased from them would be placed in locations satisfactory to the purchasers thereof?

The complaint charges that the Respondents have represented that they would have the vending machines purchased from them placed at satisfactory locations, but that, contrary to such representation, the locations in which the machines were actually placed were "often unsatisfactory."

The evidence shows that Respondents have represented in their advertisements that their vending machines would be placed in locations to be secured by the sponsor. It may be reasonably assumed that such locations would be "satisfactory" from the standpoint of the servicing of the machines and the profit to be derived therefrom. This advertising representation was later supplemented by a sponsorship contract which placed the responsibility, both for locating the vending machines and for any relocations that might become necessary, upon the sponsor, for which such organization was to receive 10% commission on the proceeds from the vending machines so placed.

Each of the seven operators who testified in this proceeding, except one witness, Trumpetier, signed a Location Completion Form acknowledging, in effect, that their vending machines had been satisfactorily placed. They testified, in general, however, to dissatisfaction with a number of their locations. One witness testified that he executed the Location Completion Form only in order to validate insurance on his vending machines.

As hereinbefore stated, the record contains no evidence to show the total number of vending machines sold by Respondents, nor, with respect to the issue presently being considered, was any evidence presented showing how many of all the machines sold were placed in locations satisfactory to the operators thereof. There is evidence of only seven operators who considered their locations unsatisfactory, and no evidence as to the total number of operators who might have been likewise dissatisfied. Consequently we have no factual basis in the record upon which to base a determination as to the percentage of the total number of machines sold, whose operators were dissatisfied with their locations, the total number of relocations which proved to be necessary, or whether such relocations were satisfactory or unsatisfactory to the operators of the vending machines placed therein. In the absence of such evidence, or some evidence competent to serve as a basis for comparison, we must conclude that there is no substantial, probative and reliable evidence in the record to support the conclusion that Respondents' representations relative to the location of their vending machines is false and misleading. Accordingly, the allegation of the complaint that such locations were "often" unsatisfactory has not been proven.

9. Was Respondents' advertising statement, "Insured for property and liability by Lloyds of London. 1:—Plus fire, theft insurance and a 100% Money Back Guarantee," false and misleading because it failed to disclose that the purchaser must pay an added sum for such insurance?

The evidence shows that some of Respondents' salesmen offered to purchasers of Respondents' vending machines, at the time of purchase, an opportunity to purchase, for an additional consideration, certain policies of insurance issued by Miller National Insurance and Lloyds of London. For present purposes, we are not concerned with the detailed provisions of these policies or the way in which the premiums therefor were transmitted to the insurance agency in Denver, Colorado, which represented the two insurance companies named.

Since there is no evidence in the record that purchasers were ever actually misled or deceived by the Respondents' representation quoted above, and since there is also no evidence of consumer understanding of the advertisement in question, we must determine, on the basis of the advertisement itself, whether such representation has the tendency and capacity to deceive.

We think we are justified in taking judicial notice of the common business practice of requiring purchasers who desire insurance in connection with a purchase to pay the premium therefor. This

practice is so prevalent in business today that to expect a seller to pay for insurance which protects a purchaser is to expect something for nothing in a business deal. Purchasers today, more reasonably, expect the seller either to quote outright the cost of such insurance, or to include it in the price of the commodity purchased. It appears to us, therefore, that a prospective purchaser of vending machines would have to be very foolish indeed to expect to get insurance on such machines without paying for it in one form or another.

Accordingly, we must conclude that the Respondents' representations relative to insurance cannot reasonably be interpreted as false, misleading and deceptive, simply because they fail to reveal that the purchaser must pay the premium on such insurance in addition to the price of the vending machines themselves. Therefore the allegation of the complaint in this respect fails for lack of proof.

CONCLUSION

In summary, we must conclude that the allegations of the complaint have not been proved by reliable and substantial evidence. Accordingly,

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

FINAL ORDER

The hearing examiner on August 21, 1957, having filed an initial decision dismissing the complaint in this proceeding, and no appeal from said decision having been filed; and

The Commission on October 17, 1957, having placed the case on its own docket for review:

It is ordered, That the Commission's action of October 17, 1957, purporting to place the case on the Commission's docket for review be, and it hereby is, vacated and set aside.

It is further ordered, That the initial decision of the hearing examiner did, on October 16, 1957, become the decision of the Commission.

IN THE MATTER OF

BEN STECKER, ALSO KNOWN AS BEN STECHER, TRADING AS DUMONT FURS

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

Docket 6817. Complaint, June 11, 1957—Decision, Nov. 19, 1957

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements.

Mr. John T. Walker for the Commission.
Mr. Angelo M. Torrisi, of New York, N.Y., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein charging the above-named respondent, Ben Stecker, also known as Ben Stecher, an individual trading as Dumont Furs, with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On October 3, 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 said respondent and by his attorney and John T. Walker, counsel supporting the complaint, under date of September 24, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

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 in content, is in accord with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Ben Stecker, also known as Ben Stecher, is an individual trading as Dumont Furs, with his office and principal place of business located at 115 West 30th Street, in the City of New York, State of New York.

2. Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission, on June 11, 1957, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. 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.

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

5. Respondent waives:

(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 he 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 respondent that he has violated the law as alleged in the complaint.

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, 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 person of the respondent herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges 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 full disposition of all 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 Ben Stecker, also known as Ben Stecher, an individual trading as Dumont Furs, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the in-

troduction into commerce, or manufacture for introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise falsely or deceptively identifying any such fur product by affixing a label thereto that contains a Registered Identification Number other than respondent's.

2. 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 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 registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it in commerce, advertised or offered it for sale in commerce;

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

(g) The item number or mark assigned to a fur product.

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 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 furs used in a fur product;

(g) The item number or mark assigned to a fur product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 19th day of November, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Ben Stecker, also known as Ben Stecher, an individual trading as Dumont Furs, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

HARRY PELTZ ET AL., TRADING AS BRESLAU, AND M. H. PELTZ, INC.

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

Docket 6694. Complaint, Dec. 13, 1956—Decision, Nov. 22, 1957*

Consent order requiring two associated furriers in Washington, D.C., and Baltimore, Md., to cease violating the Fur Products Labeling Act by advertising, labeling, and invoicing which, variously, carried fictitious prices and misrepresented values, named animals other than those producing certain furs, failed to disclose that the fur in certain products was secondhand used, and failed in other respects to comply with the requirements of the Act.

Mr. Brockman Horne supporting the complaint.
Mr. Webster Ballinger of Washington, D.C., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 13, 1956, charging them with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and also violation of the Federal Trade Commission Act as set out in said complaint. After service of the complaint, joint answer was filed by the respondents. Hearings were held for the taking of evidence after which both sides rested. Subsequently the complaint was, on motion of counsel supporting the complaint, without objection by respondents, amended to conform to the proof. The original answer was allowed to stand as answer to the complaint, as amended. The hearing examiner fixed the time for filing proposed findings of fact, conclusions of law and order and the reasons therefor.

On September 7, 1957 respondents and their counsel and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist from the practices complained of which agreement purports to dispose of all the issues in this proceeding. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned hearing examiner herein for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

* Amended Aug. 16, 1957.

It is noted that whereas the complaint as amended charged that respondents Harry Peltz, Samuel Peltz and Irving Peltz were trading as copartners under the name of Breslau, the agreement is executed by Harry Peltz as an individual doing business as Breslau. The other individual respondents executed the agreement as individuals and as officers of the corporate respondent M. H. Peltz, Inc. The order to cease and desist is directed to all respondents.

Section 3.25(b) of the Commission's Rules of Practice says among other things that an agreement for a consent order to cease and desist may contain a statement "that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint." It is noted that the agreement does not contain such statement. Since such statement is not mandatory, its absence is held not to vitiate the agreement.

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

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

1. Respondent Harry Peltz is an individual trading as Breslau, with his office and principal place of business located at 614 Twelfth Street, N.W., Washington, D.C.

2. Respondent M. H. Peltz, Inc., is a corporation organized 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 228–230 Eutaw Street, Baltimore, Maryland.

3. Respondents Samuel Peltz and Irving Peltz are individuals and are Vice-President and Secretary-Treasurer, respectively, of said corporation, and they formulate, direct, and control its policies, acts, and practices. Their business address is the same as that of the corporation.

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

ORDER

It is ordered, That respondents Harry Peltz, an individual trading as Breslau or under any other name, M. H. Peltz, Inc., a corporation, and its officers, and Samuel Peltz and Irving Peltz, 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 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 setting forth on labels attached thereto prices represented to be the regular or usual price of such fur products which are an amount in excess of the prices at which the respondents usually or customarily sell such fur products.

B. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise 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 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 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 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.

3. Setting forth on labels attached to fur products information required under Section 4(2) of the Act and the Rules and Regulations thereunder in abbreviated form or in handwriting.

C. 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 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 invoices;

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

2. Setting forth on invoices information required under Section 5(b)(1) of the Act and the Rules and Regulations thereunder in abbreviated form.

3. Failing to set forth an item number or mark assigned to fur products on invoices pertaining to such products as required by Rule 40 of the Rules and Regulations.

4. Using on invoices the name or names of any animal or animals other than the name or names provided for in Paragraph C(1)(a) above.

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

1. Fails to disclose 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.

2. Represents, directly or by implication:

(a) That respondents' price of any fur product is below cost, when such is not the fact.

(b) That the regular or usual price of fur products is an amount in excess of the prices at which the respondents usually or customarily sell such fur products.

3. Makes pricing claims or representations of the type referred to in paragraph D(2) above unless there are maintained by the respondents full and adequate records disclosing the facts upon which such claims and representations are based as required by Rule 44(e) 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 22nd day of November, 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.

IN THE MATTER OF

BERNARD D. GARFINKEL DOING BUSINESS AS BENAT WATCH CASE CO.

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

Docket 6857. Complaint, July 26, 1957—Decision, Nov. 22, 1957

Consent order requiring a New York City distributor to cease misrepresenting the gold karat fineness of watch cases he sold to jobbers and retailers by imprinting "14 K" on the backs thereof.

Edward F. Downs, Esq. and *Thomas A. Sterner*, Esq., for the Commission.

Respondent, pro se.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on July 26, 1957, charging him with having violated the Federal Trade Commission Act by labeling his gold watch cases 14 karat when they were in fact less than 14 karat. Respondent entered into an agreement, dated September 21, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

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

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

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

1. Respondent Bernard D. Garfinkel is an individual trading and doing business as Benat Watch Case Co., with his office and principal place of business at 2 West 47th Street, New York, New York.

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

ORDER

It is ordered, That respondent, Bernard D. Garfinkel, trading and doing business as Benat Watch Case Co., or under any other name, his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any articles composed in whole or in part of gold or an alloy of gold in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stamping, branding, engraving or marking any article, or selling any article that is stamped, branded, engraved or marked, with any phrase or mark such as 14K, or otherwise representing directly or by implication that the whole or a part of any article is composed of gold or any alloy of gold of any designated fineness, unless the article or part thereof so marked or represented is composed of gold of the designated fineness within the permissible tolerance established by the National Stamping Act (15 U.S.C. Sections 294 et seq.).

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 did, on the 22nd day of November, 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

JULIUS BERMAN ET AL. TRADING AS BERMAN BROTHERS

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

Docket 6863. Complaint, Aug. 14, 1957—Decision, Nov. 22, 1957

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to label certain products as required and by invoicing which showed the United States as the country of origin of furs which were in fact imported.

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

Mr. Julius Berman, Mr. Max Berman, and *Mr. William Berman, pro se.*

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on August 14, 1957, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Rules and Regulations promulgated under the Fur Products Labeling Act. In lieu of submitting answer to said complaint, all of the respondents on September 20, 1957, entered into an agreement for consent order with counsel supporting the complaint disposing of all the issues in this proceeding in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission, which agreement has been duly approved by the Director and the Assistant Director of the Bureau of Litigation.

By the terms of said agreement, the respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Respondents in the agreement expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that said agreement is for settlement purposes only and does not constitute an admission by the respondents that

they have violated the law as alleged in the complaint. The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondents are Julius Berman, Max Berman, and William Berman, individuals and copartners trading as Berman Brothers, with their office and place of business located at 305 Seventh Avenue, in the City of New York, State of New York.

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

ORDER

It is ordered, That respondents Julius Berman, Max Berman, and William Berman, as individuals and as copartners trading as Berman Brothers, or under any other name, 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 in the transportation and distribution in commerce, of any fur product, or in connection with the manufacture for sale, sale, advertising, offiering 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 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 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.

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 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 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 invoices;

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 22nd day of November, 1957, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

SOUTHERN PIANO COMPANY, INC., ET AL.

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

Docket 6839. Complaint, July 15, 1957—Decision, Nov. 23, 1957

Consent order requiring sellers in Salisbury, N.C., to cease advertising new pianos falsely as bargain repossessed instruments previously sold at prices substantially higher than those at which they were presently offered.

Mr. Brockman Horne for the Commission.

Mr. Graham M. Carlton, of Salisbury, N.C., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein charging the above-named respondents, Southern Piano Company, Inc., a corporation, and Thomas W. Willis, Mildred Ellen Willis and Dan Miller Nicholas, individually and as officers of said corporation, with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondents were duly served with process. The initial hearing and subsequent hearings ordered by the hearing examiner were canceled pending negotiations of counsel for a consent agreement.

On October 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 said respondents and by its attorney and Brockman Horne, counsel supporting the complaint, under date of October 1, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

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 in content, is in accord with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Southern Piano Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 128 East Council Street, Salisbury, North Carolina.

Respondents Thomas W. Willis, Mildred Ellen Willis and Dan Miller Nicholas were, prior to about January 1, 1957, President, Vice-President, and Secretary-Treasurer, respectively, of said corporation and formulated, directed and controlled its policies, acts and practices. Subsequent to that date, Thomas W. Willis and Mildred Ellen Willis resigned as officers of said corporation. Their present address is 514 Heilig Avenue, Salisbury, North Carolina. At the same time, Dan Miller Nicholas became President of said corporation and presently formulates, directs and controls its policies, acts and practices. His address is the same as that of the corporation.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 15, 1957, 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.

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, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Con-

sent Order To Cease And Desist," that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges 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 full disposition of all 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 respondents Southern Piano Company, Inc., a corporation, and its officers, and Thomas W. Willis, Mildred Ellen Willis and Dan Miller Nicholas, individually and as officers and former officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of pianos, 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 pianos which are new and had not been previously sold to others and used by them are repossessed pianos.

2. That pianos have previously been sold at prices higher than those at which they are offered, unless such is the fact.

3. That savings are offered on the purchase of pianos unless based upon the price at which the pianos are customarily and usually sold.

4. That any amount is the price at which respondents sell their pianos when it is in excess of the price at which said pianos are customarily and usually sold by respondents.

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 did on the 23rd day of November, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Southern Piano Company, Inc., a corporation, and its officers, and Thomas W. Willis, Mildred Ellen Willis and Dan Miller Nicholas, individually and as officers and former 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

IN THE MATTER OF

UNIVERSAL SEWING SERVICE, INC., ET AL.

