IN THE MATTER OF

COLEMAN'S FASHION SHOP, INC., ET AL.

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

Docket 7299. Complaint, Nov. 14, 1958—Decision, Mar. 10, 1959

Consent order requiring a furrier in Wellesley, Mass., to cease violating the Fur Products Labeling Act by failing to set forth as required on labels and invoices such terms as "Persian Lamb," "Dyed Mouton-processed Lamb," and "Dyed Broadtail-processed Lamb"; by advertising in newspapers which represented fur products as from a liquidating business and prices as reduced from regular prices which were in fact fictitious; and by failing in other respects to comply with the labeling, invoicing, and advertising requirements, and to keep adequate records as a basis for said pricing claims.

Mr. Alvin D. Edelson supporting the complaint.
Mr. Alan J. Dimond, of Boston, Mass., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on November 14, 1958, charging them with having violated the Fur Products Labeling Act and the Rules and Regulations issued thereunder, and the Federal Trade Commission Act, through the misbranding of certain fur products and the false and deceptive invoicing and advertising thereof. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated January 7, 1959, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by all respondents, by counsel for said respondents, and by counsel supporting the complaint, and approved by the director and assistant director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allega-

tions. Said agreement further provides that 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 such agreement. It has been agreed 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 and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

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

1. Respondent Coleman's Fashion Shop, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. The address of the corporate respondent is 71 Central Street, Wellesley, Mass.

Individual respondents Robert J. Coleman, Clara A. Coleman and Alfred F. Coleman are officers of the said corporate respondent and each has a business address at the same address as the corporate respondent.

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

ORDER

It is ordered, That Coleman's Fashion Shop, Inc., a corporation, and its officers, and Robert J. Coleman, Clara A. Coleman

and Alfred F. Coleman, individually and as officers of said corporation, hereinafter referred to as respondents, 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 fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are 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 or the country of origin of any imported furs contained in a fur product;

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

2. 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.

3. Setting forth on labels affixed to fur products:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form;

(b) Information required under Section 4(2) of the Fur Prod-

ucts Labeling Act and the Rules and Regulations thereunder, mingled with nonrequired information;

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

4. Failing to set forth required information in the sequence required under Rule 30.

5. Failing to set forth the term "Persian Lamb" in the manner required by Rule 8 of the Regulations.

6. Failing to set forth the term "Dyed Mouton-processed Lamb" in the manner required by Rule 9 of the Regulations.

7. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required by Rule 10 of the Regulations.

8. Affixing to fur products labels that do not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches.

9. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

B. Falsely or deceptively invoicing fur products by:

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

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

(b) That the fur product contains or is composed of used fur when such is 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 or origin of any imported furs contained in a fur product;

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

2. Setting forth information required under Section 5(b)(1)

of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to set forth the term "Persian Lamb" in the manner required by Rule 8 of the Regulations.

4. Failing to set forth the term "Dyed Mouton-processed Lamb" in the manner required by Rule 9 of the Regulations.

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required by Rule 10 of the Regulations.

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

1. Fails to set forth the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

2. Represents, directly or by implication, that any such products are the stock of a business in a state of liquidation, contrary to fact.

3. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of business.

D. Making price claims and representations respecting comparative prices, percentage savings claims, prices being reduced from regular or usual prices, and prices being "Many way below cost" unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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 March 1959, 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

STAZ-SET, INC., ET AL.

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

Docket 7302. Complaint, Nov. 14, 1958—Decision, Mar. 10, 1959

Consent order requiring a distributor and its advertising agency in New York City to cease representing falsely in advertising that their drug preparation designated "7 Day Reducer" was safe for use by all obese persons, would cause them to lose weight without dieting and at specific rates per week and per month, and was approved for reducing weight by the U.S. Public Health authorities.

Mr. Berryman Davis for the Commission.
Bass & Friend, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with misrepresenting a weight reducing preparation advertised and sold by them. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the

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

1. Respondent Staz-Set, Inc., is a corporation existing and doing business under the laws of the State of New York, with its office and principal place of business located at 42 West 38th Street, New York, N.Y. Respondents David L. Ratke and Herman Liebenson are officers of respondent Staz-Set, Inc., and the address of said individual respondents is the same as that of the corporate respondent.

Respondent Parker Advertising, Inc., is a corporation existing and doing business under the laws of the State of New York, with its office and principal place of business located at 42 West 38th Street, New York, N.Y.

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, Staz-Set, Inc., a corporation, and its officers and David L. Ratke, and Herman Liebenson, individually and as officers of said corporation, and Parker Advertising, Inc., and its officers, 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 7-Day Reducer, or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

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

(a) The preparation is safe to use by all obese persons;

(b) Obese persons can lose weight by use of the preparation without dieting, that is while consuming the same kinds and amounts of food they ordinarily consume;

(c) Any predetermined weight reduction can be achieved by the taking or use of said preparation for a prescribed period of time;

(d) United States Public Health Authorities approve or en-

dorse the use of respondents' preparation for the purpose of reducing weight.

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

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 March 1959, become the decision of the Commission; and, accordingly:

It is ordered, That 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

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.

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

Docket 5724. Complaint, Dec. 20, 1949—Decision, Mar. 12, 1959

Order requiring 17 jobbers of automotive parts and supplies and their buying association in the New York City area to cease violating Sec. 2(f) of the Clayton Act by inducing or accepting discriminatory prices from their suppliers, such as rebates up to 19% higher than those received by their competitors; and requiring said jobbers to cease maintaining said buying association as an instrumentality to induce or receive discriminatory prices.

Mr. Eldon P. Schrup for the Commission.

Mr. B. F. Lerch, of New York, N.Y., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is now before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings of fact and conclusions submitted 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, conclusions drawn therefrom and order:

1. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., is a membership corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 11 Park Place, New York, N.Y. At the time of the issuance of the complaint in this proceeding the members of said respondent Metropolitan Automotive Wholesalers Cooperative, Inc., were as follows:

(1) Respondent American Motor Specialties Co., Inc., a New Jersey corporation, with its principal office and place of business located at 53 Lock Street, Newark, N.J.

(2) Respondent Bronx Gear & Bearing Co., Inc., a New York

corporation, with its principal office and place of business located at 221 East 149th Street, New York, N.Y.

(3) Respondent Clinton Square Auto Parts Corp., a New Jersey corporation, with its principal office and place of business located at 22 Elizabeth Avenue, Newark, N.J.

(4) Respondents George Boelger, Mrs. Anna Marian Boelger, Julius N. Cohen, and Mrs. Cherrie Cohen, copartners trading as Eveready Automotive Company, a partnership with their principal office and place of business located at 67 Richmond Avenue, Port Richmond, Long Island, N.Y.

(5) Respondent Green's Auto Gear & Parts Co., Inc., a New York corporation, with its principal office and place of business located at 110 West 145th Street, New York, N.Y.

(6) Respondent Howell Treiber, Inc., a New York corporation, with its principal office and place of business located at 1077 Atlantic Avenue, Brooklyn, N.Y.

(7) Respondent M & G Auto Supplies, Inc., a New Jersey corporation, with its principal office and place of business located at 504 Bergen Avenue, Jersey City, N.J.

(8) Respondent Miller Auto Supply & Equipment Co., Inc., is a New York corporation, with its principal office and place of business located at 205 East 9th Street, New York, N.Y.

(9) Respondent North Shore Auto Parts Co. of Flushing, Inc., is a New York corporation, with its principal office and place of business located at 137–40 Northern Boulevard, Flushing, Long Island, N.Y.

(10) Respondent S & R Auto Parts, Inc., is a New York corporation, with its principal office and place of business located at 28 Seventh Avenue, South, New York, N.Y.

(11) Respondent Sanders & Ruskin, Inc., a New York corporation, with its principal office and place of business located at 412 Lafayette Street, New York, N.Y.