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

Docket 6844. Complaint, July 22, 1957—Decision, Nov. 26, 1957

Order requiring sellers in Cincinnati to cease using "bait" advertising and other false claims in newspapers, radio and television broadcasts, and statements of salesmen, to sell sewing machines and vacuum cleaners, including representations of unconditional guarantees, representations that installment notes would not be sold to a finance company, and representations that the instrument signed by prospective customers was a "receipt" for products left on approval when it was actually a blank contract of sale; and to cease using the name "Westinghouse" for sewing machines which were manufactured in Japan.

Edward F. Downs, Esq. and *Thomas A. Sterner*, Esq., supporting the complaint.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

On July 22, 1957 the Federal Trade Commission issued its complaint against the above-named respondents charging them with violation of the Federal Trade Commission Act as set forth in said complaint. From the record it appears that copies of said complaint were duly served on said respondents together with copies of an order designating and appointing James A. Purcell as hearing examiner in this proceeding. The complaint so served contained a notice that a hearing would be held in Cincinnati, Ohio on September 25, 1957 on the charges set forth in said complaint, at which time respondents would have the right to appear and show cause why an order should not be entered requiring each of them to cease and desist from violations of the law charged in the complaint. The complaint further contained a notice that respondents were afforded an opportunity to file with the Commission an answer to the complaint on or before 30 days after service.

The record shows further that no answer to the complaint was filed within the time prescribed, that after the time for filing answer had expired hearing examiner Purcell issued an order on September 11, 1957 noting the default in the matter of filing answer, cancelling the hearing set for Cincinnati, Ohio on September 25, 1957 and in lieu thereof scheduling a hearing in Room 692, Federal Trade Commission Building, Washington, D.C. on October 3, 1957 at 10:00 A.M., which order was duly served on respondents.

On October 2, 1957, by authority of the Commission, the Director of Hearing Examiners issued an order designating and appointing the undersigned, a hearing examiner of this Commission, to take testimony and receive evidence in this proceeding and to perform all other dutes authorized by law in the place and stead of James A. Purcell, hearing examiner heretofore appointed.

On October 3, 1957 pursuant to the order of hearing examiner Purcell a hearing was held at 10:00 A.M. in Room 692, Federal Trade Commission Building, Washington, D.C. At that hearing counsel supporting the complaint was present but neither of respondents were present in person or by counsel. Attention of the hearing examiner was called to the fact and it was noted on the record that no answer was filed by or for either respondent.

Following Section 3.7(b) of the Commission's Rules of Practice, the respondents, Universal Sewing Service, Inc., a corporation, and Raymond Anderson, individually and as an officer of the corporate respondent, having failed to answer the complaint within the time provided therefor and having failed to appear either in person or by attorney at the time and place fixed for hearing, after due notice thereof, were deemed to be in default and it was so stated on the record by the hearing examiner at the hearing. Also at said hearing consideration was given to determination of the form of order to be entered herein. In view of the foregoing the hearing examiner now makes the following findings as to the facts, conclusions and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Universal Sewing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 600 Reading Road, Cincinnati, Ohio.

Respondent Raymond Anderson is an individual and an officer of corporate respondent Universal Sewing Service, Inc. He formulated, directed and controlled the policies, acts and practices of said corporate respondent. His address is the same as that of corporate respondent.

PAR. 2. Respondents at the time of issuance of the complaint and for some time prior thereto were engaged in the sale of sewing machines and vacuum cleaners.

PAR. 3. Respondents, in the course and conduct of their business, were engaged in substantial competition in commerce with other corporations, and with firms and individuals who are likewise engaged in the sale of sewing machines and vacuum cleaners, in commerce.

PAR. 4. In the course and conduct of their business, respondents caused their said products, when sold, to be transported from their place of business in the State of Ohio to purchasers thereof located in various other states of the United States and have maintained a course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Their volume of trade in said commerce was and has been substantial.

Respondents further engaged in commerce, in that they transmitted various instruments of a commercial nature to their customers and to financial or banking institutions located in states other than the State of Ohio.

PAR. 5. By means of advertisements inserted in newspapers of general circulation, commercial announcements by radio and television broadcasts which carry across state lines, in circulars and by oral statements made by their salesmen during the solicitation of sales of their products, respondents have falsely represented, directly or by implication:

(1) That offers to sell their products at low prices are bona fide offers to sell the products advertised at such prices, when in truth and in fact, such offers are not made in good faith but constitute "bait" advertisements the purpose of which is to obtain leads and information as to persons interested in purchasing such products. When prospective purchasers responded to said advertisements, respondents' salesmen called upon them and made no effort to sell the product so advertised but instead disparaged such products in a manner calculated to discourage the purchase thereof and attempted to, and frequently did, sell similar products at much higher prices.

(2) That their products were unconditionally guaranteed for five (5) or twenty (20) years, when actually such guarantees were limited in coverage and the limitations thereof were not disclosed in the advertisements or to purchasers, until after the sale and delivery of the products purchased.

(3) That sales contracts or notes to be paid off in installments would be retained by respondents and not sold by them to a finance or other company. Notwithstanding such assurances to purchasers respondents have sold their contracts and notes to finance or other companies with the result that they purchasers of respondents' products have been compelled to pay financing or carrying charges that they did not expect to have to pay.

(4) That the instrument signed by prospective purchasers, with whom respondents' products were left on a trial or approval basis, was a "receipt" for same, when, in fact, such instrument was actually a blank contract of sale or note that respondents subsequently completed and they or their assignees sought to enforce.

PAR. 6. Respondents used the name "Westinghouse" in connection with certain of their sewing machines, thereby representing, directly or by implication, that said sewing machines were domestically manufactured by the well known firm with which the name "Westinghouse" has long been associated, when, in truth and in fact, such sewing machines were not made by said firm but were, in fact, manufactured in Japan.

PAR. 7. The use by respondents of the aforementioned false, misleading and deceptive statements, acts and practices has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were and are true, and into the purchase of substantial quantities of the aforesaid products, including higher priced products than those advertised, because of such mistaken and erroneous belief. As a result thereof, trade in commerce has been unfairly diverted to the respondents from their competitors and injury has thereby been done to competition in commerce.

CONCLUSIONS

The aforesaid acts and practices as hereinabove set out were all to the injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The Federal Trade Commission has jusidiction of the subject matter of this proceeding and of the respondents herein. The complaint states a cause of action against respondents under the Federal Trade Commission Act. This proceeding is in the public interest.

ORDER

It is ordered, That the respondents Universal Sewing Service, Inc., a corporation, and its officers, and Raymond Anderson, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or vacuum cleaners or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

2. Representing, directly or by implication, that their sewing machines, vacuum cleaners, or other merchandise is guaranteed for five (5) or twenty (20) years, or for any period of time, or that they are otherwise guaranteed, without clearly and conspicuously disclosing the existence of any material limitations upon the nature and extent of such guarantee or the manner of performance thereof, and the identity of the guarantor.

3. Selling or negotiating any contract or other instrument evidencing an installment sale after having represented directly or by implication to the person or persons executing such contract or other instrument that it would not be sold or negotiated.

4. Obtaining signatures on sales contracts or notes upon the representation, directly or by implication, that they are receipts or any instrument other than a contract or note, or attempting to collect from persons who have signed instruments so misrepresented.

5. Using the word "Westinghouse," or any simulation thereof, to designate, describe or refer to their sewing machines, vacuum cleaners or other products; or representing, through the use of any other words, or in any other manner, that said products are made by anyone other than the actual manufacturer.

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 did, on the 26th day of November, 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.

IN THE MATTER OF

BETTER LIVING, INC., ET AL.

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

Docket 6290. Complaint, Jan. 25, 1955—Decision, Nov. 29, 1957

Order requiring Philadelphia operators of retail stores in Pennsylvania, New York, New Jersey, and Maryland, to cease using bait advertising in the sale of their aluminum storm doors, aluminum storm windows, and aluminum awnings, and to cease making false representations in advertising and trade literature concerning prices and terms of sale, guarantees, durability of their products, prizes purportedly awarded in competitive contests, and fuel savings resulting from installation.

Mr. Daniel J. Murphy for the Commission.

Mr. Robert John Brecker, Mr. Isadore A. Shrager and *Mr. Sidney Ginsberg*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On January 25, 1955, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with dissemination of false advertisements to promote sales of aluminum storm doors, windows and awnings in commerce, in violation of the Federal Trade Commission Act.

THE ANSWER

On March 15, 1955, Respondents submitted an answer to the complaint herein, denying the principal charges thereof.

HEARINGS AND PROPOSED FINDINGS

Hearings were held in Washington, D.C. and Philadelphia, Pennsylvania, at which evidence was presented in support of and in opposition to the allegations of the complaint. Thereafter, counsel submitted proposed findings as to the facts and proposed conclusions, whereupon the proceeding came before the Hearing Examiner for his consideration of the entire record and issuance of an initial decision based thereon.

IDENTITY AND ORGANIZATION OF THE RESPONDENTS

Respondent Better Living, Inc. is a Pennsylvania corporation, with its office and principal place of business formerly located at 37th and Walnut Streets, now located at 21st and Godfrey Streets, Philadelphia, Pennsylvania. Individual Respondents Carl Mickelson and Fred E. Block are, respectively, President and Treasurer, and Vice-President and Secretary, of the corporate Respondent, having the same address. The individual Respondents formulate, direct and control the acts, policies and business affairs of the corporate Respondent. The individual Respondents herein have also been partners trading and doing business as Aluminum Storm Window Company, but in 1954 this partnership was converted into a corporation of the same name, with the former partners as the principal officers thereof, which positions they still hold. Respondents own, control and operate retail stores in the States of Pennsylvania, New York, New Jersey and Maryland.

NATURE AND SCOPE OF RESPONDENTS' BUSINESS

Respondents have been for several years last past, and now are, engaged in the sale and distribution of aluminum storm doors, storm windows and aluminum awnings. Respondents distribute their products from their place of business in Pennsylvania to purchasers located in various other states of the United States and in the District of Columbia. Respondents compete with various others in their course of trade in commerce in such products, which is substantial.

ADVERTISEMENTS DISSEMINATED

For the purpose of soliciting the sale of, and selling, their aluminum products in commerce, Respondents have represented in correspondence, advertisements, and trade literature disseminated in commerce, among other things, as follows:

Greatest Fuel Savings on Record;

* * * Storm Windows covered by Unconditional Guarantee;

$14.95 plus "vacuum type" installation for larger size standard windows 24¼" by 45".;

Every Installation GUARANTEED;

Better Living, Inc., "Beauty Prize" storm windows and doors. Acclaimed from Coast to Coast First Prize Winners for Beauty. Choice of Famous Home Stylists.;

Storm windows * * * pay for themselves over and over again in fuel and maintenance savings;

All Storm Windows you need—Any size you need $14.95 * * * Large size standard windows 24½" x 45".;

Aluminum storm doors * * * $59 size 34" x 77".;

Repeated by Popular Demand 3 days only! * * * Storm and Screen Doors $10 * * * with purchase of 8 or more satin-finish aircraft aluminum * * * STORM WINDOWS;

Fully Guaranteed;

Your Installation Fully Guaranteed for Life;

* * * Everlasting Aluminum Door * * *;

SAVE ½ ON FUEL;

Prompt Installation;

Beautiful 1" thick all aluminum STORM & SCREEN DOORS $10.00 * * * REG. $90 installed;

IMMEDIATE INSTALLATION;

Profit Guaranteed Installations;

WORLD'S LOWEST PRICES;

Nationally Adjudged America's Finest! * * *;

Mr. and Mrs. Home Owner! Can you Spare $4.92 per month to guarantee yourself lowered household expense?;

Studies made by the U.S. Government Conservation Division (official manual 599141– * * *) clearly reveal that beyond question Storm Windows will definitely cut your heat loss "as much as 50%";

All good storm windows pay for themselves and show a profit * * *;

Better Living, Inc., unconditionally guarantees to lower your household expenses! Why can we fearlessly, unhesitatingly, publish such a guarantee, black on white? Who is the authority behind the guarantee? We'll tell you why, we'll tell you who: The United States Government also black on white and indisputable, clearly reveals that, beyond question, Storm Windows will definitely cut your fuel bills when accurately measured and properly installed "Heat Loss" says Uncle Sam "can be reduced as much as 50%".;

"The many square feet of window panes in the average house are therefore one of the prime factors in the heat loss. This loss can be reduced as much as 50% by the use of storm windows * * *" official manual U.S. Gov. Conservation Division Booklet 599141.;

We unconditionally guarantee to install FOUR (4) Genuine YOUNGSTOWN ALUMINUM STORM WINDOWS for only $4.92 per month.;

STORM AND SCREEN DOORS

$10

ACTUAL VALUE $90 Installed

* * *

With purchase of 8 or more satin-finish aircraft aluminum triple-track all-welded storm windows.

By means of the above-quoted advertisements and others not herein set forth, Respondents have represented, directly or by implication, as follows:

(a) That the reduced prices quoted in the advertisements are the complete prices for the products including installations, hardware and accessories;

(b) That the products and installations are fully and unconditionally guaranteed for life;

(c) That the products are sold at the world's lowest prices;

(d) That their products have been awarded prizes in competitive contests;

(e) That their products are everlasting and are made of indestructible materials;

(f) That customers will obtain immediate installation of Respondents' products;

(g) That installations of their storm windows will result in savings of ½ in fuel and will reduce heat loss as much as 50%;

(h) That a bona fide offer is being made to sell their products at a greatly reduced price in combination with the purchase of other products.

TRUTH OR FALSITY OF REPRESENTATIONS

Since the complaint alleges, and Respondents' answer denies, that the foregoing representations are false and deceptive, it is necessary, in order to resolve the issues thus raised, to consider each representation seriatim, together with all the evidence relevant thereto.

(a) That the reduced prices quoted in the advertisements are the complete prices for the products including installations, hardware and accessories.

The evidence shows that persons answering Respondents' advertisements and seeking to purchase from Respondent Better Living, Inc. storm doors or windows at the prices quoted in such advertisements, discovered that for one reason or another the particular type of window or door which they wished to buy was not available at the price advertised. At various times prospective customers were told that they could obtain the desired products at a higher price, or at the price advertised in combination with other higher-priced items. They were also told that the price advertised did not include the installation of the doors or windows, nor the hardware and accessories required for their installation. In fact, Respondent Block is quoted as admitting that the basic purpose of Respondents' advertisements as to price was merely to develop leads, and that actually Respondents could not afford to sell the products at the special prices quoted in such advertisements. A witness testified that Respondent Block further stated that they could make their customers think that the customer was getting a particular article at a very low price, simply by combining the specially-priced article with another article at a higher price. Considering the entire record, we must conclude that the reduced prices and special prices advertised by Respondents for several years prior to the issuance of the complaint herein were misleading and deceptive, and that

such prices were not the complete prices for the products advertised, in that they did not include the cost of installation, hardware and accessories, and in some instances the article could not be purchased at all for the price advertised.

(b) That the products and installations are fully and unconditionally guaranteed for life.

The evidence shows that some of the printed purchase orders used by the Respondents during the period of time in question contained a one-year guarantee, as follows:

* * * For a period of one year, from date of installation, Seller guarantees that all materials furnished by it will be of standard quality, free from defects, and will be installed or applied in a good and workmanlike manner. * * *

No statement relative to a lifetime guarantee appears on this particular printed form. On another purchase-order form, which contains the same printed one-year guarantee, there appears in handwriting the statement "Guaranteed for the life of the property against rust, corrosion, pitting. Install. also guaranteed." On another purchase order containing the printed one-year guarantee limitation, there appears the statement, also in handwriting, "Guaranteed for life of house." Of the three purchase orders cited, it will be noted that one contains no lifetime guarantee, but only a one-year guarantee printed on the order form; of the other two, both of which contain the same one-year printed guarantee, one bears a handwritten statement contradicting the printed one-year guarantee by apparently guaranteeing the product for the life of the property; and the third bears a similar contradiction in the form of a handwritten guarantee, "For the life of the house."

The statement that a product is "guaranteed for life" is, on its face, ambiguous and deceptive, unless qualified by a definition of the term "life" as used in the advertisement; that is, whether the life of the purchaser is meant, or the life of the property wherein the product is being installed. In the present instance, however, Respondents' order blanks bear a printed limitation of one year as the period during which the product is guaranteed. We find, therefore, that Respondents did not fully and unconditionally guarantee for life their products and the installaton thereof. Accordingly, we must conclude that such representation is false and deceptive.

(c) That the products are sold at the world's lowest prices.

The only evidence relevant to the claim that Respondents' prices were the world's lowest prices consists of the testimony of Respondents' advertising agent, who testified that for several weeks prior to the publication of the advertisement a check was made of local competitive prices, and that the prices thereafter advertised by Re-

spondents were slightly lower than their competitors'. Respondents' agent then admitted that he had no real factual basis to support Respondents' claim, and, in answer to a leading question, he stated that the claim was "Typical puffing, yes."

The question at once arises as to what is puffing, and whether the representation here under examination may properly be so characterized. Puffing, as we understand it, is a term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined. In contrast thereto, the representation as to "the world's lowest price" is a statement of an objective actuality, the truth or falsity of which is not variable and can be ascertained with factual precision. This representation cannot, therefore, properly be termed "puffing." It is either true, or it is false; and, accordingly, such a determination must be made.

Respondents' advertising agent admitted, in substance, that the representation was disseminated without a real factual basis therefor. Although we consider the issuance of such an advertising statement a reckless disregard of one's moral obligation to know whereof he speaks, nevertheless the admission that such a statement has no known basis in fact does not prove such statement false. We might reach that conclusion, if the record contained even one report of products, substantially the same as the Respondents', having been sold anywhere in the world at a lower price. No such evidence, however, appears herein. In the absence thereof, and of any other factual proof of the falsehood of this representation, we must conclude that the burden of proof with respect thereto has not been sustained.

(d) That their products have been awarded prizes in competitive contests.

Respondents' advertising agent admitted in his testimony that "those storm windows were never awarded a beauty prize of any kind." This testimony flatly contradicts Respondents' representations of "Beauty Prize Storm Windows and Doors" and "First Prize Winners for Beauty." Respondents' contention that such a statement is mere subjective puffing, which is acceptable in the field of advertising and is deceptive to no one, fails as a defense because the readers of Respondents' advertisements, not knowing that Respondents' products have never been entered in a beauty contest, may reasonably accept such statement at its face value. It contains, therefore, at least the capacity and tendency to mislead and deceive. Accordingly, we must conclude that Respondents' representations with respect to the prize-winning beauty of their products are false and deceptive.

(e) That their products are everlasting and are made of indestructible materials.

The evidence shows that aluminum possesses qualities which render it resistant to the effects of weather, but that it is not completely unaffected thereby. As a matter of fact, pittings and discolorations appear upon its surface under the action of weather, and cannot be easily removed. Furthermore, it is shown that aluminum is injuriously affected by salt air. The evidence further shows that aluminum storm windows and doors may be mechanically damaged, as by a blow, or by the settling or warping of the building in which they are installed. We must find, therefore, that Respondents' aluminum storm windows, doors and awnings are not everlasting, and are in no sense indestructible. Accordingly, we must conclude that Respondents' representations that their products are everlasting and indestructible are false and deceptive.

(f) That customers will obtain immediate installation of Respondents' products.

There is substantial evidence in the record that Respondents' customers, on a number of occasions, did not obtain immediate installation, but, on the contrary, were compelled to wait several months, and some as long as six months, before the products purchased were actually delivered and installed. A manufacturer and dealer in the industry testified that immediate installation implied a delivery of the product in two or three days, or within a week. We can, for present purposes, accept the definition of "immediate" as meaning within a few days' time, or without unreasonable delay; but by no means can "immediate" be expanded to mean within three or six months. Accordingly, we must conclude that Respondents' representations with respect to the immediate delivery of their products have been false and deceptive.

(g) That installations of their storm windows will result in savings of ½ in fuel and will reduce heat loss as much as 50%.

The record contains testimony by experienced dealers in storm windows and doors, to the effect that, in their opinions, the installation of storm windows, in a house in reasonably good repair, would probably save about 20% of the fuel bill, but that it would not result in savings of 50%. The difference between the experienced observation and opinion of the practical men in this field as to the possible saving in fuel, and the Respondents' claims for such saving, is considerable. The only possibility of a saving of as much as 50% in fuel costs being effected by the installation of Respondents' storm windows and doors would be in the extreme instance of a house in poor repair, wherein the repair needed concerned only the windows

and doors. This would be so rare and special an instance that it cannot be here considered as a criterion of the truth of Respondents' representations. In fact, it is obvious that no installation will be exactly like any other, and that it will be practically impossible to state in advance any precise percentage of savings in fuel cost that might be expected to result. Accordingly, we must conclude that Respondents' representations with respect to possible fuel savings by installation of their products are false and deceptive.

(h) That a bona fide offer is being made to sell their products at a greatly reduced price in combination with the purchase of other products.

The evidence shows that Respondents' agents and salesmen called upon prospective purchasers who had responded to the corporate Respondents' advertisements, and that such prospective purchasers were, in some instances, persuaded from the purchase of the cheaper products advertised in combination with other products, and into the purchase of aluminum storm doors and windows much more expensive than those advertised. In other instances, the cheaper products advertised were not made available to the prospective purchasers until after persistent demands, as illustrated in the case of Witness Winkler, who testified that he called Respondents relative to the purchase of sixteen windows at an advertised price of $11.95 each. Thereafter a representative of Respondents called at Mr. Winkler's home and "put on high-pressure talk to sell windows at a regular price * * *," stating that Respondents did not have the desired windows in stock. Thereafter, following lengthy negotiations between the witness and Respondents' representative, Respondents agreed to deliver the desired sixteen windows at $11.95 each, the price advertised, provided Mr. Winkler also purchased one additional window at a price of $38.00, and paid $5.00 for a survey. After a lengthy delay, involving months, the windows were finally delivered, and the purchaser was required to pay an additional $3.00 for the installation of each of the sixteen windows, making the windows cost $14.95 each instead of $11.95, as advertised, plus $5.00 for the survey and $38.00 for the extra window.

From a consideration of all the evidence it is clear that Respondents' advertisements did not present a bona fide offer to prospective purchasers to sell them aluminum products at a greatly reduced price in combination with the purchase of other aluminum products, but that Respondents employed such advertisements merely as a means of developing leads for the purpose of selling their products at their regular prices. We must conclude, therefore, that Respondents' advertising representations regarding greatly reduced

prices in combination with the purchase of other products are misleading and deceptive.

CONCLUSIONS

Based upon consideration of the entire record, and in consonance with the applicable principles of law and precedent, we conclude:

1. That the Federal Trade Commission has jurisdiction over the Respondents and over their acts and practices alleged in the complaint herein to be unlawful;

2. That this proceeding is in the interest of the public and that public interest herein is substantial; and

3. That the use by Respondents of the false, misleading and deceptive statements herein found tends to mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief that such representations are true, and thereby to induce the purchase of substantial quantities of Respondents' products. Consequently, trade has been unfairly diverted to Respondents from their competitors in commerce, and substantial injury to competition has resulted therefrom. Such acts and practices are all to the prejudice and injury of the public, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Accordingly,

It is ordered, That Respondents Better Living, Inc., a corporation, and Carl Mickelson and Fred E. Block, individually and as officers of said corporation, and also as partners trading as Aluminum Storm Window Company, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of aluminum storm doors, aluminum storm windows and aluminum awnings 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 their products are offered at reduced prices, without clearly and conspicuously disclosing, in immediate conjunction therewith, all of the terms and conditions thereof, including the requirement that additional merchandise must be purchased, if such is the case;

2. That the advertised price of any of said products includes the cost of installation, or any equipment or accessories, for which an additional charge is made;

3. That their products or installations are fully or unconditionally guaranteed or are guaranteed for life, without revealing, in

immediate conjunction therewith, the full terms and meaning of such guarantee;

4. That any of said products are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly and conspicuously disclosed;

5. That any of said products have been awarded prizes in competitive contests, unless such is in fact true;

6. That any of said products are everlasting or are made of indestructible materials;

7. That customers will obtain immediate installation of aluminum products purchased from Respondents, unless such installation is in fact made without unreasonable delay in the usual course of business;

8. That installation of their storm windows will cut fuel consumption one-half or will reduce total heat loss as much as 50%;

9. That articles are offered for sale at a certain price or under certain conditions, when such offer is not a bona fide offer to sell the articles so, and as, offered.

OPINION OF THE COMMISSION

By GWYNNE, *Chairman*:

The complaint, filed January 25, 1955, charges respondents with the dissemination of false advertising of aluminum storm doors, windows and awnings in violation of the Federal Trade Commission Act. From an initial decision and order, respondents have appealed.

The individual respondents Carl Mickelson and Fred E. Block have been partners doing business as Aluminum Storm Window Company, which partnership was, in 1954, converted into a corporation of the same name. Respondent Better Living, Inc. is a corporation, of which respondent Carl Mickelson is president and treasurer, and respondent Fred E. Block is vice-president and secretary. The office and principal place of business of respondents was formerly 37th and Walnut Streets, and at the time of the hearing was 21st and Godfrey Streets, both addresses in Philadelphia, Pa.

Respondents are engaged in the sale and distribution in interstate commerce of aluminum storm doors, aluminum storm windows and aluminum awnings. Their business is substantial and they are in competition with others also engaged in such general type of business.

In the conduct of their business, respondents made representations as to their products in newspaper advertisements, letters and by

other means. A partial list of such representations found to have been made is set out in the initial decision as follows:

Greatest Fuel Savings on Record;

* * * Storm Windows covered by Unconditional Guarantee;

$14.95 plus "vacuum type" installation for larger size standard windows 24¼" by 45".;

Every Installation GUARANTEED;

Better Living, Inc., "Beauty Prize" storm windows and doors. Acclaimed from Coast to Coast First Prize Winners for Beauty. Choice of Famous Home Stylists.;

Storm windows . . . pay for themselves over and over again in fuel and maintenance savings;

All Storm Windows you need—Any size you need $14.95 * * * Large size standard windows 24½" x 45".;

Aluminum storm doors . . . $59 size 34" x 77".;

Repeated by Popular Demand 3 days only! . . . Storm and Screen Doors $10 . . . with purchase of 8 or more satin-finish aircraft aluminum . . . STORM WINDOWS;

Fully Guaranteed;

Your Installation Fully Guaranteed for Life;

* * * Everlasting Aluminum Door . . .;

SAVE ½ ON FUEL;

Prompt Installation;

Beautiful 1" thick all aluminum STORM & SCREEN DOORS $10 * * * REG. $90 installed;

IMMEDIATE INSTALLATION;

Profit Guaranteed Installations;

WORLD'S LOWEST PRICES;

Nationally Adjudged America's Finest! . . .;

Mr. and Mrs. Home Owner! Can you spare $4.92 per month to guarantee yourself lowered household expense?;

Studies made by the U.S. Government Conservation Division (official manual 599141- . . .) clearly reveal that beyond question Storm Windows will definitely cut your heat loss "as much as 50%";

All good storm windows pay for themselves and show a profit. . . .;

Better Living, Inc., unconditionally guarantees to lower your household expenses! Why can we fearlessly, unhesitatingly, publish such a guarantee, black on white? Who is the authority behind the guarantee? We'll tell you why, we'll tell you who: The United States Government also black on white and indisputable, clearly reveals that, beyond question, Storm Windows will definitely cut your fuel bills when accurately measured and properly installed "Heat Loss" says Uncle Sam "can be reduced as much as 50%".;

"The many square feet of window panes in the average house are therefore one of the prime factors in the heat loss. This loss can be reduced as much as 50% by the use of storm windows. . . ." official manual U.S. Gov. Conservation Division Booklet 599141.;

We unconditionally guarantee to install FOUR (4) Genuine YOUNGSTOWN ALUMINUM STORM WINDOWS for only $4.92 per month.;

STORM AND SCREEN DOORS

$10

ACTUAL VALUE $90 Installed

* * *

With purchase of 8 or more satin-finish aircraft aluminum triple-track all-welded storm windows.

The hearing examiner found that respondents had made false and deceptive representations as follows:

(a) That the reduced prices quoted in the advertisements are the complete prices for the products including installations, hardware and accessories.

(b) That the products and installations are fully and unconditionally guaranteed for life.

* * * * * * *

(d) That their products have been awarded prizes in competitive contests.

(e) That their products are everlasting and are made of indestructible materials.

(f) That customers will obtain immediate installation of Respondents' products.

(g) That installations of their storm windows will result in savings of ½ in fuel and will reduce heat loss as much as 50%.

(h) That a bona fide offer is being made to sell their products at a greatly reduced price in combination with the purchase of other products.

The hearing examiner also found that the falsity of the representation, "(c) That the products are sold at the world's lowest prices," had not been established. From this finding, counsel supporting the complaint has not appealed.

Respondents' appeal first challenges the sufficiency of the evidence to establish the violations charged in the complaint and above referred to.

The initial decision sets out a summary of the evidence as to each specific charge considered by the hearing examiner. We will not enumerate these items of evidence in this opinion. It is sufficient to say that a consideration of the entire record demonstrates that the hearing examiner correctly found that the enumerated representations were false and deceptive and had the capacity to deceive.

The brief and oral argument for respondents point out that the alleged false and deceptive representations were made in 1952 and 1953 and up to approximately the middle, if not the end, of 1954, and that "there has been no attempt made by the Commission to relate these acts in 1952 and 1953 which Better Living, or the company now operated by Mr. Mickelson and Mr. Block, is doing today."

It would no doubt have been proper for respondents to show that the practices alleged in the complaint had been abandoned and that there was reasonable ground to believe that they would not be resumed in the future. The difficulty is, however, that nothing appears in the record to warrant the Commission's arriving at any such conclusion.

Counsel supporting the complaint introduced, over the objection of respondents, a written statement given by respondents Fred E.

Block and Carl Mickelson to an Assistant District Attorney in Philadelphia on September 9, 1953. This statement was given in connection with an investigation being conducted by the District Attorney's Office and contained various admissions as to the method of conducting respondents' business. Prior to that time, in March 1952, respondent Better Living, Inc. had been convicted in Baltimore, Maryland, of false advertising of their products under the Maryland statutes.

We believe that both the written statement of respondents and the conviction were admissible evidence; the former, as an admission against interest, and the latter, for the purpose of apprising the Commission of respondents' past conduct in order that a proper evaluation could be made of possible future conduct.

We think the order issued by the hearing examiner was necessary and proper for the protection of the public. The appeal of respondents is denied, and the findings and order of the hearing examiner are adopted as the findings and order of the Commission. It is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard on the respondents' appeal from the hearing examiner's initial decision, including briefs in support of and in opposition thereto and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusions and order contained in the initial decision:

It is ordered, That the respondents, Better Living, Inc., a corporation, and Carl Mickelson and Fred E. Block, 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 contained in the aforesaid initial decision.