(12) Respondent South Shore Motor Parts Co., Inc., a New York corporation, with its principal office and place of business located at 225 Merrick Road, Lynbrook, Long Island, N.Y.

(13) Respondent Arthur Schwartz, doing business as Cypress Auto Parts Company, with his principal office and place of business located at 70–20 60th Lane, Brooklyn, N.Y.

(14) Respondent A. Jacoby & Sons, Inc., a New York corporation, with its principal office and place of business located at 8620 18th Avenue, Brooklyn, N.Y.

(15) Respondent K & G Auto Parts, Inc., a New York corporation, with its principal office and place of business located at 397 Empire Boulevard, Brooklyn, N.Y.

(16) Respondent Norwood Distributors, Inc., a New Jersey corporation, with its principal office and place of business located at 624 Broadway, Long Branch, N.J.

(17) Respondents Chester Klein and Mrs. Isabell Klein, copartners trading as Republic Auto Parts, with their principal office and place of business located at 260 West 52nd Street, New York, N.Y.

2. The above respondents, who have been named as members of Metropolitan Automotive Wholesalers Cooperative, Inc., are independent jobbers dealing principally in automotive parts, accessories and supplies. Since June 19, 1936, said respondent jobbers have been engaged in the purchase and resale of said automotive products in interstate commerce and have been and are now engaged in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase and resale of such automotive products of like grade and quality in interstate commerce which have been purchased from the same or competitive sellers.

3. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., was organized by the respondent members on March 30, 1948, and this respondent is, in fact, a successor to respondent Automotive Group Buyers, Inc. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., took over all assets and contracts and assumed the liabilities of respondent Automotive Group Buyers, Inc., and thereafter the Automotive Group Buyers, Inc., became dormant.

4. Respondent jobbers organized and have maintained, controlled and operated respondent Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, Automotive Group Buyers, Inc., for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive parts, accessories and supplies. It was the regular procedure for the respondent jobbers, acting through Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, to notify manufacturers and sellers of various lines of automotive parts, accessories and supplies to submit their prices to the executive secretary in charge of operations. If satisfactory arrangements as to price could be made, the matter was then submitted to the purchasing committee for the purpose of

determining suitability and acceptance of the product. Thereafter the members of the group organization would consider the offers and vote to accept or reject the seller's line to the exclusion of the lines of the seller's competitors. This, however, was not a rigid requirement in that the individual members could continue to handle competitive lines which they were already selling or for which they had a preference. In actual practice, most of the members of the group organization sold and distributed the manufacturers' lines accepted by the group.

5. The pricing practices of many of the manufacturers or sellers who entered into contracts with the respondent jobbers as members of Metropolitan Automotive Wholesalers Cooperative, Inc., consisted of the issuance of distributor or jobber price lists which listed the basic prices of the sellers' products. All allowances, discounts, and rebates were off the distributor or jobber price lists. As part of their pricing structure these sellers allowed a retroactive volume rebate based upon the total purchases of the customer during the entire year. For example, one such supplier granted annual volume rebates ranging from 3 percent on a yearly volume of $1,800 in purchases, to 15 percent on purchases of a yearly volume of $10,000 or more. In the case of the respondent jobbers, purchasing as members of Metropolitan Automotive Wholesalers Cooperative, Inc., the retroactive annual volume rebate allowed by the suppliers was based not on the total purchases of the individual jobbers, but instead was based on the total purchases of all members of the group organization.

6. The purchasing procedure followed by the respondent jobbers as members of Metropolitan Automotive Wholesalers Cooperative, Inc., provided for the forwarding of purchase orders by the individual respondent jobber member to the seller, either directly or through the group office. Monthly settlements were made between the supplier and the group office for the aggregate purchase orders of all the respondent jobber members so received, and each respondent jobber member also settled monthly with the group office for its individual purchases so made. The annual volume rebate allowed by the seller was based upon the aggregate purchases of the members of the group and was paid to the group office, which in turn distributed such volume rebate, less expenses, to its jobber members in proportion to the amount of such jobber's individual purchases.

7. The annual volume rebates were granted and allowed by the sellers to each individual respondent jobber member on the

basis of the total purchases of all the members of the group, irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the seller's volume rebate schedules as set forth in the seller's contracts. The group buying organizations, Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., were in reality bookkeeping devices for the collection of rebates, discounts and allowances received from sellers for purchases made by their jobber members. Such respondent jobbers in fact purchase their requirements of the seller's products direct from the seller and at the same time receive a more favorable price or a higher rebate based upon the combined purchases of all the members.

8. The purpose of the respondent jobbers in organizing and maintaining respondents Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., was to obtain a price lower than a jobber respondent could obtain on the amount of his purchases if made as a nonmember of the group. The jobber respondents knew that the net prices obtained through the use of the group buying device were not based upon the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to them as purchasers, and bear relation to factors other than actual costs of production or delivery. The method of purchase was substantially the same as if the jobber member had been operating individually instead of as a group member. The deliveries by the seller were made direct to the respondent jobber in the same manner as deliveries would have been made had respondent jobber been a purchaser independent of any group organization. Respondent jobbers further knew that they were getting a lower price through the means of the group organization than was obtained by jobbers competing with them in the resale of the supplier's products in the same marketing area where such competitors were not members of a buying group.

9. Illustrative of the monetary benefits derived by respondent jobbers as members of the group buying organization as opposed to those individual purchasers buying without the benefit of such group consolidation of purchases and as opposed to what the respondent jobber would have paid had it been operating without the benefit of group consolidation of purchases are the following tabulations taken from Commission Exhibits 1, 194 and 195; and tabulations taken from Commission Exhibits 2 and 276 B–C:

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING[1]

Manufacturer's published discount schedule to trade		Member-jobbers	Actual Net purchases each member jobber	Manufacturer's schedule discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
Net purchases	Retroactive rebate		1	2	3	4	5	6
	Percent			*Percent*		*Percent*		
Under $1,800	None	Bronx Gear & Bearing Co.	$146.49	None	.....	19.99	$29.26	$29.26
$1,800 – $2,400	3	Cypress Auto Parts Co.	1,254.31	None	.....	20.02	251.15	251.15
$2,400 – $3,600	5	Green's Auto Gear & Parts Co.	1,974.23	3	$59.23	20.00	394.84	335.61
$3,600 – $5,000	7	The M. & G. Auto Supplies, Inc.	5,182.64	9	466.44	20.53	1,063.82	597.38
$5,000 – $6,500	9	North Shore Auto Parts Co.	5,178.18	9	466.04	19.93	1,031.77	565.73
$6,500 – $8,000	11	Norwood Distributors Inc.	13,701.48	15	2,055.22	20.00	2,740.29	685.07
$8,000 – $10,000	13	Republic Auto Parts	1,523.70	None	.....	20.02	305.06	305.06
Over $10,000	15	S & R Auto Parts, Inc.	2,228.55	3	66.86	20.00	445.72	378.86
		Sanders & Ruskin, Inc.	1,916.77	3	57.50	19.79	379.30	321.80
		South Shore Motor Parts, Inc.	10,407.50	15	1,561.13	20.00	2,081.17	520.04
		Eveready Automotive Co.	.....	None	.....	.....	.....	.....
		K & G Auto Parts, Inc.	76.80	None	.....	20.00	15.36	15.36
Totals	.....	.....	$43,590.65	.....	$4,732.42	.....	$8,737.78	$4,005.32

[1] Compiled from Commission Exhibit No. 1, showing actual purchases from Exhibit Nos. 194 and 195, being the applicable Standard Motor Products, Inc. Standard Motor Products, Inc. during 1949 and comparison with Commission rebate contract and endorsement.