IN THE MATTER OF

COMFORTE, INC., ET AL.[1]

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

Docket 6547. Complaint, Apr. 30, 1956—Decision, Nov. 30, 1957

Consent order requiring a Chicago manufacturer of wool products to cease enclosing in individual containers of bed comforters, inserts or streamers carrying fictitious prices greatly in excess of the usual retail prices and thus placing in the hands of retailers means of deceiving the purchasing public.

Mr. William A. Somers for the Commission.

Chapman, Anixter & Delaney, of Chicago, Ill., by *Mr. Mandel L. Anixter*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charged the respondents with certain violations of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, in connection with the sale of bed comforters. An agreement for a consent order with respect to all of the issues raised in the complaint, except that relating to the prices of respondents' products, has heretofore been entered into by respondents and counsel supporting the complaint, and an initial decision based upon such agreement was issued by the hearing examiner on October 11, 1956. That decision also dismissed the complaint in its entirety as to respondent Earl Chapman.

An agreement for a consent order with respect to the issue of pricing has now been entered into by the remaining respondents and counsel supporting the complaint. This agreement provides, among other things, that said respondents admit all 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 such remaining issue 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 said issue, such order to have the same force and

[1] The other charges of the complaint were disposed of by a consent order on Nov. 24, 1956, 53 F.T.C. 486.

effect as if entered after a full hearing, said 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 being of the opinion that the agreement provides an adequate basis for appropriate disposition of the remaining issue in the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Comforte, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Illinois. Respondents Nathan E. Chapman and Jesse Parmacek are individuals and are officers of the corporation. The office and principal place of business of all the respondents is located at 2511–51 West 18th Street, Chicago, Illinois.

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

ORDER

It is ordered, That respondents, Comforte, Inc., a corporation, and its officers, and Nathan E. Chapman and Jesse Parmacek, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bed comforters or similar merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Representing, by preticketing or in any other manner, that a certain amount is the customary or usual retail price of such merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold at retail.

2. Furnishing such merchandise to others which has been preticketed with a price or amount which is in excess of the price at which such merchandise is customarily and usually sold at retail.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 30th day of

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

It is ordered, That the respondents Comforte, Inc., a corporation, and Nathan E. Chapman and Jesse Parmacek, 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.

IN THE MATTER OF

GROVE LABORATORIES, INC.

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

Docket 6743. Complaint, Mar. 18, 1957—Decision, Nov. 30, 1957

Consent order requiring the manufacturer of "Fitch" hair and scalp preparations to cease discriminating in price by paying to certain favored wholesale customers, in addition to the customary 15% discount, a 10% "warehouse allowance" which was not granted to their competitors; and to cease requiring some retailers to purchase specific minimum quantities of its preparations while allowing their favored competitors to purchase in any quantity.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (15 U.S.C., Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Grove Laboratories, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 8877 Ladue Road, St. Louis 24, Missouri.

PAR. 2. The respondent is now and has since 1919 been engaged directly or indirectly in the manufacture, sale, and distribution of drug preparations known as Grove products and hair and scalp preparations known as Fitch products. For the fiscal year ending April 30, 1955, the gross sales of Grove Laboratories, Inc., amounted to $9,934,285.

Respondent classifies the customers to whom it sells and distributes its products into several categories. The principal classifications are (1) wholesale accounts such as drug-service, grocery, miscellaneous, drug merchandise, beauty and barber, and (2) retail accounts consisting of chain drugstores, chain grocery stores, chain variety stores, drug merchandisers, independent drugstores, independent de-

partment stores, independent super markets, grocery stores, independent variety stores, and the United States Government.

PAR. 3. In the course and conduct of its business the respondent has been and is now engaged in commerce as "commerce" is defined in the Clayton Act, as amended, in that it ships or causes to be shipped hair and scalp preparations referred to as Fitch products produced by it, from the state or states in which said items are produced or packed to purchasers thereof located in other states and the District of Columbia; and there is and has been at all times a continuous current of trade and commerce in said items between and among the several States of the United States and the District of Columbia.

PAR. 4. The respondent sells and distributes Fitch products in the aforesaid commerce to customers, some of whom are in competition with each other in the resale of said products.

PAR. 5. Respondent, in the course and conduct of its said business in commerce, as aforesaid, has been and is now discriminating in price between purchasers of Fitch products distributed by said respondent by selling said products to some purchasers at higher prices than it sells said products of like grade and quality to other purchasers and some of said other purchasers are engaged in active and open competition with the less favored purchasers in the resale of Fitch products in the United States.

PAR. 6. Specifically, respondent offers for sale, sells and distributes Fitch products to all customers buying directly from it at a list price less a 15% discount. However, certain customers classified as wholesale accounts, are given an additional substantial discount of 10% which is designated as a warehouse allowance, and this 10% discount is not given to other customers also classified as wholesale accounts. Some of the wholesalers receiving the additional 10% allowance are in competition with wholesalers not receiving said allowance.

PAR. 7. The effect of the respondent's aforesaid discriminations in price between said different purchasers of its said products of like grade and quality sold in the manner and method aforesaid, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the aforesaid favored and nonfavored purchasers are engaged, or to injure, destroy or prevent competition between said favored and nonfavored purchasers, or with the customers of either of them.

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

COUNT II

PAR. 9. Paragraphs 1 and 2 are hereby adopted and made a part of this count as fully as if herein set out verbatim.

PAR. 10. In the course and conduct of its business the respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act in that it ships or causes to be shipped Fitch products, referred to in Paragraph 2 hereof, from the state in which said items are produced or packed to purchasers thereof located in other States of the United States and the District of Columbia; and there is and has been at all times mentioned a continuous current of trade and commerce in said items between and among the several States of the United States and the District of Columbia.

PAR. 11. The respondent sells and distributes Fitch products in the aforementioned commerce to customers, some of whom are in competition with each other in the resale of such products.

PAR. 12. Respondent, in the course and conduct of its said business in commerce, as aforesaid, offers for sale, sells and distributes Fitch products to certain customers in any quantity desired by said customer, while other customers desiring the same privilege are required to purchase in specific minimum quantities, which are greater than the quantity the more favored customers are permitted to buy. Thus, the non-favored customers are required to either purchase in greater quantities than the favored customers purchase to obtain the same price as their favored competitors who are not required to purchase specific minimum quantities or they must of necessity buy from a wholesaler at a price higher than respondent's price.

PAR. 13. This practice of granting unequal treatment to competing purchasers places an undue burden upon the non-favored purchasers and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between retail dealers, and has unduly restrained, hindered, suppressed and eliminated competition therein in the sale and distribution of Fitch products in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Frederick McManus, Esq., for the Commission.

Mr. William Blum, Jr., of Washington, D.C. and *Shepley, Kroeger, Fisse and Shepley* of St. Louis, Mo., for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 18, 1957, charging it with having violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act and also Section 5 of the Federal Trade Commission Act. Respondent appeared by counsel and entered into an agreement, dated September 24, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director and the Assistant Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

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

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of

the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 8877 Ladue Road, St. Louis 24, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Clayton Act, as amended by the Robinson-Patman Act and the Federal Trade Commission Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That the respondent, Grove Laboratories, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the sale of hair and scalp preparations of like grade and quality in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Directly or indirectly discriminating in price between different purchasers by selling to any of its purchasers at higher net prices than it sells to other purchasers who compete in the resale and distribution of said hair and scalp preparations.

It is further ordered, That the respondent Grove Laboratories, Inc., a corporation, its officers, representatives, agents and employees, directly or indirectly or through any corporate or other device in connection with the sale of hair and scalp preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering or granting more favorable treatment to any customer than to competing customers by requiring different minimum quantities to be purchased.

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 did, on the 30th day of November 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

FOTO MURALS OF CALIFORNIA, INC., ET AL.

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

Docket 6708. Complaint, Jan. 9, 1957—Decision, Dec. 9, 1957

Order dismissing, for failure to sustain the allegations, complaint charging that use in advertising of the terms "photo mural", "Foto Mural", etc., by a Beverly Hills, Calif., dealer, for photogravure reproductions of photographs, designed as wall decorations or coverings, constituted false advertising.

Mr. Edward F. Downs and *Mr. Garland S. Ferguson* for the Commission.

Adelman & Schwartz, of Beverly Hills, Calif., for respondents.

INITIAL DECISION DISMISSING COMPLAINT BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration, upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts and conclusions drawn therefrom and order:

1. Respondent Foto Murals of California, Inc., is a California corporation located at 8401 Wilshire Boulevard, Beverly Hills, Calif. It is engaged in the sale and distribution in interstate commerce of reproductions of photographs designed to sell as wall decorations or wall coverings. These products are referred to as "Photo Murals," "Foto Murals," and "Muralettes."

2. In the production of its murals the corporate respondent causes an original color transparency to be made of a scene to be reproduced on a mural. This transparency is subjected to further photographic processing to obtain four color separation negatives which are used to make printing plates of specified color for transfer to respondent's

specialized paper by means of the photogravure process. This photogravure processing is performed by independent printing concerns under contracts with respondent.

3. The complaint in this proceeding alleges that the use of the term "Foto Murals" in respondent's trade name, and the use of the terms "Photo Murals" and "Foto Murals" to designate or describe respondent's products, constitute false, deceptive, and misleading representations in violation of the Federal Trade Commission Act because respondent's products are not enlarged photographs on photographic paper. This allegation is not supported by the testimony and other evidence in this proceeding. Respondent's murals are reproductions of original color transparencies printed by the photogravure process from plates prepared by photographic methods and can properly be referred to as "photo murals." The record herein does not demonstrate any public interest in limiting the term "photo murals" to an enlargement on sensitized paper.

4. The complaint also alleges that representations that respondent manufactures its products are false and misleading in that a substantial portion of the purchasing public have a preference for dealing direct with a factory and manufacturer of merchandise. No evidence was introduced as to any public preference for dealing direct with the printing concern printing the products as opposed to a concern which designed and caused the products to be produced according to its specifications. In the absence of such testimony as to preference, this charge has not been sustained.

5. The further allegation of the complaint that respondent has falsely represented that the price of custom photographic murals is two to twenty times the price of respondent's products, is wholly unsupported by the record in this proceeding.

6. On the basis of the present record, it appears that there has been a total failure to sustain the allegations of the complaint.

It is therefore ordered, That the complaint in this proceeding be, and the same is hereby, dismissed.

OPINION OF THE COMMISSION

By Secrest, Commissioner:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint for failure of the evidence to sustain the allegations. The complaint charges respondents with violating the Federal Trade Commission Act through the use in advertising of false, misleading, and deceptive statements and representations in

connection with the sale of reproductions of photographs designed to sell as wall decorations or wall coverings.

The basis of the appeal is the dismissal of the complaint with respect to the charge that respondents, through the use of the terms "photo mural," "photographic mural" and "Foto Mural," to describe or refer to their products, have misrepresented the true nature of such products. Specifically, this charge is that respondents, by the use of these terms, have represented that their products are actual enlarged photographs on photographic paper when they allegedly are not such, but are prints or mechanical reproductions of photographs, printed or lithographed from metal or gelatin plates on ordinary paper. Counsel in their appeal contend that the record contains substantial evidence to sustain the complaint in this particular.

The actual process employed in the making of respondents' products is explained in the initial decision as follows:

"In the production of its murals the corporate respondent causes an original color transparency to be made of a scene to be reproduced on a mural. This transparency is subjected to further photographic processing to obtain four color separation negatives which are used to make printing plates of specified color for transfer to respondent's specialized paper by means of the photogravure process."

There is no showing in this record that the purchasing public understands the terms "photo mural," "photographic mural" or "Foto Mural" to be so limited in meaning as to exclude murals made by the above-described process. Such evidence as there is on this point is all to the contrary. William C. Mayfield, engaged in business as technical consultant for users of photographic arts, testified to the effect that, based on his selling contacts with people, it is the end result that counts with the buying public, not the process. He testified in part:

"When people go out to buy these things, I think they buy primarily from what they see. They buy the beauty of the thing. They buy from the standpoint of whether it will fit their budget; they do not consider the processes as such; to them, one process is the same as the other."

Considering the record as a whole, we do not think that the evidence warrants a finding that respondents have engaged in misrepresentation or deception by use of the terms "photo mural," "photographic mural" and "Foto Mural."

Counsel appealing also contend that the hearing examiner erred in not receiving as evidence a stipulation which one of the individual respondents, Peter C. Goldsmith, had entered into with the Commis-

sion and which allegedly dealt with issues here involved. The examiner did not flatly reject the offer of evidence but ruled that in the then present state of the record, he was unable to determine the admissibility of the document. He suggested that it be withdrawn, to be offered later after the introduction of additional testimony, so that the circumstances could then be determined. The document was never again offered. It does not appear at all unreasonable for the examiner to have so deferred his ruling on such an offer. Under the circumstances, we cannot find that he committed error in this matter.

The appeal of counsel supporting the complaint is denied and the initial decision of the hearing examiner dismissing the complaint is affirmed.

FINAL ORDER

Counsel supporting the complaint having appealed from the hearing examiner's initial decision dismissing the complaint in this proceeding; and the matter having been heard upon the record, including the briefs of counsel, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the order contained in the initial decision dismissing the complaint be, and it hereby is, affirmed.

IN THE MATTER OF

HENRY BROCH AND OSCAR ADLER TRADING AS HENRY BROCH & CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(c) OF THE CLAYTON ACT

Docket 6484. Complaint, Jan. 11, 1956—Decision, Dec. 10, 1957

Order requiring Chicago brokers to cease violating section 2(c) of the Clayton Act by granting a buyer a percentage of their brokerage fee in connection with the purchase of apple concentrate; specifically accepting a 3-percent commission instead of the customary brokerage fee of 5 percent whereupon the seller lowered its established price to the buyer, recouping part of the reduction out of what respondent brokers would have earned at the normal brokerage fee.

Mr. Edward S. Raysdale supporting the complaint.

Mr. Harold Orlinsky and *Mr. Fred Herzog*, of Chicago, Ill., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on January 11, 1956, charging them with having violated section 2(c) of the Clayton Act, as amended. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that respondents granted and allowed a percentage of their commission or brokerage fee to a buyer of food products, in connection with such buyer's purchase of such food products in commerce. Respondents appeared by counsel and filed answer to the complaint in which they denied, in substance, having engaged in the illegal conduct charged.

Hearings on the charges were held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on various dates between May 8, 1956, and October 3, 1956, at Chicago, Ill., and Pittsburgh, Pa. The oral deposition of a witness for respondents was also taken on August 6, 1956, at Kentville, Nova Scotia, before a notary public, the undersigned being present at the taking of said deposition, by agreement of counsel.[1]

[1] It was agreed by counsel that the undersigned could be present during the taking of said deposition, with the right to address appropriate questions to the witness, to observe his demeanor in testifying and to take such observation into account in determining the credibility of the witness. The deposition was made a part of the record as an exhibit on behalf of respondents, in lieu of being read into the record.

At the hearings held herein, testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of the evidence in support of the complaint, counsel for respondents moved, on the record, to dismiss the complaint herein on the ground that upon the facts and the law the Commission had failed to show the right to relief. The undersigned denied said motion, on the record, without prejudice to its renewal at the close of the entire case. Said motion was renewed at the close of the case, and is disposed of in accordance with the findings, conclusions, and order hereafter made.

At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel supporting the complaint, and counsel for respondents on November 15 and November 16, 1956, respectively. No request for formal oral argument was made by any of the parties, except for brief oral argument made on the record by counsel for respondents. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Upon consideration of the entire record herein and from his observation of the witnesses, including the witness whose deposition was taken at Kentville, Nova Scotia, the hearing examiner makes the following:

FINDINGS OF FACT

I. The Business of Respondents

Respondents Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co., with their principal office and place of business in the Hyde Park National Bank Building, located at 1525 53d Street, Chicago, Ill.

Said respondents are now engaged and have engaged, since August 1942, in business as brokers or sales representatives of seller principals, negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products for and on account of approximately 25 or more sellers as principals. Respondents are compensated for making sales of their respective seller principals' food products by being paid a commission or brokerage fee by the respective seller principals. Such commissions or brokerage fees are fixed by agreement with their re-

spective seller principals, and usually range from 2 percent to 5 percent of the net purchase price of the food product sold. Said respondents sell such food products to buyers, located in various cities and towns in many of the States of the United States, who are chiefly engaged in business as food manufacturers or distributors of food products. Respondents' sales of such food products are substantial, amounting to approximately $4 to $5 million annually.[2]

II. The Interstate Commerce

In the course and conduct of their business, said respondents are now, and since August of 1942 have been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act. Said respondents, during the period stated, as brokers or sales representatives for their sellers as principals, have sold food products to buyers located in the various States of the United States and caused said food products so purchased to be transported from the respective sellers' places of business to destinations in other States where such buyers were located. Thus there is, and has been at all times mentioned herein, a continuous course of trade in commerce in said food products across State lines.

III. The Alleged Unlawful Practices

A. *The Issues*

1. The charges in this proceeding arise out of the sale of 500 steel drums of apple concentrate on October 27, 1954, by respondents, as brokers for Canada Foods Ltd. (herein referred to as Canada Foods) of Kentville, Nova Scotia, Canada, processors of apple concentrate and similar products, to The J. M. Smucker Co. (herein referred to as Smucker) of Orrville, Ohio, manufacturers of apple butter and preserves.

2. The complaint charges that the normal and customary commission or brokerage fee for sales on behalf of Canada Foods was 5 percent, but that instead of receiving such fee, respondents requested their seller principal to lower its established price of the apple concentrate, and to recoup part of such price reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of 5 percent. It is alleged that by giving up part of their commission

[2] Respondents have denied the allegation of the complaint that they are a substantial factor in the sale of food products. The undersigned finds it unnecessary to resolve this question since the allegation made in the complaint is immaterial in this respect. It is sufficient, for purposes of section 2(c), if the sales involved are of more than de minimis quantities and if respondents have engaged in the conduct charged. There is no requirement, as in the case of section 2(a), of a showing of probable substantial injury to competition or of tendency to monopoly. *Oliver Bros.* v. *FTC*, 102 F. 2d 763, 767 (C.A. 4, 1939).

so as to permit a lowering of the price to the buyer, respondents were granting or allowing a percentage of their commission or brokerage fee, directly or indirectly, to the buyer, thereby violating section 2(c) of the Clayton Act, as amended.

3. Respondents have admitted, in their answer, certain of the basic facts relied upon by counsel supporting the complaint. They admit that the seller principal, Canada Foods, first agreed to pay them a brokerage fee of 5 percent, but allege that this fee was based on contemplated sales of much smaller quantities than the sale in question. They admit also, that the seller lowered his price from the original quotation of $1.30 per gallon to $1.25 per gallon, and that they accepted a brokerage fee of 3 percent instead of 5 percent. They allege, however, that the reduction in the price was the result of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not from any suggestion on their part. Respondents assert, in this connection, that there is no such thing as a customary or normal brokerage fee, but that the amounts vary from time to time, even for the same seller and with respect to the same product, depending on quantity and market conditions.

4. The basic question presented is whether the reduction of respondents' commission on the sale in question was part of an arrangement to grant or allow the buyer part of respondents' normal commission, or whether it was accomplished in accordance with a flexible brokerage arrangement between respondents and their principal in which brokerage varied with quantity and market conditions. Respondents have also raised a number of legal questions concerning the application of section 2(c) to them and its constitutionality as applied to the facts here.

B. *Chronology of Events*

1. Respondents were first appointed to represent Canada Foods in the spring of 1954, following an exhange of correspondence between them in the latter part of April and early part of May. The rate of commission agreed upon was 5 percent. There were apparently no extensive sales made prior to October 1954, since Canada Foods only had a few hundred barrels of concentrate on hand, these being the unsold balance of the pack which had been processed in the fall of 1953. In any event, no sales were made to Smucker from this pack.

2. Canada Foods began to process the 1954 pack of apples during the latter part of September. When the season began, it was apparently represented in the United States by only two brokers, respondents and the Poole Co. of Boston. However, during the latter part of

September it also appointed as broker, Tenser & Phipps of Pittsburgh, Pa., who had previously represented its predecessor company. During October it appointed Otto W. Cuyler of Webster, N.Y., to also represent it. The brokers, other than respondents, were appointed with the understanding that their rate of commission would be 4 percent. Respondents received a higher rate of commission because they stocked merchandise in advance of sales.

3. The record discloses that the first attempt to sell Canada Foods' apple concentrate to Smucker was made, not by respondents, but by A. J. Phipps of Tenser & Phipps, which had been dealing with Smucker for many years on behalf of other sellers. Phipp's efforts to sell the concentrate to Smucker began several weeks prior to respondents' first contact, and are herein referred to because of the light which they shed on the transaction at issue.

4. By letter dated October 1, 1954, Phipps advised Smucker that Canada Foods was processing apple concentrate on a large scale and that they expected to receive the price within the next 5 or 6 days. Smucker was also advised that samples of the new pack were on the way and would be forwarded to Smucker as soon as they arrived.[3]

5. Canada Foods advised Tenser & Phipps by Western Union night letter, dated October 11, 1954, that the price of the new pack of apple concentrate would be $1.30 per gallon, in 50-gallon steel drums. This price was confirmed in a letter from Canada Foods, dated October 13, 1954. The same price was also quoted to respondents by Canada Foods in a letter which was likewise dated October 13.

6. On October 14, apparently following an earlier telephone conversation with H. W. Kieffer, purchasing agent for Smucker, Phipps advised Smucker by letter that the price of Nova Scotia apple concentrate would be $1.30 per gallon, delivered in steel drums. A copy of Canada Foods' price list was also sent to Smucker, as was a sample of the apple concentrate on October 15.

7. Following the receipt of price information and sample, Smucker's purchasing agent, Kieffer, discussed the matter by telephone with Phipps. From the correspondence which is in evidence, it would appear that this conversation took place sometime between October 15 and 18. Kieffer endeavored to obtain a more favorable price, indicating that he was interested in buying approximately 500-barrels of the concentrate. Phipps informed Kieffer that he would communicate with his principal to see what could be done about getting a better price.

[3] The advice from Phipps to Smucker was in accordance with a letter from Canada Foods, dated September 29, 1954, advising Phipps that the price for the new season had not yet been settled but would be on hand in about 5 or 6 days, and that samples of the concentrate were being forwarded under separate cover.

8. Phipps talked to L. Koldinsky, manager of Canada Foods, about Kieffer's proposal by telephone on or about October 18, and discussed the matter further in person when Koldinsky came to Pisttburgh on October 19, 1954, on a business trip.[4] Koldinsky informed Phipps that $1.30 was his best price and that if not for the Canadian Government subsidy on apples, he would not even be able to sell at that price.

9. On October 19 Phipps telephoned Kieffer and advised him of his conversation with Koldinsky. This advice was confirmed by letter from Phipps to Smucker, dated October 19, stating that Koldinsky had informed him "there positively will be no lower price on apple concentrate" and that the "only reason for making the price of $1.30 per gallon is the fact that it is a Government support proposition." Phipps urged Kieffer to place his order. Another letter from Phipps to Kieffer on October 20 advised Kieffer of the visit from Koldinsky and the latter's advise that when Canada Foods finished processing the Government subsidized apples "the price [of $1.30] will no longer be available."

10. In an apparent effort to maintain the status quo while Kieffer made up his mind, Phipps wrote to Canada Foods on October 20, requesting a 10-day option for Smucker on 500 to 700 barrels of concentrate. Koldinsky replied by letter dated October 25 in which, after expressing his pleasure at meeting Phipps during his recent visit, he repeated that the price was still $1.30 per gallon and concluded:

> Further to your letter of October 20, I am sorry to advise you that I am unable to give you an option for 10 days for Smucker, covering 500 to 700 barrels. As I already informed you, the situation with regards to concentrate does not look to [sic] bright, and prices are liable to rise.

11. On or about October 26, while Phipps was in Orrville at the Smucker plant, Kieffer offered to purchase 500 gallons of concentrate at $1.25 per gallon. Prior to that time Kieffer had endeavored to obtain a better price than $1.30, but had not definitely indicated at what price he would be willing to buy. At the October 26 meeting he advised Phipps that he had another offer for apple concentrate at $1.25 per gallon.[5] Phipps thereupon wired Canada Foods on October 26 as follows:

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[4] Koldinsky corroborated Phipps' testimony that he had visited the latter on a business trip to the United States in the fall of 1954. A letter which Phipps wrote to Smucker on October 20, fixes the date of this meeting as October 19.

[5] The record does not clearly establish who, if anyone, had made the offer of $1.25 per gallon. Kieffer's testimony indicates that he had offerings of European concentrate at that price, but that it was of an inferior grade. As will appear, Kieffer had also talked to respondent Henry Broch at or about the same time and it may be that he had received the impression from Broch that he could buy the concentrate at $1.25 per gallon.

SMUCKER ORVILLE OFFER $1.25 PER GALLON FOR 500 DRUMS 36 BAUME CONCENTRATE LIKE SAMPLES SUBMITTED HAS BEEN OFFERED THIS PRICE SHIPMENT EARLY JANUARY

12. The following day, October 27, Koldinsky telephoned Phipps and advised him that Canada Foods could not sell the concentrate for less than $1.30 per gallon, again indicating that it was only because of the Government subsidy that they could sell at that price. After some discussion, Koldinsky stated that the only way the price could be less than $1.30 would be if the brokerage was cut. Phipps gave no indication of a willingness to accept a cut in brokerage, and the conversation was concluded. Phipps then telephoned Kieffer to advise him of his inability to obtain a lower price, and sent him a letter in confirmation of their conversation as follows:

As per my telephone conversation with you today, Mr. Koldinsky called from Kentville. He merely said that the price was a Government price and there was nothing that could be done about it.

He has a base price, plus freight to Eastern Seaboard, plus brokerage and that is it.

We could confirm the order at the price of $1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.

It would be a feather in somebody's cap to decorate us with the violation and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.

Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly.[6]

13. Within a day or two prior to October 27, respondent Henry Broch also communicated with Kieffer of the Smucker organization

[6] The above findings with respect to the conversation between Phipps and Koldinsky are based on Phipps' testimony. Phipps impressed the undersigned generally as being worthy of belief, and his testimony in many important respects was corroborated by letters written contemporaneously with the events at issue, while the details were still fresh in his mind. Koldinsky's version of this conversation was that he refused Phipps' offer because he had already made a deal with Henry Broch 3 or 4 days prior thereto and because Phipps' territory was limited to the State of Pennsylvania. He also denied suggesting that the only way the price could be reduced would be if Phipps took a lower commission. The undersigned cannot credit Koldinsky's version of the conversation. He impressed the undersigned as being confused concerning many of the facts about which he testified, having no correspondence or memoranda with him to refresh his recollection, and appeared to be engaging in some ex post facto rationalizing in order to justify his position. There is nothing in the record to substantiate his claim that Tenser & Phipps were restricted to Pennsylvania in their sales. His letter of September 29, designating the latter as broker, contains no such limitation. The correspondence and reliable testimony in the record indicates that Koldinsky was aware Phipps was negotiating with Smucker at least as early as October 19 when Koldinsky was in Pittsburgh, and yet he did not suggest to Phipps that he was acting outside of his assigned territory. His letter of October 25 to Phipps, turning down the Smucker proposal because "prices are liable to rise," hardly suggests that he had already made a deal to sell through Broch at $1.25 per gallon. The fact that Kieffer on October 26 made Phipps a definite proposal for 500 drums at $1.25 indicates that Smucker had not yet closed with Broch. The reference in the October 27 letter from Phipps to Smucker that Phipps could not confirm the order at $1.25, without running afoul of the Robinson-Patman Act, tends to confirm Phipps' testimony that he had received some suggestion from Koldinsky with respect to reducing his commission as a condition for a reduction in price.

in an effort to sell apple concentrate on behalf of Canada Foods. Kieffer advised Broch that he already had an offer of $1.30 per gallon on Canada Foods' concentrate, but indicated he might be interested if he could get a better price. Broch asked Kieffer what quantity he had in mind and Kieffer told him it would be about 500 drums. Broch stated he would contact his principal and see what could be done.

14. On or about October 26, which was either the same day or the day following that on which he talked to Kieffer, Broch telephoned Koldinsky of Canada Foods and told him he could sell approximately 500 drums of apple concentrate to Smucker if he could get a price of $1.25 per gallon. Broch indicated that Smucker was able to buy French concentrate in the United States at $1.25 per gallon. Koldinsky told Broch he would take the proposition under advisement and call him back. [7]

15. The following day, October 27, Koldinsky telephoned Broch and informed him that he would be willing to make the sale at $1.25 per gallon, provided that Broch would agree to reduce his commission from 5 percent to 3 percent. From the entire context of events it may be inferred that this call followed Koldinsky's telephone conversation the same day with Phipps, in which the latter declined to accept a cut in brokerage as a condition for a lower price. Broch agreed to Koldinsky's proposal and then telephoned Kieffer to advise him that his principal had agreed to sell at $1.25 per gallon, due to the large size of the order. A sales contract was then prepared, dated October 27, 1954, for 500 steel drums of apple concentrate at $1.25 per gallon.

16. Following the agreement to sell 500 drums to Smucker through Broch, Koldinsky of Canada Foods sent a wire to Phipps requesting the latter to stop selling concentrate for 1 week. To this, Phipps replied by letter dated October 29 stating, in part, as follows:

> We do not know how to talk to you regarding this Smucker deal on the 500 barrels. We do hope the buyer's position is legal. The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger concerns.

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[7] In an apparent effort to establish that Broch talked to Koldinsky about the Smucker order prior to the time Phipps did, counsel for respondents refer to Koldinsky's testimony as establishing that Broch called him about the Smucker proposal a week or 10 days before the order of October 27. However, it seems clear from the record as a whole that not more than about 2 days, if that much, elapsed between Broch's conversation with Kieffer, his submission of the Smucker proposal to Koldinsky, and the latter's approval. Broch prepared the order on October 27, when he received Koldinsky's approval. According to the latter's testimony he gave Broch his approval either the same day or the day following that on which Broch called him about Smucker. The testimony of both Broch and Kieffer indicates that only a few days elapsed between their telephone conversation and Koldinsky's approval of the deal. Koldinsky's letter of October 25 to Phipps, referring to the possibility of a price rise, suggests that as late as that date he was not thinking in terms of any proposal to reduce the price.