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING[2]

Manufacturer's published discount schedule to trade		Member-jobbers	Actual net rebateable purchases each member jobber	Manufacturer's schedule non-retroactive discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
Net purchases	Non-retroactive rebate		1	2	3	4	5	6
	Percent	M. & G. Auto Supplies, Inc.	2,585.60	*Percent* {0; 5; 7½; 10; 12½	$180.70	*Percent* 20.10	$519.79	$339.09
$600 or Less	None							
$600 to $1,000	5	Clinton Square Auto	10,866.90	{0; 5; 7½; 10; 12½; 17½	1,609.21	20.17	2,192.30	583.09
$1,000 to $1,500	7½							
$1,500 to $2,000	10	American Motor Specialties	3,556.97	{0; 5; 7½; 10; 12½; 17½	329.97	20.13	716.10	386.13
$2,000 to $3,000	12½							
$3,000 and over	15	Bronx Gear & Bearing Co.	1,836.90	0; 5; 7½; 10	91.19	20.08	368.91	277.72
		Cypress Auto Parts Co.	306.32	None	.....	20.12	61.63	61.63
		Howell-Treiber, Inc.	2,353.06	{0; 5; 7½; 10; 12½	151.63	20.04	471.62	319.99
		South Shore Motor Parts Co.	2,130.27	{0; 5; 7½; 10; 12½	123.78	20.10	428.20	304.42
		Miller Auto Supply Co.	82.75	None	.....	20.00	16.55	16.55
		Eveready Automotive Co.	915.00	0; 5	15.75	20.04	183.36	167.61
Totals	.....	.....	$24,633.77	.....	$ 2,502.23	.....	$4,958.46	$2,456.23

2 Compiled from Commission Exhibit No. 2, showing actual purchases from Exhibits Nos. 276 B & C, being the applicable Whitaker Cable Corporation Whitaker Cable Corporation during 1949 and comparison with Commission rebate contract.

10. The automotive parts industry is a highly competitive business involving small margins of profit. The importance of discriminatory prices allowed by the various sellers is pointed up by the importance given by the respondent jobbers to the 2 percent cash discount as increasing their margin of profit and reducing the cost of acquisition of their merchandise. Through the lower cost of merchandise, resulting from such discriminatory prices, the respondent jobbers obtained a competitive advantage over their competitors selling the same or comparable merchandise in the same trade area who receive discounts or rebates based upon the individual purchases.

11. The complaint in this proceeding named as respondents certain individuals who were described as officers and directors of Metropolitan Automotive Wholesalers Cooperative, Inc. Due to the length of time this proceeding has been pending, and since the officers and directors of said group organization change from time to time, it is the opinion of the hearing examiner that no useful purpose would be served by entry of an order against the individuals named in the complaint as officers and directors of Metropolitan Automotive Wholesalers Cooperative, Inc.

CONCLUSION

1. The lower prices granted to the respondent jobbers through the group buying device constituted discriminations in price within the intent and meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The competitive opportunities of the less favored competitors of the respondent jobbers were injured when such competitors had to pay substantially more for a supplier's products than the respondent jobbers had to pay. The various Circuit Courts of Appeals in six cases have held that the granting of discounts or rebates by suppliers through group buying organizations, under the conditions and circumstances as herein found constituted a price discrimination in violation of Section 2(a) of the Clayton Act.[1]

2. The method of operation of the respondents Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers

[1] Whitaker Cable Corporation v. Federal Trade Commission (C.C.A. 7) 239 F.2d 253; Moog Industries, Inc. v. Federal Trade Commission (C.C.A. 8) 238 F.2d 43; E. Edelmann & Company v. Federal Trade Commission (C.C.A. 7) 239 F.2d 152; C. E. Niehoff & Co. v. Federal Trade Commission (C.C.A. 7) 241 F.2d 37; P. & D. Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. 7) 245 F.2d 281; P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. D.C.) 246 F.2d 687.

Cooperative, Inc., including the adoption of the line of one seller to the exclusion of its competitors and the holding out to sellers the prospects of increasing their volume and obtaining new customers, served as an inducement to manufacturers and sellers of automotive parts, accessories and supplies to grant to the respondent jobbers a lower price than would have otherwise been obtained.

3. The price differentials involved in this proceeding were substantial. The volume rebates, discounts and other allowances granted by the sellers in this proceeding were made in accordance with such sellers' published price lists distributed generally to their jobber customers. The volume rebates allowed to the respondent jobbers were in fact off scale prices based upon the aggregate purchases of all the members rather than upon the purchases of the individual member. Each of the respondent jobber members knew, or should have known, that the discriminatory prices granted them by sellers in the form of a volume rebate based upon the aggregate purchases of all members could not be cost justified. They knew that they, as well as their competitors in the same trade area, were buying from the seller at the sellers' published price list; that shipments of merchandise by the sellers were made direct to the jobber respondents in the same manner and in substantially the same quantities as to their competitors; and that they received a lower price by means of the group buying organization than their competitors were receiving and lower prices than they themselves would have received had the volume rebate been based upon their individual purchases instead of the aggregate purchases of all the members. The jobber respondents knew that the rebates allowed were based not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to the group organization and bear relationship to factors other than the actual costs of production and delivery. The respondent jobbers were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved. Furthermore, the jobber respondents were placed upon notice as to the illegality of price discriminations received through the medium of group buying organizations by the initial decisions of the hearing examiners, and the decisions

of the Federal Trade Commission and the Circuit Courts of Appeals in the following cases:

Whitaker Cable Corporation, initial decision, February 11, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 253 (C.C.A. 7, December 14, 1956).

Moog Industries, Inc., initial decision, March 8, 1954; Commission affirmance, April 29, 1955; Court affirmance, 238 F. 2d 43 (C.C.A. 8, November 5, 1956).

E. Edelmann & Company, initial decision, March 5, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 152 (C.C.A. 7, December 14, 1956).

C. E. Niehoff & Co., initial decision, July 6, 1954; Commission affirmance, May 17, 1955; Court affirmance, 241 F. 2d 37 (C.C.A. 7, January 9, 1957).

P. & D. Manufacturing Co., Inc., initial decision, December 21, 1954; Commission affirmance, April 26, 1956; Court affirmance, 245 F. 2d 281 (C.C.A. 7, April 30, 1957).

P. Sorensen Manufacturing Co., Inc., initial decision, February 2, 1956; Commission affirmance, June 29, 1956; Court affirmance, 246 F. 2d 687 (C.C.A., D.C., May 23, 1957).

Regardless of these various decisions which came to the attention of the respondent jobbers they had, up until the time of the close of the hearings in these proceedings, continued the practice of purchasing through the group buying organizations.

4. It is not necessary to determine whether or not the respondent Metropolitan Automotive Wholesalers Cooperative, Inc., is a cooperative within the meaning of Section 4 of the Robinson-Patman Act since the law is well settled that Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2 of the Clayton Act or exempt them from its provisions (*Quality Bakers of America, et al.* v. *Federal Trade Commission,* 114 F. 2d 393).

5. The acts and practices of the respondent jobbers in knowingly inducing and knowingly receiving discriminations in price through the use of the group buying organizations Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., prohibited by subsection (a) of Section 2 of the Clayton Act, as herein found are in violation of subsection (f) of Section 2 of said Act.

ORDER

It is ordered, That American Motor Specialties Co., Inc., a

corporation; Bronx Gear & Bearing Co., Inc., a corporation; Clinton Square Auto Parts Corp., a corporation; George Boelger, Mrs. Anna Marian Boelger, Julius N. Cohen, and Mrs. Cherrie Cohen, copartners trading as Eveready Automotive Company; Green's Auto Gear & Parts Co., Inc., a corporation; Howell Treiber, Inc., a corporation; M & G Auto Supplies, Inc., a corporation; Miller Auto Supply & Equipment Co., Inc., a corporation; North Shore Auto Parts Co. of Flushing, Inc., a corporation; S & R Auto Parts, Inc., a corporation; Sanders & Ruskin, Inc., a corporation; South Shore Motor Parts Co., Inc., a corporation; Arthur Schwartz, doing business as Cypress Auto Parts Company, A. Jacoby & Sons, Inc., a corporation; K & G Auto Parts, Inc., a corporation; Norwood Distributors, Inc., a corporation; and Chester Klein, and Mrs. Isabell Klein, copartners trading as Republic Auto Parts, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories or supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That respondents Automotive Group Buyers, Inc., a corporation, and Metropolitan Automotive Wholesalers Cooperative, Inc., a corporation, and their respective mem-

bers, officers, agents, representatives and employees, in connection with the offering to purchase, or purchase, of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That the complaint be dismissed as to the following individual respondents: Alfred Epstein, Isadore Strulson, Abraham Lonoff, Benjamin Green, Peter J. Treiber, Meyer Gladstein, Joseph Finkelstein, Max Leifer, Morris Garber, Herman Sanders, George G. Korshin, Joseph Jacoby, Max Granoff, and Benjamin Peskoe.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

The complaint herein charges the respondents with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for certain individual respondents against whom the complaint was dismissed) to cease and desist the practices found to be unlawful. Respondents have appealed from this decision.

Respondents herein are jobbers for automotive parts, accessories and supplies, the membership corporation of which they are members and the predecessor of this corporation, now dormant.

The hearing examiner's findings and conclusion might be summarized as follows:

The buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, Automotive Group Buyers,

Inc., were organized and operated by respondent jobbers for the purpose of inducing the granting or allowance of lower prices by their suppliers and were in fact bookkeeping devices for the collection of rebates, discounts and allowances received from such suppliers for purchases made by the jobber members. The operation of the buying groups did not result in any significant savings to the sellers with which they dealt. This is obvious because of the fact that the members continued to purchase their requirements in substantially the same manner and to receive deliveries directly from the sellers in substantially the same quantities as though they were operating individually instead of as members of a group. The members, however, received more favorable prices through use of the group buying device than competitors who were not members of a buying group. The discounts allowed to them by various sellers through the application of retroactive volume rebate schedules were based upon the aggregate purchases of all members rather than upon the purchases of the individual members. Respondents were aware of these price differences and of the probable adverse competitive effect thereof. They also knew that the discounts which they received were based not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to the group organization and were related to factors other than the actual costs of production and delivery. Consequently, they knew or should have known that the lower prices which they received were discriminatory and could not be cost justified.

Respondents in their appeal except to these findings and conclusions and to several rulings of the hearing examiner.

In their exception to certain alleged procedural errors, respondents contend that the hearing examiner erred in admitting into evidence three charts introduced by counsel supporting the complaint. Two of these charts were tabulations of sales made by Standard Motor Products, Inc., and Whitaker Cable Corporation to respondents during the year 1949. The third was a tabulation of sales made by Moog Industries, Inc., during 1947, 1948 and 1949 to buyers located in New Brunswick, N.J., Newark, N.J., and Brooklyn, N.Y. According to the record, information contained in these charts was obtained by Commission accountants from the business records of the three manufacturers. These charts were received following the accountants' testimony as to

how they were prepared and as to the source of the data contained therein. Although respondents failed to cite any authority in support of their position, they contend that since the accounting witnesses who testified concerning the charts had not made the original entries in the records of the manufacturers, the admission of the charts into evidence was in violation of Section 1732 of the Judiciary and Judicial Procedure of the United States Code Annotated.

The hearing examiner's ruling on this point was correct. *Federal Trade Commission* v. *Cement Institute, et al.,* 333 U.S. 683; *John Bene* v. *Federal Trade Commission,* 299 F. 2d 468; *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126. Even if the technical rules for the exclusion of evidence applicable to jury trials applied to this proceeding, the charts, which had been prepared by accountants from records kept in the regular course of business, would be admissible. *Wigmore on Evidence,* 3d Ed., Book V, 1955 Supp., Sec. 1530; *United States* v. *Mortimer,* 118 F. 2d 266.

Respondents also contend that the distribution made by the group to its members did not result in lower net prices to them. This would seem to be contradicted by the following statement made by their counsel in the oral argument to dismiss at the close of the case-in-chief:

> I will concede at the very opening of my motion that if the Government contends that the cooperative was organized for the purpose of ultimately reducing the costs of the members' merchandise by the distribution which he received from the cooperative, I would concede it was done for that purpose. . . .

We think the evidence is clear that respondent jobbers were not in fact purchasing their requirements from the membership corporation but were using this device to obtain discounts or rebates which they would not have received if they had purchased individually. As found by the hearing examiner, the only change in the purchasing procedure followed by jobbers after becoming members of the group was that, as members, they forwarded their purchase orders through the group headquarters and were billed in the same manner. It is also clear that annual volume rebates based upon the aggregate purchases of all members of the group were paid by the seller to the corporation and that these rebates or discounts, less expenses, were distributed to the members in proportion to the amount of each jobber's individual purchases. The fact that the corporation did not distribute these rebates immediately upon receipt thereof from the seller

and was thereby able to build up a surplus fund, as pointed out by the respondents, is of no particular significance. The important facts are that the corporation was merely a device or instrumentality for collecting the rebates, that these rebates were paid, or were earmarked for payment, to the individual members, and that the prices paid by the members were thereby reduced by approximately the difference between the amount of such rebates and the amount of the rebates which they would have received based upon their individual purchases.

Respondents also argue that such distribution of rebates is permissible under Section 4 of the Robinson-Patman Act. In order to accept this argument we must necessarily hold that a cooperative association may with impunity engage in practices forbidden not only by Section 2(f) of the Clayton Act but by that entire section, since there is nothing in Section 4 which would indicate that its provisions are applicable to one subsection of Section 2 to the exclusion of the others. We do not construe Section 4 as granting such immunity to cooperative associations and consequently must reject respondents' argument on this point. *Quality Bakers of America, et al.* v. *Federal Trade Commission,* 114 F. 2d 393.

Respondents also contend that there is no proof in the record that any competitor purchased goods of "like grade and quality" to those purchased by respondents, citing the testimony of two witnesses, competitors of respondent jobbers, who, it is argued, did not testify as to which line of Moog products they bought or sold. The two witnesses referred to were called to testify on the subject of competitive injury and not for the purpose of establishing that merchandise sold to respondent jobbers and their competitors was of like grade and quality. The evidence does show, however, that these witnesses and respondent jobbers did in fact handle Moog's coil action line. Proof that respondent jobbers received more favorable prices than their competitors in the purchase of Moog's coil action line appears in the aforementioned tabulation of sales by Moog of this line to respondent jobbers and other jobbers in Newark, N.J., New Brunswick, N.J., and Brooklyn, N.Y. That all items in a particular line may be "sufficiently comparable for price regulation by the statute" is fully explained in *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43.

Respondents also urge that there is no proof that the lower prices received by them would lessen competition or tend to

create a monopoly. It is our opinion that the findings by the hearing examiner on this point are fully supported by the record. The evidence shows that these jobbers are engaged in a highly competitive business involving the sale of thousands of items at small margins of profit. The importance of the higher rebates which they received is illustrated by the fact that they and other jobbers who testified invariably take advantage of the 2% cash discount allowed by their suppliers. The fact that they consider this discount to be of importance in increasing their margin of profit and reducing the cost of acquisition of their merchandise is clear. In view of this competitive situation, it is our opinion that the receipt by respondent jobbers of the preferential prices reflected by the record may be substantially to lessen competition as between the jobbers and their competitors.

Respondents assert, however, that from 1948 to 1954 their annual purchases of Moog's coil action line dropped from $60,895 to $14,031 and argue that this decline in purchases should be attributed solely to the forces of competition at the jobber level. In the circumstances shown by this record, we do not believe that the mere showing of a decline in sales, which may logically be attributed to any number of causes, is inconsistent with the findings of potential competitive injury.