All we want to know is that your price quoted to other brokers was the same as that given to us.

We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands.

17. In a telephone conversation between Koldinsky and Phipps soon after the October 29 letter, Koldinsky advised Phipps that his price was still $1.30 per gallon and that if anyone was selling the concentrate at less than $1.30, they were giving up part of their brokerage.

18. About 2 weeks later, Koldinsky advised Phipps that he had a few hundred barrels of concentrate to sell and the latter, by letter dated November 15, requested a price quotation. Koldinsky replied by letter dated November 17, again quoting $1.30 per gallon as the price of concentrate.

19. On December 8, 1954, respondents made another contract with Smucker on behalf of Canada Foods to sell an additional 50 steel drums of apple concentrate at $1.25 per gallon. Shipments on the October 27 and December 8 contracts were made between December 9, 1954, and May 1, 1955, totalling 32,589.44 gallons which, at the invoice price of $1.25 per gallon, amounted to $40,736.80. Respondents received a commission of 3 percent on these sales to Smucker. During the same period respondents made sales to a number of other buyers of apple concentrate at a price of $1.30 per gallon, said sales totalling approximately $50,000. On the latter sales Broch received his regular commission of 5 percent.

20. Sales were also made during the same period by Canada Foods through its other brokers. The price of the concentrate in all such sales was $1.30 per gallon and all the other brokers received their agreed commission of 4 percent.

C. *The Agreement as to Commission*

1. Although apparently conceding in their answer that there was an agreement between respondents and their seller principal to pay respondents a commission of 5 percent, respondents take the somewhat contradictory position that there was no such thing as a fixed rate of commission and that they sometimes had to negotiate with their seller principals separately on each sale. Respondents endeavored to establish through the testimony of respondent Henry Broch, that any understanding between Broch and his principals was, at best, of such a vague, uncertain and amorphous nature as to be almost meaningless. Thus, Broch testified that the sellers merely gave him an "indicated" or "approximate" rate of brokerage, but that this

could be changed "any day" as the seller "sees fit." He denied that there were any written agreements between broker and principal, or anything in writing concerning the rate of commission. However, he conceded that "there might be an indication" (without revealing where such indication could be found), but that this was "never anything specific; definitely specified."

When asked on cross-examination whether it was not true that the understanding as to brokerage was usually confirmed by correspondence between the parties, Broch testified that this was "not necessarily" true, that there were "very few letters" specifying brokerage, and that he was unable to recall having any such letters. When asked whether he meant to suggest that in going out to sell on behalf of some 25 or more sellers, he actually did not know what brokerage he was going to be paid, Broch at first replied: "That is correct." However, the absurdity of this position apparently occurred to him after further reflection and he later conceded that it "might not be as hazy" as suggested by counsel supporting the complaint, and that he had a "general idea" as to what his commission would be.

Broch's testimony was a masterpiece in circumlocution and evasion, was contrary to the probabilities inherent in the situation, and was contradicted by other reliable evidence in the record. Based on his evaluation of the testimony as a whole and his observation of the demeanor of the witness, the undersigned can give no weight to Broch's claims.

2. Whether or not it can be formally characterized as an agreement, there is no question but that there was a written understanding between Broch and his seller principal, Canada Foods. Such understanding originated in the correspondence which passed between them in the spring of 1954, to which reference has been heretofore made. In the letter of April 21, 1954, Canada Foods advised Broch that it was looking for an agent in the Central United States and, after quoting the selling price of the apple concentrate, stated: "In this price is included 5 percent commission for you." Respondents accepted the appointment, under the conditions indicated, by their letter of May 5, 1954, in which they stated, in part:

> * * * we are very pleased that you are appointing us as your executive agents for the midwestern territories and rest assured that we will do the right kind of job for you.

Although not claiming that the arrangement reflected in the above correspondence had ever been rescinded, Broch testified that his agreement with Canada Foods was entirely oral and was made in the fall of 1954, when Koldinsky visited him in Chicago. It seems quite

likely that the arrangement made in the spring of 1954 was still in effect in the fall of that year and that Broch was mistaken in his testimony. Assuming, however, that the earlier arrangement was withdrawn, it is clear from the testimony of respondents' witness, L. Koldinsky, that any arrangement which he made with Broch in the fall of 1954 was confirmed in writing and provided for a commission of 5 percent.[8]

3. Respondents also endeavored to show that whatever arrangement as to commission might have been made initially, such arrangement was of no long range significance since each sale was "subject to confirmation." Both Broch and Koldinsky testified to this effect, and respondents also offered in evidence the sales contract used by them which recites that the sale is: "Subject to confirmation of the seller."

The undersigned is satisfied from the evidence as a whole that the "subject to confirmation" provision has nothing to do with the rate of brokerage, as between seller and broker, and does not contemplate renegotiation of the rate of brokerage on a sale-by-sale basis. To hold otherwise would be to assume that the parties intended to agree to a nullity when they fixed the rate of commission at 5 percent. As a matter of common sense, a provision that a sale is "subject to confirmation of the seller" merely constitutes notification to the buyer that the seller may refuse to confirm a sale made by his broker if he is not satisfied with the terms thereof, as between himself and the buyer, such as price, quantity, terms of payment, and delivery dates. That such was the meaning which was intended here seems evident from the context of the sales contract in which the cited language appears, and also from the testimony of Broch himself.[9]

It is significant that in none of the correspondence in evidence, either the letters from Canada Foods to Broch or to Tenser & Phipps, or any of the other brokers, is there any indication that the rate of commission specified is "subject to confirmation." From the manner in which the parties conducted themselves, it is clear that they understood they were proceeding on the basis of a definitely fixed rate of commission and not one which was subject to renegotiation from sale to sale.

4. In addition to the somewhat contradictory claims that there was no definite agreement as to commission, and that if there was one,

[8] Koldinsky testified that it was his normal procedure to confirm brokerage arrangements in writing and that "in my correspondence I promised him [Broch] 5 percent."

[9] Although Broch made the characteristically exaggerated claim that the term in question contemplated that there would be confirmation "as to everything," in giving an explanation of the matters to be confirmed he unwittingly testified that it involved confirmation "as to price; when he [the seller] wants to sell or when he wants to ship."

it was subject to renegotiation, respondents advanced the additional contention that the agreement to pay a commission of 5 percent was based on contemplated sales of much smaller quantities than the sale in question. The testimony offered in support of this contention followed the same confused, contradictory and unconvincing pattern as some of the other testimony which has been referred to above. Thus, Broch testified that when he and Koldinsky discussed the arrangement in the fall of 1954, it was contemplated that he would sell approximately 1,000 drums a year to all his customers, but that there was no discussion concerning the amount which it was contemplated would be sold to any individual account. However, after a little prodding from his counsel, Broch finally testified that it was contemplated the sales to any one customer would not exceed 50 to 100 drums. Koldinsky, on the other hand, testified that Broch advised him that he could sell several thousand barrels of the concentrate but that there was no discussion as to the quantity to be sold to any individual account. While Koldinsky indicated that it had been his impression that no one in the United States could use more than 250 barrels, he definitely stated the matter of quantity was never discussed in fixing Broch's rate of commission.

The undersigned is satisfied from the evidence as a whole that whatever discussion there may have been with respect to the quantity of sales, the rate of commission agreed upon was fixed without reference to the quantity sold, either to all customers or to any individual customer. The record shows that when Smucker made another purchase in December 1954 for only 50 barrels, he still received the same favorable price which he had been given on the larger order of 500 barrels, and Broch received the same 3-percent commission. Conversely, another purchaser who made substantial purchases during the same period paid the $1.30 price and Broch received his regular 5-percent commission.[10]

The fact that the rate of commission agreed upon with Canada Foods was a fixed percentage, without regard to the quantity involved, is further corroborated by a list of respondents' principals which was given to a Federal Trade Commission investigator by respondents prior to the issuance of the complaint, containing the rate of commission payable by each principal. The rate of commission specified in this document for Canada Foods is 5 percent. The same document indicates a fixed rate of commission payable by all of the other sellers represented by respondents with the exception of one seller, for whom

[10] The record shows that during the period between October 1954 and March 1955, deliveries to Smucker amounted to $25,904, while deliveries to another buyer represented by respondents, Squire Dingee Co., amounted to $16,763. On the latter sales the rate of commission was 5 percent.

the document indicates a variation of commission from 1 percent to 3 percent, "according to volume and selling price of products." [11]

Respondents contend that the rates of commission specified in the list given to the Commission investigator were merely "indicated" rates and offered evidence to show that there were variations from the rates reflected in the document. The evidence offered by respondents involved 4 out of approximately 25 sellers represented by respondents. Two of the sellers are not directly represented by respondents, but respondents act through a cobroker. The rate of commission with the sellers in those instances was established by the cobroker and not by respondents, and it is clear that the reasons for any changes or variations in commission as between the cobroker and his principals is a matter which does not lie within respondents' personal knowledge. In any event, the record contains no reasons as to the variations in commission nor is there any indication that such variations were geared to the quantity involved.

The third account cited by respondents is clearly inapposite since it involved a situation where after a particular date the rate of commission was reduced on all sales from 3 percent to 2 percent. The record does not indicate the reason for such change nor that it had anything to do with quantity. So far as appears from the record, respondents merely re-negotiated the rate of commission with their seller principal so that on all sales to all customers beginning in January 1956, a new rate of commission was applicable. The fourth instance cited by respondents involves the very account to which reference has been made, as being the only account in the list given to Commission investigator, where there was any indication of a variation in commission according to quantity.

These accounts do not appear to be typical, and hardly establish the existence of a loose, flexible practice as to commission or that the rate of commission customarily varies with quantity. It is possible that some of these transactions may be subject to the same vice as that here involved. In any event, whatever may have been respondents' arrangements with other sellers, the undersigned is satisfied from the record as a whole that in the case of the Canada Foods' account there was a definite arrangement that respondents would be paid a commission of 5 percent on sales, and that this arrangement was made without regard to the quantity involved in any particular sale.

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[11] The Commission investigator testified that the document was prepared under the direction of Henry Broch and given to him. Broch was somewhat evasive and confused in his testimony as to whether his office had prepared the document or whether the investigator had prepared it from records in Broch's office. Broch conceded, however, that the information contained therein was correct.

D. *The Legal Questions*

Insofar as is here pertinent, subsection (c) makes it unlawful—

> for any person engaged in commerce, in the course of such commerce, to pay or grant * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, * * * in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

In addition to taking issue with counsel supporting the complaint with respect to the facts surrounding the transaction at issue, counsel for respondents have also raised a number of legal questions. They contend that subsection (c) was not intended to apply to independent brokers such as respondents; that even if it was so intended, respondents' conduct does not fall within the section; and that in any event, the section would be unconstitutional if applied to the factual situation here involved. The examiner now turns to a consideration of these arguments.

1. The application of section 2(c) to independent brokers

Counsel for respondents contend that section 2(c) was intended to prevent so-called "dummy" brokerage, i.e., payments of brokerage to the buyer or to a broker or agent acting on behalf of the buyer, or subject to the buyer's control, but that Congress never intended the section to apply to so-called "pure" brokers, i.e., brokers who represent only the seller in a transaction and are not connected in any way with the buyer. Counsels' argument rests, in part, on the reference in the House Judiciary Committee Report to the practice of certain large buyers in demanding the allowance of brokerage, either directly to them or to an agent whom they set up in the guise of a broker.[12]

Counsels' argument overlooks the fact that the illustration referred to in the committee report is merely cited as being "among the prevalent modes of discrimination at which this bill is directed," and is by no means intended to be exhaustive of the methods by which the section in question may be violated. On the contrary, it is clear from the legislative history that subsection (c) was included in the bill as part of a broad congressional plan to shore up the avenues of evasion which had arisen under the earlier narrow prohibition on price discrimination in the original Clayton Act, one of the prominent modes of evasion from which was the use of brokerage as an indirect

[12] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).

method of price discrimination. As stated in the very report cited by respondents, subsection (c) was intended to prevent "the abuse of the brokerage function for purposes of oppressive discrimination."

In considering the proposed legislation Congress had before it statements such as the following, which was made by a representative of the Associated Grocery Manufacturers of America, one of the proponents of the legislation: [13]

> This association supports a valid, sound, and constructive amendment of section 2, *effective to strengthen its protective application against price discrimination* offensive to the competitive principle; that is, an amendment (a) which broadens the section's prohibitory jurisdiction to the extent permitted and consistent in the circumstances, (b) which tightens its exemptions against their misuse to defeat the law, (c) *which makes the section expressly prohibit indirect price discrimination by brokerage diversion to a trade buyer*, and (d) which makes the section expressly and reasonably regulate distribution-service payments to prevent their degeneration into an indirect price discrimination violative of the section and thus nip its violation in the bud. [Emphasis supplied.]

Further reflecting the broad purpose of subsection (c) is the statement made by Representative Patman during the legislative debates that the section was—

> directed against the corruption of the true brokerage function as a real and valuable servant of commerce, into a subterfuge for those unfair and coercive price discriminations which constitute such a real menace to commerce. [14]

The undersigned entertains no doubt that subsection (c) was intended not only to reach "dummy" brokerage payments made to a buyer or his representative, but also to prevent a so-called "pure" broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction. That subsection (c) was intended to prevent the splitting of commissions by a seller's broker has been the commonly accepted understanding of the statute almost from the beginning. Thus, Congressman Patman in his book entitled "The Robinson-Patman Act," published soon after the passage of the act, gives the following answer to the specific question whether the act "prohibits a broker from splitting his brokerage with a buyer" (p. 108):

> Yes. It applies to any person. The intent of Congress, the reports of committees, and the act are all specific on this point. The payment of *any* brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable.

In the book entitled "The Robinson-Patman Act, Its History and Probable Meaning," published by The Washington Post of Washing-

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[13] Hearings before subcommittee of Committee on Judiciary on S. 4171, 74th Cong. 2d Sess. 62 (1936).
[14] 79 Cong. Rec. 9079 (June 11, 1935).

ton, D.C., in October 1936, the following statement appears with respect to the basic structure and interrelation of the various subdivisions of section 2 (p. 6):

> The final enactment contains, in the first instance, a prohibition of price discrimination in sweeping terms. Next, it specifically prohibits a series of practices (*such as split and bogus brokerage,* individualized advertising and service allowances, etc.) which, whether within or without the basic prohibition [of section 2], are made unlawful because their use may lead to discrimination. [Emphasis supplied.]

Addressing itself specifically to the subject of the splitting of commissions, the same work states that subsection (c) (p. 38)—

> prohibits the splitting of brokerage where the seller or the buyer is aware of the practice. For where a broker passes a portion of his commission back to the buyer, it would appear that he is acting, at least in part, "for or in behalf" of such buyer.

In 1940, The American Institute of Food Distribution, Inc., prepared a booklet for use in the industry entitled "Robinson-Patman Guide Book." This work expresses the following opinion on the question of whether the Robinson-Patman Act "prevents any splitting of brokerage" (p. 74):

> Seller's broker cannot legally pass any of his commission to the buyer. This would be the same as the seller making the payment. If the broker does split, the seller would be held liable, particularly if he knew about the practice. [15]

It seems apparent from the foregoing that subsection (c) has been generally accepted as prohibiting the splitting of commission by independent brokers, as well as the granting of "dummy" brokerage to the buyer or someone controlled by or affiliated with a buyer. That this should be so is not surprising in view of the fact that the paying or granting of commission, under the indicated circumstances, is made unlawful for "any person," and not merely for the seller to the buyer or the latter's affiliate.