Relying on the Supreme Court's decision in *Automatic Canteen Company of America* v. *Federal Trade Commission,* 346 U.S. 61, respondents insist that counsel supporting the complaint has failed to meet the burden of proof necessary to establish that respondent jobbers have knowingly induced or received prohibited discriminatory prices in violation of Section 2(f) of the Clayton Act. This same point was recently raised in another case involving virtually the same factual situation. *In the matter of D & N Auto Parts Company, Inc., et al.,* Docket 5767, and in the matter of *Borden-Aicklen Auto Supply Co., Inc., et al.,* Docket 5766. As we stated in that opinion:

> The *Automatic Canteen* case, *supra,* holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of their probable competitive effect. In other words, under the "balance of convenience" rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such evidence, under the Court's opinion, must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless induced or received the discriminatory prices.

Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear.

It is obvious from the record in this matter that respondent jobbers were receiving rebates which ranged up to 19% higher than those received by competing jobbers and that respondents were aware of these price differences and of the probable adverse effect thereof on competition. They also knew that the only difference in the methods or quantities in which goods were sold and delivered to members of the group and to nonmember jobbers which could give rise to a savings in cost to the seller was in the manner in which the various purchasers were billed. Only one billing was required for purchases by all members of the group, whereas separate billings were required for other jobbers operating individually. The savings to the seller on billing costs would not be significant, however, and certainly would not be sufficient to justify price differences ranging up to 19%. Respondents, therefore, having knowledge of this fact, knew or should have known that the lower prices which they received could not be cost justified.

Respondents also knew that the price differences they received had their source in a rebate system and that the rebates allowed by Moog and various other sellers were based, not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to a purchaser, or to a group, made in the preceding year. Under such a system the prices necessarily bear relation to factors other than actual costs of production, sale or delivery, and the inevitable result is systematic price discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission, supra.* Consequently, respondents should have known that the sellers could not have cost justified their lower prices to them.

We do not construe the Court's opinion in *Automatic Canteen* as imposing upon counsel supporting the complaint the additional burden of showing as a part of his case that respondents knew or should have known that the "defenses" of fluctuating market conditions and good faith meeting of lower competitive prices were not available to the sellers. As we stated in the matter of *D & N Auto Parts Company, Inc., et al., supra,* we believe that the respondents would more readily have evidence concerning such "defenses" and that under the "balance of convenience"

doctrine would have the burden of coming forward with it. However, if in this respect we are in error, it seems clear that the required knowledge on the part of respondents has been shown.

As to the meeting of competition defense available to a seller under Section 2(b), respondents knew or should have known that the rebate system used by their suppliers was unlawful, for the reasons stated above, and that any competing seller granting the same prices to them on the same basis would also be using an illegal pricing system. Consequently, they should have known that their suppliers could not be meeting in good faith the equally low price of a competitor since the prices they would be meeting would not be lawful prices.

In the circumstances shown to exist, respondents also should have known that the price discriminations involved here were not caused by price changes made from time to time in response to changing conditions affecting the market for or the marketability of goods concerned. They knew that these discriminations which continued over a period of years did not result from occasional or sporadic changes in the seller's basic prices but from the use of a continuing rebate system. Thus, they knew or should have known that the lower prices they received did not bear any relation to changing market conditions and that the seller could not avail itself of the defense provided by the last proviso of Section 2(a).

Respondents' appeal is denied and the initial decision will be 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 and adopting the initial decision:

It is ordered, That the respondents, except those against whom the complaint has been dismissed, 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 initial decision.

IN THE MATTER OF

CANNON MILLS, INC.

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

Docket 7115. Complaint, Apr. 10, 1958—Decision, Mar. 12, 1959

Order requiring a seller of textile products, with main office in New York City, to cease advertising falsely that its "X-ron" blankets, containing 65% rayon and 25% cotton, were composed predominantly of orlon and nylon, and to disclose clearly when the silk-appearing bindings were acetate.

Mr. Alvin D. Edelson for the Commission.

Mr. James L. Rankin, of *Geary & Rankin*, of Chester, Pa., and *Mr. William H. Beckerdite*, of Concord, N.C., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 10, 1958, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. In addition, a hearing was held on September 5, 1958, for oral argument before the hearing examiner. Thereafter, the proceeding regularly came on for consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel and the said oral argument. Said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public, and makes the following findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Cannon Mills, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with offices and principal place of business at 70 Worth Street, New York, N.Y.

PAR. 2. Respondent is engaged in the distribution and sale of numerous textile products among which are blankets, sheets and towels, and other similar products.

PAR. 3. In the course and conduct of its business respondent causes, and has caused, the products it sells, when sold, to be transported from the place of manufacture of said products in the State of North Carolina to purchasers thereof located in various other states of the United States, and maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Its volume of trade in said commerce has been and is substantial—the volume of its total business in blankets being between five and six million dollars per year.

PAR. 4. At all times mentioned herein respondent has been, and is now, in direct and substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of textile products, including blankets.

PAR. 5. In the course and conduct of its said business respondent has engaged in the practice of representing the fiber content of certain of its blankets in advertising leaflets or mailing pieces which it placed in the hands of retailers of its said blankets for display and distribution to the purchasing public. During the year 1957, respondent sent to about 60 or 65 customers, principally engaged in the sale of furniture on credit, approximately two million four-color mailing pieces, sometimes referred to as "mailers," containing the following description of respondent's blankets in large type prominently displayed:

X - r o n
A New Blend* of
Miracle Fibers . . .
Orlon, Nylon, Rayon
and Cotton . . . By
Nationally Famous
C A N N O N .

PAR. 6. In the lower right-hand corner of the said mailing piece or "mailer," indicated by the asterisk after the word "blend," the following statement appears in small, obscure type:

*

65% Rayon
25% Cotton
5% Nylon
5% Orlon.

PAR. 7. By means of the aforesaid arrangement of the descriptive matter, with the emphasis placed upon the so-called "miracle fibers" orlon and nylon at the top of the statement on the mailing piece, respondent represented that said blankets were composed predominantly or in at least equal parts of orlon and nylon.

PAR. 8. Said statements and representations were false, misleading and deceptive. In truth and in fact said blankets were composed in only a very small part (5%) each of orlon and nylon, the predominant fiber being rayon.

PAR. 9. Respondent has, for several years last past, advertised and sold in commerce blankets which have bindings composed of acetate, which is a chemically manufactured fiber having the appearance and feel of silk. By reason of these qualities, acetate, when not clearly designated as such, is practically indistinguishable from silk. Respondent advertises such blankets in leaflets distributed to the purchasing public without disclosure of such acetate content. Although respondent identifies such content on said blankets themselves, the binding-content information is placed on labels in such a manner that said information cannot be readily discerned by the customer, the information being placed on the side of the label which is tucked under the edge of the blanket, and thus away from sight.

PAR. 10. Respondent's practice of failing to disclose the acetate content of its blanket binding in its advertising, and in an adequate and clear manner on the blankets themselves, has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that the bindings of such blankets are composed of silk, when such is not the fact.

PAR. 11. The use by the respondent of the aforesaid false, deceptive and misleading statements, representations and practices has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into

the erroneous belief that such statements and representations were and are true, and into the purchase of substantial quantities of respondent's blankets because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been done to competition in commerce.

PAR. 12. Sometime in November 1957, an investigator of the Federal Trade Commission called at the office of the respondent in New York City, and during the course of his investigation indicated to officials of the respondent that the "mailers" and blanket tickets were being criticized; and on November 14, 1957, the vice president of the respondent notified the Commission respondent was discontinuing the use of the mailing piece and the use of the name X-ron on blankets.

Thereafter, prior to January 1958, the respondent discontinued the use of the criticized blanket ticket and said mailing piece containing the said deceptive descriptive matter and had the printer dispose of the stock of said mailing pieces on hand (about 100,000 pieces) and attached new blanket tickets containing a descriptive statement that the binding was acetate satin. However, no notice was sent to the said customers of the discontinuance of said mailing pieces or the reason therefor nor were the customers instructed to discontinue their use.

Officials of the respondent admitted they were aware of the Trade Practice Conference Rules issued by the Commission on December 11, 1951, for the Rayon and Acetate Textile Industry, Rule 5 of which calls for the identification of fiber content of mixed goods as follows:

> It is an unfair trade practice to sell or offer for sale or distribute in commerce any industry product composed of rayon and acetate with or without other textile fiber or fibers, or either rayon or acetate with other textile fiber or fibers, without making identification of the fiber content of such industry product on all invoices, labels, advertisements, and other representations concerning such product by accurately designating and naming each constituent fiber in the order of predominance by weight, with or without accompanying statement of the fraction or percentage by weight of the entire mixture which each represents, such identification being subject to the following provisions:
>
> * * * * * * *
>
> (b) Statements of the fiber content contained in any such mixed product of two or more fibers shall not set forth the name of any fiber in a type or manner so disproportionately enlarged, emphasized, or conspicuously placed, as

thereby to have the capacity and tendency or effect of deceiving purchasers or prospective purchasers into the belief that a greater proportion of such fiber is present than is in fact true.

However, it appears from the testimony of these officials that they do not now believe that the practices hereinabove found were deceptive or misleading to the public, or that they violated the Commission's Trade Practice Rules.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, were all to the prejudice and injury of the public and of respondent's 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.

In a recent decision, *Mary Muffet* v. *Federal Trade Commission*, 193 F. 2d 504 (1952), the Commissioner's order requiring affirmative disclosure of fiber content in textiles composed in whole or in part of rayon has been upheld by the Court. The Commission has, in subsequent cases, consistently adhered to the principle of requiring affirmative disclosure. It is believed that respondent's manner of arranging the names of the fibers contained in its blankets is deceptive in the light of the foregoing decisions. Fibers composing but 10% of the entire blanket, orlon and nylon, are featured as a "new blend of miracle fibers" in large type (½" high) at the top of respondent's mailing piece or "mailer," in a conspicuously contrasted color scheme, whereas the actual percentages of fibers contained in the product, which consists predominantly of rayon and cotton (orlon and nylon being 5% each), is set forth in the extreme lower right-hand corner of the page, in such small type and blending, inconspicuous colors as to be almost invisible and difficult to find by anyone, even though he knows it is there. Such disclosure does not satisfy the requirements of the law.

Although it is not intended, in this decision, to enforce the Trade Practice Rules for the Rayon and Acetate Textile Industry, they are referred to in connection with the contention by respondent that it had discontinued the practices criticized before the complaint was issued, and that therefore the complaint should be dismissed. In view of the fact that officials of the respondent were aware of the existence of such Rules and the agreement among their competitors to subscribe to such Rules, it is believed

that respondent cannot claim to have acted in such good faith with respect to the abandonment of the unlawful practices hereinabove found as to be entitled to a dismissal of the complaint, particularly in view of the fact that respondent's officials still deny that said practices are deceptive or in violation of the Rules.

With respect to the contention of counsel for the respondent made in his oral argument that the binder of a blanket is not a part of the blanket, that it is a trimming or an ornament and, consequently, should be exempt from any action by the Commission, no support by way of decisions of the Commission or the Courts was submitted by counsel and it is believed that such an interpretation is not tenable under the circumstances. A silk binder adds to the attractiveness of a blanket and the silky appearance of an acetate or rayon binder could be deceptive and misleading unless the public is notified in plain, unmistakable language on the label the nature of the fabric used as a binder.

ORDER

It is ordered, That respondent Cannon Mills, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of blankets, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, in advertising of any kind, by setting forth fiber content other than in the order of predominance, or by any means, that respondent's blankets, or other merchandise, contain a greater proportion of particular fibers, or of a particular fiber, than is actually the fact;

2. Failing to disclose in a clear and conspicuous manner, on labeling attached to blankets or other merchandise, or by other means, and in advertising of any kind, that said merchandise contains acetate, when such is the fact.

Provided, however, That nothing herein shall relieve the respondent from its obligation to comply with the requirements of the Textile Fiber Products Identification Act after the effective date thereof or forbid the respondent thereafter from labeling and otherwise offering products subject to that Act in the manner prescribed thereby and rules and regulations promulgated thereunder by the Commission.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

In his initial decision the hearing examiner found that the respondent had engaged in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act in connection with the advertising and labeling of its blankets composed of mixed fibers. The order contained in the initial decision requires the respondent to cease the practices found to be unlawful and respondent has appealed from that decision.

The respondent in 1956 and 1957 was selling its X-ron blankets, the merchandise here involved, to approximately 65 distributors, principally concerns engaged in credit sales of furniture. In each of those years, it sold or otherwise furnished to such customers approximately two million mailers or four color prints for use in circularizing their trade. In 1957, respondent's blankets were composed of 65% rayon, 25% cotton, 5% nylon and 5% orlon. The X-ron blankets marketed in 1956 were substantially the same except that they contained 10% nylon and no orlon fiber. Their binding or edging was acetate fiber with a satin weave. The color circular or mailer used by the respondent in 1957 offered the blankets as "A New Blend Of Miracle Fibers * * * Orlon, Nylon, Rayon and Cotton." Above the word "Blend" appeared an asterisk; and in the lower right corner in small type blending indistinctly into the colored background, the percentages of the constituent fibers were listed in the order in which present. Considering the advertisement in its entirety, the hearing examiner found that the manner and order in which the fiber constituents were listed in the circular, including the emphasis placed in the advertisement upon the so-called miracle fibers, reasonably served to engender impressions and beliefs that the blankets were composed predominantly or at least in equal part of orlon and nylon. Inasmuch as they were composed instead predominantly of rayon, he held the advertising statements accordingly deceptive and concluded that the first category of the complaint's charges were supported by the record. The examiner likewise sustained the additional or second category of charges alleging law violation through respondent's failure to adequately disclose in its advertising and on the blankets that their binding or edging was composed of acetate fiber.

The respondent's brief lists the points to be argued and controlling to decision, as (1) whether the complaint should be dis-

missed by reason of respondent's discontinuance of the challenged practices prior to issuance of the complaint; (2) whether the hearing examiner erred in finding that the respondent had violated the Act by failing to disclose in advertising and labeling that the binding of the blankets was acetate; and (3) whether the hearing examiner's order is inequitable and exceeds proper legal bounds because its fiber disclosure requirements are not limited to blankets but include other merchandise.

The second contention of error respecting the initial decision's holding of deceptive failure to disclose material facts concerning the fiber content of the binding material challenges substantive evidentiary findings made by the hearing examiner and legal principles applied by him in reaching decision here. This contention accordingly will be considered first. The acetate composition of the binding was not revealed in the advertising circular. The labels used were the so-called double faced type. As received in their flat or unfolded form from the printer, the first part of the label set out information as to the dimensions of the blanket and its rayon, cotton, nylon and orlon constituents, and identified the article as respondent's; and the remaining statements identified the binder as acetate satin and contained laundering instructions. When affixed to the blanket, the part containing the first mentioned statements was faced up and the succeeding part was folded under and attached to the reverse surface of the blanket. Only the first or upper part of the label was visible when the blankets were folded and packed in their transparent pliofilm folders for point-of-sale display to the public.

It is clear, therefore, that the information respecting the content of the acetate binder appeared in a position highly difficult for discernment by prospective purchasers. Furthermore, the visible part of the label contained no suggestion that further information appeared on the underside of the blanket fold. This 3-inch binding is affixed to both ends of the blanket and represents a substantial and prominent component of the merchandise. The appearance and feel of the acetate binding simulates silk and it is clear from the record that a substantial segment of the public would not be able to, or would find it extremely difficult to, distinguish the binding from a silk binding.