In further support of their argument that section 2(c) was not intended to apply to "pure" brokers, counsel for respondents claim that the Commission has failed to issue any complaint against brokers not affiliated with a buyer, except in one case, *D. J. Easterlin*, Docket No. 6587, and that the complaint there was dismissed by the Commission before hearing, without any reason for its action being specified (33 F.T.C. 1639). Counsel apparently regard the paucity of decisions on the point and the action taken in the *Easterlin* case as indicative of the Commission's belief that it lacks jurisdiction over "pure" brokers.

Counsel's argument in this respect is not correct since the Commission has issued complaints in at least two other cases, involving

[15] The opinion above quoted purports to be based on instructions issued by the Great Atlantic & Pacific Tea Co. to its buyers.

the splitting of commissions by brokers representing sellers only, and has in both instances issued orders against the brokers. In *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370, the seller's broker was charged with passing on approximately 50 percent of his brokerage to certain purchasers and was ordered to cease and desist from such practice. In *Custom House Packing Corp.*, 43 F.T.C. 164, a broker having no connection with the buyers, was found to have violated section 2(c) by passing on part of his commission to such buyers.

The Court of Appeals for the Fourth Circuit has also made it clear that it upholds the Commission's position that section 2(c) applies to the seller's broker, in *Oliver Brothers, Inc.* v. *F.T.C.*, 102 F. 2d 736. Although that case involved a payment of brokerage by a seller to a broker representing the buyer, the court in addressing itself to the argument that the broker was rendering a service to the seller and was therefore entitled to a commission, stated (p. 770):

> And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision.* As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent *or the agent of the seller*, it would seem to follow necessarily that he may uot receive commissions allowed a broker who is the agent of both. [Emphasis supplied.]

It is accordingly concluded that section 2(c) prohibits an independent broker who represents a seller from splitting with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller.

2. Application of section 2(c) to respondents' reduction in commission

Counsel for respondents advance the alternative argument that even if section 2(c) does apply to the splitting of commission by independent brokers, it is not applicable to the facts here since (a) it does not apply to "indirect" payments or allowances to a buyer and (b) respondents' acceptance of a reduction in commission can, in no event, be considered a payment or allowance of brokerage, either direct or indirect.

a. Counsels' argument that the statute does not apply to indirect payments or allowances to a buyer by a broker is based on the fact that the statute, in declaring it to be illegal for any person "to pay or grant" anything of value as a commission to the other party to the transaction does not use the words "directly or indirectly" after

the phrase "to pay or grant." Counsel point out, in this connection, that when Congress wanted to prohibit payments to brokers or agents under the indirect, as well as the direct, control of the other party to the transaction, it was careful to use the expression "subject to the direct or indirect control" of such party. Counsel apparently regard the omission of a similar phrase, in connection with the prohibition on the payment or granting of brokerage, as significant.

While it is true that Congress, out of an abundance of caution, might have inserted the phrase "directly or indirectly" after the language "to pay or grant," the undersigned does not consider its omission to be of any significance. Considering that it was the basic intent of Congress in adding subsections (c), (d), and (e) to the act to circumvent indirect forms of price discrimination, and in the light of the expressed intent of Congress in the case of subsection (c) to prevent the "abuse of the brokerage function for purposes of oppressive [price] discrimination," the undersigned cannot believe that Congress intended to give section 2(c) the narrow scope for which respondents argue. On the contrary, the very portion of the legislative history cited by respondents contains the statement that section 2(c) "prohibits the *direct or indirect* payment of brokerage except for such services rendered."[16] It is inconceivable that Congress intended to prohibit the seller's broker from making a direct payment of part of his commission to the buyer, but intended to permit the broker to remit such sum to the seller and have the latter, in turn, transmit it to the buyer. Merely to state the proposition is to demonstrate its absurdity.

b. Counsel for respondents further argue that even if the statute applies to indirect, as well as direct, payments, the conduct of respondents here cannot be deemed to fall within either category. Counsels' argument, in substance, is that since the seller was under no obligation to pay respondents the 5-percent commisssion for any specified period of time, and made it a condition of its approval of the sale that they accept a reduction of commission to 3 percent, respondents actually "earned" only 3 percent on the sale, and accordingly they cannot be deemed to have paid, granted, or allowed any part of their commission to the buyer.[17] Counsel also argue that it was a

[16] H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

[17] Counsel for respondents point out in the memorandum filed by them that while the complaint charges, as the violation, the "granting or allowing" of a percentage of their brokerage to the buyer, the act does not use the word "allowing" in referring to the illegal conduct, but uses the expression "pay or grant." Counsel apparently do not urge this variance between the complaint and the statute as the basis for any serious argument. It may be noted, however, that the word "allow" is defined as "to grant as a deduction or an addition" (Webster's New Collegiate Dictionary, 1949 Edition). Consequently, the charge that respondents granted or allowed a part of their brokerage to the buyer is clearly synonymous with the language used in the act.

sine qua non, in establishing respondents' connection with the payment or granting of brokerage to the purchaser, to show that respondents had requested the seller to recoup part of its loss out of their commission.

By arguing that they only "earned" 3-percent commission and, consequently, did not pass on any of their commission to the buyer, respondents are in effect seeking to lift themselves by their own bootstraps. They seek to escape the application of the statute by the very conduct which makes it operative. As has been found above, it was agreed between respondents and their principal that respondents would receive a commission of 5 percent on sales made by them. This agreement was in effect on October 27, 1954, and, except for sales to Smucker, is still in effect. By accepting a commission of 3 percent, under the circumstances here present, respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession. It may be, as counsel for respondents argue, that there is no proof that respondents actually requested the seller to recoup part of the price reduction out of their commission. However, in the light of the economic realities of the situation, this is immaterial.

Respondents were fully mindful of the fact that the going price of Canada Foods' apple concentrate was $1.30 per gallon. This was the price at which they sold concentrate to every purchaser except Smucker. This was the price which Tenser & Phipps had already quoted to Smucker, to respondents' knowledge, when the latter intervened in the situation and induced Canada Foods to lower its price. Irrespective of whether respondents actively urged Canada Foods to recoup part of the price reduction out of the commission to which they would otherwise have been entitled, they were fully cognizant of the fact that their acceptance of a reduced rate of commission was a material factor in making possible the sale to Smucker at a reduced price. As the agent for Canada Foods, respondents are equally guilty with their principal of contributing to the price concession which the latter gave to the purchaser. The fact that the principal is beyond the jurisdiction of the Federal Trade Commission, by reason of its situs in Canada, does not absolve the agent from liability for his participation in the transaction.

It may be, as argued by counsel for respondents, that the original agreement between respondents and Canada Foods was not for any specified duration and could have been terminated or modified. However, what is involved here is not merely a modification of an

existing agreement with respect to commission, but a dropping of commission on sales to a single purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the quid pro quo for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly paid 2 percent of their commission to the purchaser.

It may also be, as argued by counsel for respondents, that had they not accepted the 3 percent they might not have made the sale. However, the choice with which respondents were confronted was largely of their own making since had they not intervened in the situation, it seems quite probable that Tenser & Phipps would have made the sale at the going price and at their agreed rate of commission. Respondents' conduct, under these circumstances, tends to point up the vice involved in the splitting of commissions as a competitive weapon. In any event, the fact that respondents' conduct was motivated by economic reasons connot be deemed a legal justification for what they did.[18]

c. Counsel for respondents argue, finally, that whatever benefit the buyer may have received when respondents accepted a 3-percent commission instead of 5 percent, it did not involve the granting or allowing of commission or brokerage or of any sum in lieu thereof. Counsels' argument appears to be that because a portion of respondents' commission reached the purchaser in the form of a price concession, it cannot be deemed to fall within the proscription of section 2(c). This argument is wholly without merit.

What the statute prohibits is the payment or allowance to the buyer of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." Under this broad language it is not necessary that the payment be labeled as commission or brokerage. In the instant case the price reduction to the purchaser involved partly an actual price reduction by the seller and partly a portion of the brokerage commission which respondents permitted the seller to retain in order to make possible the full reduction sought by the buyer. Certainly the portion of the price concession to which respondents contributed may be deemed an allowance or discount in lieu of commission or brokerage, within the meaning of the statute. In fact, if not for such concession on respondents' part, it appears unlikely that there would have been any price reduction to the purchaser.

[18] *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457, 468; *Wholesale Dry Goods Institute* v. *F.T.C.*, 139 F. 2d 230 (C.A. 2, 1943), cert. den. 321 U.S. 770.

In both the *Custom House Packing Corp.* case and the *W. E. Robinson & Co.* case, *supra*, the splitting of commission took the form not merely of the transmission of part of the broker's commission to the purchaser, but also was effected indirectly though equivalent price reductions. The latter practice was also considered to be in violation of section 2(c) and, in the *Robinson* case, the order specifically prohibited a reduction in price which reflected the part of the brokerage payment to which the broker was entitled.

CONCLUDING FINDING

Based on the facts hereinabove found, it is concluded and found that respondents, and each of them, have since October 27, 1954, granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods Ltd., to The J. M. Smucker Co., a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce.

3. The question of constitutionality

Counsel for respondents contend that section 2(c), as applied to the acts and practices here involved, is in violation of the due process clause of the fifth amendment because it constitutes an arbitrary discrimination against them. When reduced to its essence, respondents' argument is that by denying them the right to meet the competition of other brokers who charge a lower rate of commission, section 2(c) discriminates against them and hence violates the fifth amendment.

Aside from the fact that an administrative agency is required to assume the constitutionality of the laws it administers, the short answer to counsels' contention is that it was laid at rest many years ago in the *Oliver Brothers* case, *supra*. In that case it was contended that section 2(c) violated the fifth amendment because it did not permit the use of the defensive measures provided with respect to section 2(a), such as the meeting of competition. In response to this argument the Court of Appeals stated (p. 768):

> And we are not impressed with the argument that when construed without the limitation prescribed by 2(a) section 2(c) is violative of the due process clause of the fifth amendment. It is addressed to a definite evil in interstate trade and commerce which Congress has full power to regulate. It is uniform in operation and applies to all persons alike. It is not arbitrary or unreasonable, but is directed toward the elimination of hidden discriminations in price which are thought to be injurious to the proper operation of a free competitive system of trade and

commerce and to have a tendency to promote unreasonable restraints and monopolization.

To this it need only be added that section 2(c) does not require any broker to charge any particular rate of commission. If respondents desire to reduce their rate of commission, they are not denied the right to do so under section 2(c), except insofar as they use such reduction as a vehicle for granting or allowing something to the buyer to which Congress has stated the buyer is not entitled.

CONCLUSION OF LAW

It is concluded that respondents, and each of them, by engaging in the acts and practices hereinabove found have violated, and are now, violating, the provisions of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondents Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., their representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

Respondents have appealed from the hearing examiner's initial decision which, on the basis of findings of fact therein made, concluded that respondents had violated section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. [1] The initial decision contains an order to cease and desist which would prohibit respondents from:

(1) Paying, granting, or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.

The gravamen of the complaint is that respondents granted and allowed a buyer, The J. M. Smucker Co., referred to in the above-quoted order, a percentage of respondents' commission or brokerage fee in connection with such buyer's purchase of apple concentrate from Canada Foods. The complaint charges that in making such sale, respondents, as brokers, earned their normal and customary commission, or brokerage fee, of 5 percent but did not receive all of such normal brokerage, accepting instead a 3-percent commission, and that respondents' seller principal thereupon lowered its established price, recouping part of the reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of 5 percent. It is further alleged that such transaction resulted in the granting or allowing by respondents (brokers) of a percentage of

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[1] Section 2(c) provides that:

"* * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

their commission or brokerage fee, directly or indirectly, to a buyer of food products, thus breaching the statute.

The record discloses, respondents admit and the hearing examiner found, that the seller principal, Canada Foods, first agreed to pay respondents a brokerage fee of 5 percent, but respondents contend that this was based on much smaller quantities than the sale in question of 500 steel drums of apple concentrate. Respondents also admit that their seller-principal originally quoted to the buyer a price of $1.30 per gallon, which subsequently was reduced and the sale to the buyer consummated at a lower price of $1.25, with respondents accepting a brokerage fee of 3 percent instead of 5 percent. It appears to be respondents' further position that the reduced price obtained because of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not by reason of any request by respondents.

In view of the disposition we make of the case, we find it unnecessary to pass on any questions except the legal issues involved in this appeal. We have reviewed the whole record herein and are satisfied that the hearing examiner's findings as to the facts are fully supported by the record made. Some of those findings are based on conflicting testimony and evidence. As to those, giving proper weight to the hearing examiner's findings, based as they are on the complete record in the case, including all exhibits and testimony, and considering especially that the hearing examiner had full opportunity to observe the bearing and demeanor of the witnesses, we are constrained to conclude from our view of the record that he correctly weighed and resolved the conflicting evidence. We will, therefore, refer but briefly to the salient ultimate facts found wherever necessary by way of explanation of our disposition of the legal points raised on this appeal.

The principal issue presented is whether subsection 2(c) of the Clayton Act, as amended, encompasses the passing on of all or part of brokerage commissions by a seller's broker to the buyer. The respondent contends that the brokerage clause reaches only illicit grants made *directly* to buyers and that in the transaction involved here, where the broker "acquiesced" in a lower rate of commission by his seller principal, it is not a payment or a grant of brokerage allowance on respondent broker's part and in no event runs to the buyer in the transaction.

Respondents in this connection argue that a price reduction to a buyer by a seller cannot constitute an allowance "in lieu of brokerage"

within the meaning of section 2(c) unless directly correlated with a brokerage commission in both conception and amount and cites that principle as the rationale of the Commission's decision in the matter of *Main Fish Company, Inc.*, Docket No. 6386 (decided July 30, 1956).

Directing attention first to respondents' contention that subsection 2(c) relates only to discriminatory practices on the part of sellers and buyers and enacts no liability for independent seller's brokers, we have first to ascertain the overall legislative objective of the Robinson-Patman amendment to the Clayton Act. Section 2 of the Clayton Act, which was the section amended, merely interdicted generally discrimination in price where the effect thereof was substantially to lessen competition or tend to create monopoly. As was said by the U.S. Court of Appeals, Fourth Circuit, in *Oliver Bros., Inc., et al.* v. *Federal Trade Commission*, 102 F. 2d 763, 676:

> The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown. Receipt of price discrimination was made unlawful for the first time, section 2(f), 15 U.S.C.A. § 13(f); and three specific matters were forbidden as unfair trade practices by subsections (c), (d), and (e), viz: *the granting of commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent*, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer.
>
> * * * * * * *
>
> *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer;* for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. [Emphasis supplied.]