Under the organic Act, the Commission has authority to require that rayon products simulating those composed of other fibers be properly identified to prevent deception in their resale. *Mary Muffet* v. *Federal Trade Commission,* 194 F. 2d 504 (C.A.

2, 1952). Furthermore, it is settled law that the Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which if known to prospective purchasers would influence their decisions on whether or not to purchase, is an unfair trade practice. *L. Heller & Son, Inc.* v. *Federal Trade Commission,* 191 F. 2d 954 (C.A. 7, 1951). The hearing examiner's conclusions of law violation by respondent resulting from its failure to adequately reveal the acetate composition of the bindings for the blankets thus have sound support in the record and in law. Respondent's contentions of error respecting that holding are rejected.

The hearing examiner further found that the manner and order in which the fiber constituents were listed in respondent's circular, including the emphasis placed in the advertisements upon the so-called miracle fibers, reasonably served to insure impressions and beliefs that the blankets were composed predominately or at least of an equal part or orlon and nylon. Actually the blankets marketed in 1957 contained but 5% orlon and 5% nylon. Although respondent's brief in its analysis of the issue does not specifically assert error by the hearing examiner in finding the complaint's charge in this regard to be supported by the evidence, certain statements appear in the brief which we interpret as challenging the correctness of the hearing examiner's ruling. For instance, at page 9, the brief states that respondent accurately and in proper order disclosed the fiber contents of the blankets at the bottom of the mailer or circular. As previously noted, however, the statement in reference to constituent fibers and their percentages was set out at the bottom in small type blending inconspicuously into the colored background used on the mailer. We deem it plainly insufficient to dispel the erroneous impressions and beliefs reasonably engendered by the statements elsewhere emphasized in the circular. The hearing examiner's findings, we believe, have sound legal basis.

The respondent's contentions that the scope of the order is improper because its requirements are not confined to sales of blankets are also rejected. The order's inclusion of the words "other merchandise" looks only to preventing respondent from continuing or resuming past unlawful practices in reference to other textile articles. That its distribution of the category of blankets here considered has represented less than 3% of the

company's total sales volume does not render the order unfair or legally unjustified. The Commission may properly close the door to future sales of other products by the same deceptive sales method; and to be of value a Commission order must proscribe the unfair method as well as the specific acts by which it was manifested. *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968 (C.A. 3, 1941); *Consumer Sales Corporation* v. *Federal Trade Commission*, 198 F. 2d 404 (C.A. 2, 1952).

Respondent states that it has discontinued the practices complained of permanently and in good faith and that dismissal of this proceeding is warranted. There is little dispute as to certain salient facts surrounding respondent's abandonment of the practices found unlawful in the initial decision. In early November, 1957, an investigational representative of the Commission visited respondent's place of business and informed two of its representatives that the mailer and X-ron label were being questioned. In a letter to the Commission dated November 14, 1957, Mr. J. W. Barnett, vice president of the respondent, stated that use of the name X-ron on blankets had been discontinued and that the mailer would not be furnished customers or used by respondent in the future. In the course of the respondent's 1956 promotion for X-ron blankets, approximately 2,000,000 of the mailers were distributed for use by customers. Around 2,200,000 were printed for distribution in 1957 and approximately 100,000 of these remained and were destroyed shortly following respondent's elected abandonment.

On March 21, 1958, Cannon distributed new mailers for certain blankets, including its Aspen blanket promotion, the particular item intended by respondent to replace the X-ron promotion. Its letter in that connection to customers made no reference to discontinuance of the 1957 circular pertaining to X-ron blankets, nor were its salesmen then informed as to the circumstances leading to discontinuance of that line. The complaint in this proceeding issued on April 10, 1958.

During the course of Commission field and other preliminary investigations undertaken in response to complaints by consumers or industry members of law violations or otherwise instituted by the Commission to ascertain whether statutes which it administers are being violated, it is not uncommon for businessmen so contacted to discontinue the practices under inquiry on their

own accord. These post-investigational abandonments may be inspired by a variety of motives ranging from recognition of the practices' legal impropriety and good faith resolve to abide by the law, on the one hand, to desires, on the other hand, to forestall or abate adversary proceedings. Other considerations, including the desire to obviate an order which may lend future practices to Commission surveillance, may also serve as controlling motives. The discontinuance of a practice found by the Commission to constitute a violation of law, however, does not render a controversy moot. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257 (1938). And the Act would confer no power or authority at all if the Commission lost jurisdiction every time a practice is halted just as it is about to act or has acted. *Hershey Chocolate Corporation* v. *Federal Trade Commission, supra.* In cases of asserted abandonment, the Commission is vested with a broad discretion in its determinations of whether the practice has been surely stopped and whether an order to cease and desist is proper. *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (C.A. 7, 1944); *Automobile Owners Safety Insurance Co.* v. *Federal Trade Commission,* 255 F. 2d 295 (C.A. 8, 1958).

Not until August 15, 1958, did the respondent notify its customers that the X-ron circular was being questioned and any supplies of the mailers remaining with distributors could be returned for credit. That date was 9 months after the respondent elected to discontinue its sale of the blankets, 4 months after the complaint's issuance and approximately 2 months after the first and only hearing for the reception of evidence convened in this proceeding. During that interval, which included two months when retail sales of blankets are normally at their peak, the respondent did not lift its hand to stay continued use by dealers of the deceptive mailers theretofore supplied. In our view, the circumstances surrounding the respondent's abandonment of certain of the practices included among those challenged in this proceeding do not warrant dismissal of the complaint, and we believe that the public interest requires issuance in this proceeding of appropriate order to cease and desist.

After this proceeding began, the Textile Fiber Products Identification Act was approved to become effective March 3, 1960. Among other things, this enactment prescribes the manner in which the there defined category of textile products shall be

labeled and advertised; and it bans the naming on labels or otherwise of fibers present in the amount of 5% or less and contains exemptive language in reference to trimmings. The order proposed by the hearing examiner looks to preventing continued false representations by respondent that fibers are present in merchandise in proportions greater than those it actually contains and, among other things, would forbid the respondent from failing to disclose the presence of acetate fibers in blanket binders. On the assumption that the binding or edging of a blanket represents trimming and based on other considerations, possibilities of future conflict between the requirements of the recommended order to cease and desist and those imposed under the new legislation are apparent.

On the other hand, the enactment does not supersede all existing laws pertaining to the marketing of textiles and it expressly excludes from its purview the categories of textile products subject to the Wool Products Labeling Act. Thus, the requirements of existing law will be governing until the new legislation becomes effective and will continue applicable with respect to products not covered thereby. Our action here nowise relieves respondent of responsibility for complying with the new act. In the circumstances, we think the order should be modified to make it clear that conduct engaged in after the effective date of the Textile Fiber Products Identification Act in distributing products subject thereto and lawful under its provisions, shall not be violative of the order to cease and desist. We are so modifying the order.

To the extent noted in the preceding paragraph, the appeal of the respondent is granted but in all other respects denied. With the order to cease and desist modified in the manner noted above, the initial decision is being adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner; and the Commission having rendered its decision denying the appeal in part and granting the appeal to the extent noted and having determined, for reasons stated in the accompanying opinion, that the order to cease and desist should be modified:

It is ordered, That the order to cease and desist contained in the initial decision be modified by adding thereto the following:

Provided, however, That nothing herein shall relieve the respondent from its obligation to comply with the requirements of the Textile Fiber Products Identification Act after the effective date thereof or forbid the respondent thereafter from labeling and otherwise offering products subject to that Act in the manner prescribed thereby and rules and regulations promulgated thereunder by the Commission.

It is further ordered, That the initial decision, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

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

Order

IN THE MATTER OF

STERLING INSURANCE COMPANY

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

Docket 6277. Complaint, Dec. 28, 1954—Order, Mar. 16, 1959

Order vacating, following the ruling of the Supreme Court in its per curiam opinion in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), initial decision filed Jan. 18, 1957, and dismissing complaint charging a Chicago insurance company with false advertising of health and accident policies.