It is the opinion of the Commission that the language of subsection (c) is so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended, *Oliver Bros.* v. *Federal Trade Commission, supra*, and that it is the office of that subsection to outlaw the diversion of brokerage to buyers, or any form of commission or sales compensation, to buyers in any manner, directly or indirectly, from any source. Reflection upon the climate which produced the Clayton Act, as amended by the Robinson-Patman Act, leads but to the conclusion that the intendment of that legislation is to establish the public policy of eliminating as a violation of law the practice of discriminating

in price, whether it be done directly or indirectly.[2] It is our view that this public policy prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage. The words of the statute are plain and mean what they say in aid of effectuating the general overall intent of the Robinson-Patman amendment of the Clayton Act. In the *Great Atlantic & Pacific Tea Co.* case (106 F. 2d 667, 674), the court said succinctly:

> At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. *Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress.* [Emphasis supplied.]

The Commission, in view of the foregoing, rejects the contention, implicit in respondents' argument in support of their appeal, that subsection 2(c) of the Clayton Act, as amended, does not reach the situation disclosed by the record in this proceeding. In this connection, the hearing examiner found in effect, and we think correctly, that respondent Henry Broch & Co. had a 5-percent brokerage agreement with Canada Foods, Ltd., under which it received 5 percent brokerage on all other transactions except those with Smucker; that by acquiescence, ratification, confirmation, agreement, or other wise, respondent Broch accepted a reduction in brokerage from 5 percent to 3 percent on Smucker transactions; that this brokerage reduction was contemporaneous with the price reduction by Canada Foods to Smucker and amounted to a sharing of the price reduction by Broch and Canada Foods. The only reasonable inference possible to be drawn from those facts established of record is that drawn by the hearing examiner to the effect that respondents' acceptance of a reduced brokerage in such circumstances constitutes a payment of

[2] Invoice prices by Canada Foods, Ltd., on sales of apple concentrate *through its broker, respondent Henry Broch & Co.*, is disclosed by reference to Comm. Ex. 5–9, incl., 11 and 13, in summary, as follows:

Date	Drums	Customer	Per gal.
12/3/54	50	Owen & Mowrey, Inc	$1.30
12/3/54	50	Adler Foods Co	1.30
12/9/54	50	J. M. Smucker Co	1.25
1/8/55	75	do	1.25
1/26/55	75	do	1.25
2/15/55	75	do	1.25
3/30/55	75	do	1.25
5/1/55	200	do	1.25

Also, Comm. Ex. 16A, 16B and 17 disclose that in 1954–55, brokerage commissions were paid to respondent Henry Broch & Co. by Canada Foods, Ltd., for sales to 18 customers other than J. M. Smucker Co. at the rate of 5 percent and for sales to J. M. Smucker Co. during that time at the rate of 3 percent.

part of their commission to the buyer exactly as though respondents had paid 2 percent of their commission to the buyer direct.

Turning next to respondents' contention that the Commission's decision in the *Main Fish Co.* case, *supra*, is dispositive here and that the decision there cannot logically coexist with the initial decision in this proceeding, we can find no merit in that argument. The two cases are obviously distinguishable.

Respondents correctly summarize our holding in *Main Fish* to be that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not, in the factual situation there present, generate a presumption that the lower price reflected an "allowance in lieu of brokerage" and that, in the circumstances there found, "the pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage" in other transactions. In so holding, however, the Commission carefully noted that in a given situation it would be possible to infer from surrounding circumstances that the payment of brokerage monies or sums in lieu thereof was the fact. We think that this latter situation obtains here and that the matrix of the factual situation projected by the record presently before us in the instant case clearly gives rise to the inference that respondent Broch instigated and granted payments in lieu of brokerage to the buyer Smucker. In other words, we find here that the price reductions convincingly are shown to be commensurate with the pattern of brokerage involved. The *Main Fish Co.* case, *supra*, is not controlling here.

Respondents, while admitting that Canada Foods first agreed to pay them a brokerage fee of 5 percent, contend that this was based on much smaller quantities than the principal sale involved here of 500 steel drums of apple concentrate. If respondents are seeking to resort to the cost differential provisos of subsection (a) of section 2 of the act, we hold that such contention is without merit. The complaint in this proceeding was issued under subsection 2(c), not under subsection 2(a), and the several defenses available to price discrimination charges under subsection 2(a) are not applicable to a proceeding under subsection 2(c). The latter is complete on its face and establishes a convention or principle of illegality entirely separate from and independent of the remaining subsections of section 2 of the statute. The Commission and the courts have consistently so held.[3]

Respondents finally argue that the proceeding here is not in the public interest and must be dismissed because it is a private contro-

[3] *Biddle Purchasing Co., et al. v. Federal Trade Commission*, 96 F. 2d 687 (C.A. 2, 1938); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763 (C.A. 4, 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C.A. 3, 1939).

versy between Broch & Co. and the broker who allegedly lost to respondent a sale to a potential buyer; in other words, that a private wrong is involved instead of an injury to the public. The answer to this is that such contention ignores the changes made in the Clayton Act by the passage of the Robinson-Patman Act. As the court said in the *Nashville Coal Co.* case:[4]

> The Clayton Act (now section 2(a)) required a showing of injury to the public. The additions made by the Robinson-Patman Act (sections 2(c), 2(d), and 2(e)), do not require any such showing in order to make the act illegal.

Respondents' contention that this is a private controversy and, as such, requires dismissal of the proceeding is rejected.

Respondents' appeal is denied and the findings as to the facts, conclusion and order to cease and desist contained in the initial decision are adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' 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 rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

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

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[4] *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co.*, 37 F. Supp. 728, 735 (D.C. W.D. Ky., 1941), order enforced *sub nomine Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 130 F. 2d 12 (C.A. 6, 1943). And see cases cited n. 3, *supra*.

Decision

IN THE MATTER OF

B. SCHOOLSKY & SON, INC., ET AL.

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

Docket 6763. Complaint, Apr. 4, 1957—Decision, Dec. 10, 1957

Consent order requiring manufacturers in Manville, R.I., to cease violating the Wool Products Labeling Act by failing to label wool stock as required and by representing in sales invoices and other shipping memoranda that certain stock contained various amounts of wool when in fact the fiber content was "reprocessed wool" and "reused wool."

Mr. Morton Nesmith and *Mr. John J. Mathias* for the Commission.

Mr. Samuel Shapiro, of New York 7, N.Y., and *Mr. Barnett Warner*, of Princeton, N.J., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that B. Schoolsky & Son Inc., a corporation, Benjamin Schoolsky, and Robert Schoolsky, individually and as officers of said corporation, hereinafter called respondents, have violated the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the rules and regulations promulgated under the last-named act by misbranding and mislabeling wool products.

After issuance and service of the complaint, the respondents, their counsel, and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondents admit 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; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondents waive 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; respondents waive 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 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 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. Respondent B. Schoolsky & Son, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 8 Albion Road, Manville, R.I.

Respondent Benjamin Schoolsky is the president and treasurer, and respondent Robert Schoolsky is the vice president and secretary of the corporate respondent. These individuals formulate, direct and control the acts, policies, and practices of the corporate respondent The address of the individual respondents is 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 the respondent, B. Schoolsky & Son, Inc., a corporation, and its officers; respondent Benjamin Schoolsky, individually and as an officer of said corporation, and respondent Robert Schoolsky, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly, or through any corporate or other device, in connection with the 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 reprocessed wool or reused wool or other "wool products," as "wool products" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding or mislabeling such products by:

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

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding 5 per centum 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 5 per centum or more, (5) the aggregate of all other fibers;

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

(c) The name or registered identification number of the manufacturers 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 B. Schoolsky & Son, Inc., a corporation, and its officers; respondent Benjamin Schoolsky, individually and as an officer of said corporation and respondent Robert Schoolsky, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly, or through any corporate or other device, in connection with the offering for sale, sale, or distribution of wool, reprocessed wool or reused wool stock or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof, in sales invoices, shipping memoranda or in any other manner.

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 10th day of December 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.

IN THE MATTER OF

SUNSET HOUSE DISTRIBUTING CORPORATION ET AL.

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

Docket 6823. Complaint, June 24, 1957—Decision, Dec. 10, 1957

Consent order requiring distributors in Hollywood, Calif., to cease advertising falsely that attachment of their "Color Filter" colored transparent plastic sheet to a black-and-white television set would produce the same visual effect as a color television.

Mr. Brockman Horne for the Commission.
Mr. Marvin A. Freeman, of Hollywood, Calif., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondents have been and are engaged in the business of selling and distributing in commerce a product called a "Color Filter", which consists of a sheet of transparent plastic upon which has been sprayed paint of orange color blending into green at one border and blue at the opposite border, and is designed to be fastened over the viewing screen of a television set. It is charged that respondents have violated the Federal Trade Commission Act by falsely and deceptively representing that the product so used on a black-and-white television set will produce the same visual effect as a color television set, in that the objects appearing upon the viewing screen will be shown in the same colors as the objects being televised.

After service of the complaint, the corporate respondent, by its president, Leonard Carlson, and the individual respondents Leonard Carlson, Milton Eisenberg, and Gloria O. Carlson, individually and as officers of the corporate respondent, Marvin A. Freeman as attorney for respondents, 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 transmitted to the hearing examiner for consideration.

Attached to the agreement and made a part thereof is an affidavit executed by Leonard Carlson, president of Sunset House Distributing Corp., the corporate respondent herein, stating that Marvin A. Freeman, an attorney at law, is attorney for and also secretary of the corporation; that neither as such secretary nor as attorney, nor in any other capacity does he have any part in the formulation, direction, and control of the policies, acts, and practices of Sunset House

Distributing Corp. Based upon this affidavit, the order set forth in the agreement properly dismisses the complaint as to him.

The agreement identifies respondent Sunset House Distributing Corp. as a California corporation, with its office and principal place of business located at 792 Sunset Building, Hollywood, Calif., and the individual respondents Leonard Carlson, Milton Eisenberg, and Gloria O. Carlson as president, vice-president, and treasurer, respectively, of said corporation, and recites that they formulate, direct, and control its policies, acts and practices. All individual respondents have their office and principal place of business at the same location as that of the corporate respondent.

The agreement provides, among other things, that the word "respondents" as used therein shall mean all respondents named in the caption hereof, other than Marvin A. Freeman; that respondents admit all of 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; that the record on which the initial decision and the decision to the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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 order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon disposes of all the issues raised in the complaint, and adequately prohibits all the acts and practices charged in the complaint as being in violation of the Federal Trade Commission Act. The agreement containing consent order to cease and desist is therefore accepted as part of the record upon which this decision is based, and this proceeding is found to be in the public interest. Accordingly,

It is ordered, That respondents Sunset House Distributing Corp., a corporation, and its officers, and Leonard Carlson, Milton Eisenberg,

and Gloria O. Carlson, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of a plastic sheet to be fastened over the viewing screen of a television set, designated as "Color Filter," or any other product of substantially the same construction or possessing substantially the same characteristics whether sold under the same or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that by the use of said product in connection with the operation of a black-and-white television set, said television will thereby produce the same visual effect as a color television set, or misrepresenting in any manner the color provided by said product when used in connection with a television set.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the respondent Marvin A. Freeman, individually and as an officer of Sunset House Distributing Corp.

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 10th day of December 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Sunset House Distributing Corp., a corporation, and Leonard Carlson, Milton Eisenberg, and Gloria O. Carlson, 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.

IN THE MATTER OF

ELIZABETH JALLIS TRADING AS ERVAY APPAREL CO.

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

Docket 6838. Complaint, July 12, 1957—Decision, Dec. 10, 1957

Order dismissing, for the reason that respondent had ceased business operations and her whereabouts were unknown, complaint charging a furrier in Dallas, Tex., with failing to comply with the advertising, invoicing, and labeling requirements of the Fur Products Labeling Act; and with misrepresenting savings by enclosing purported credit checks in letters to customers and adding that amount to the regular price charged.

Morton Nesmith, Esq. and *John J. Mathias*, Esq., for the Commission.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On July 12, 1957, the Federal Trade Commission issued a complaint in this proceeding alleging that Elizabeth Jallis, trading as Ervay Apparel Co., hereinafter called respondent, violated the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act in promoting the sale of furs.

A copy of the complaint was mailed to the respondent at her place of business located at 425 S. Ervay Street, Dallas, Tex., by registered mail, but the envelope containing said complaint was returned by the postmaster undelivered. Attempts to personally serve said complaint by personal service were unsuccessful.

On October 25, 1957, counsel supporting the complaint filed a motion with the hearing examiner in this proceeding setting out that the respondent has ceased business operations at her address in Dallas, Tex., that her present whereabouts are unknown, and requesting that said complaint be dismissed.

Under the circumstances, the hearing examiner is of the opinion that said motion should be granted and the complaint dismissed. Accordingly,

It is ordered, That the complaint herein be, and it hereby is, dismissed, without prejudice to the right of the Federal Trade Commission to take such further action in the future against respondent as the facts and circumstances may warrant.

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 10th day of December 1957, become the decision of the Commission.

IN THE MATTER OF

CENTURY PRODUCTS WORKS, INC., ET AL.

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

Docket 6840. Complaint, July 15, 1957—Decision, Dec. 10, 1957

Consent order requiring two associated corporations in Bronx, N.Y.—the manufacturer and sole distributor, respectively, of irons, cooker-fryers, and skillet-casseroles—to cease representing fictitious and exaggerated prices as the usual retail prices and representing falsely that certain of their products had been approved by Good Housekeeping magazine and advertised therein, in advertising material prepared for their purchasers for use in the resale of their products, in newspapers, on attached tags and labels, and on the cartons in which the products were displayed and sold.

Mr. Terral A. Jordan for the Commission.

Mr. Benjamin H. Fried, of Fried & Fried, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein charging the above-named respondents, Century Products Works, Inc., a corporation, Century Enterprises, Inc., a corporation, and Ned M. Grossberg, Morris Brandler, and Sam Klein, individually and as officers of said corporations, with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondents were duly served with process and in due course filed their answer. The initial hearing was canceled pending negotiations of counsel for a consent agreement.

On October 21, 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 said respondents and by their attorney and Terral A. Jordan, counsel supporting the complaint, under date of October 9, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

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 in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondents Century Products Works, Inc., and Century Enterprises, Inc., are corporations existing and doing business under and by virtue of the laws of the State of New York. Respondent Ned M. Grossberg is an individual and is vice president of Century Products Works, Inc., and president of said Century Enterprises, Inc. Respondent Morris Brandler is an individual and is secretary and treasurer of said Century Products Works, Inc., and vice president of said Century Enterprises, Inc. Respondent Sam Klein is an individual and is president of Century Products Works, Inc., and secretary and treasurer of said Century Enterprises, Inc. The office and principal place of business of the respondents is located at 2911 White Plains Road, in the City of Bronx, State of New York.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 15, 1957, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on each respondent.

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.

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, 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 person of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges 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 full disposition of all 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 respondents Century Products Works, Inc., and Century Enterprises, Inc., corporations, and their officers, and Ned M. Grossberg, Morris Brandler, and Sam Klein, individually and as officers of each of said corporations, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of electrical appliances, including irons, cooker-fryers, and skillet-casseroles, or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or indirectly:

a. That any stated price, which is in excess of the price at which such products are regularly and usually sold at retail, is the retail price of such products.

b. That respondents' said products have been advertised in Good Housekeeping magazine or any other publication or approved or guaranteed by Good Housekeeping magazine or any other person, firm, or corporation, when such is not 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 10th day of December 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Century Products Works, Inc., and Century Enterprises, Inc., corporations, and their officers, and Ned M. Grossberg, Morris Brandler, and Sam Klein, individually and as officers of each of said corporations, 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.