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

Mr. William A. Somers and *Mr. Raymond L. Hays* for the Commission.

Brundage & Short, of Chicago, Ill., for respondent.

FINAL ORDER

This matter having come before the Commission upon the cross-appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs filed by counsel, oral argument not having been requested; and

The Commission having considered the record and the ruling of the Supreme Court of the United States in its *per curiam* opinion in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), entered subsequent to the filing of the instant appeals, and having concluded that the complaint herein should be dismissed:

It is ordered, That the initial decision herein, filed January 18, 1957, be, and it hereby is, vacated and set aside.

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

IN THE MATTER OF

ASSOCIATED DRY GOODS CORPORATION

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

Docket 7260. Complaint, Sept. 17, 1958 [1]*—Decision, Mar. 20, 1959*

Consent order requiring furriers in New York City to cease violating the Fur Products Labeling Act by failing to comply with labeling and invoicing requirements, and by advertising in newspapers which failed to disclose that certain fur products contained artificially colored fur and which used comparative prices and purportedly reduced prices without maintaining adequate records as a basis for such pricing claims.

Garland S. Ferguson, Esq., for the Commission.

Wilcox & Vanallen, by *Archibald M. Laidlaw*, Esq., of Buffalo, N.Y., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint on September 17, 1958, as amended February 2, 1959, against the above-named respondent charging it with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act, by misbranding and falsely advertising and invoicing its fur products. Respondent appeared by counsel and entered into an agreement, dated January 21, 1959, containing a consent order to cease and desist, disposing of all the issues in this proceeding without further hearings, 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 §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

[1] Amended Feb. 2, 1959, by substituting "Associated Dry Goods Corporation" as respondent instead of "J. N. Adam & Company".

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 §§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 Associated Dry Goods Corporation is a corporation incorporated under the laws of the Commonwealth of Virginia, with its office and principal place of business located at 261 Madison Avenue, New York, N.Y.

The acts and practices alleged in the complaint as being violative of law were engaged in by J. N. Adam & Company of Buffalo, N.Y., located at 389 Main Street, a division of said Associated Dry Goods Corporation.

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 Fur Products Labeling Act and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent Associated Dry Goods Corporation, a corporation, and its officers, and representatives, agents, and employees trading as J. N. Adam & Company, directly or

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

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing:

(1) 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;

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

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

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

(5) 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;

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

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

B. Setting forth on labels affixed to fur products:

(1) Information required under Section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form;

(2) Information required under Section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder, mingled with nonrequired information;

(3) Information required under Section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in handwriting.

C. Failing to set forth the information required under Sec-

tion 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in proper sequence.

D. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder with respect to the fur comprising each section.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing:

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

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

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

(5) The name and address of the person issuing such invoicing;

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

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

B. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form.

C. Failing to set forth the term "Persian Lamb" in the manner required.

D. Failing to set forth the term "Dyed Mouton Processed Lamb" in the manner required.

3. 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:

A. Fails to disclose:

That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact.

4. Making price claims and representations respecting prices or reduced prices unless respondent maintains full and adequate records disclosing the facts upon which such claims and representations are based.

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 20th day of March 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Associated Dry Goods Corporation, a corporation, and its officers, and representatives, agents, and employees trading as J. N. Adam & Company shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

L. THALER & CO., INC., ET AL.

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

Docket 7287. Complaint, Oct. 27, 1958—Decision, Mar. 20, 1959

Consent order requiring distributors in New York City to cease representing falsely—by means of fliers or inserts enclosed in the plastic covers or otherwise—that bed comforters which they sold to retailers and to the premium trade were "allergy resistant," "moth resistant," and worth "$24.95."

Mr. S. F. House, counsel supporting the complaint.

Greenwald, Kovner & Goldsmith, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On October 27, 1958, the Federal Trade Commission issued a complaint charging that L. Thaler & Co., Inc., a corporation, and Louis Thaler, Charles Weiss, Leo Lederman and Morris Lederman, individually and as officers of said corporation, hereinafter referred to as respondents, had violated the provisions of the Federal Trade Commission Act by making false, misleading and deceptive statements and representations in advertisements concerning their products, which they sell and distribute.

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 assistant director and acting 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; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions 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 undersigned 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 L. Thaler & Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 141 Fifth Avenue, New York, N.Y. Respondents Louis Thaler, Charles Weiss, Leo Lederman and Morris Lederman are officers of said corporate respondent. They formulate, direct and control the acts, policies and practices of the corporate respondent. Said individual respondents have their office and principal place of business at the same address as 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 L. Thaler & Co., Inc., a corporation, and its officers, and Louis Thaler, Charles Weiss, Leo Lederman and Morris Lederman, 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 any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Representing that their bed comforters or other products are "allergy resistant," when such is not the fact;

2. Representing that their bed comforters or other products are "moth resistant," when such is not the fact;

3. Representing in any manner that certain amounts are the regular and usual retail prices of their products, when such amounts are in excess of the prices at which such products are usually and customarily sold at retail.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 20th day of March 1959, 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

JORDAN MARSH COMPANY

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

Docket 7311. Complaint, Nov. 19, 1958—Decision, Mar. 20, 1959

Consent order requiring a department store in Miami, Fla., to cease violating the Fur Products Labeling Act by advertising in newspapers which represented prices of fur products as reduced from so-called regular prices which were in fact fictitious, and represented certain mink products falsely as "Each * * * a one-of-a-kind designer piece."

Mr. John T. Walker for the Commission.

Walton, Lantaff, Schroeder, Atkins, Carson & Wahl, by *Mr. Richard A. Pettigrew*, of Miami, Fla., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on November 19, 1958 issued and subsequently served its complaint in this proceeding against respondent Jordan Marsh Company, a corporation existing and doing business under and by virtue of the laws of the State of Florida.

On January 28, 1959, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; waives the making of findings of fact and conclusions of law; and waives all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until

it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondent Jordan Marsh Company, is a corporation existing and doing business under the laws of the State of Florida, with its office and principal place of business located at 1501 Biscayne Boulevard, Miami, Fla.

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

ORDER

It is ordered, That respondent Jordan Marsh Company, a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale, in commerce, or the transportation or distribution, in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. 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:

A. Represents, directly or by implication, that the regular or

usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of business;

B. Represents, directly or by implication, that any fur product is fashioned for or in any specific year, or is in a special collection, or is a one-of-a-kind designer piece, or words of similar import, when such is not the fact.

2. Making price claims and representations of the type referred to in paragraph 1A, above, unless respondent maintains full and adequate records disclosing the facts upon which such claims or representations are based.

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 20th day of March 1959, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

THE EIS AUTOMOTIVE CORPORATION

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

Docket 6764. Complaint, Apr. 4, 1957—Decision, Mar. 21, 1959

Order requiring a Middletown, Conn., manufacturer of automotive parts, including hydraulic brake parts and cables for automobiles, trucks, and trailers, to cease discriminating in price to the disadvantage of independent jobbers, by paying a so-called redistributional discount or rebate to members of group buying organizations which were in reality devices for the collection of rebates, allowances, etc., from sellers on all purchases made by the jobber members.

Mr. William W. Rogal for the Commission.
Mr. Edward S. St. John, of New York, N.Y., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint charging the respondent The Eis Automotive Corporation, a corporation, with having discriminated in price in connection with its sale of automotive parts to competing purchasers in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A., Sec. 13). After the closing of the taking of testimony in support of the allegations of the complaint, the respondent closed its case without offering an affirmative defense.

This proceeding is now before the undersigned hearing examiner for final consideration on 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 and conclusions submitted by both parties, and all findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein, and being now duly advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent the Eis Automotive Corporation is a Connecticut corporation with its principal office and place of business located at North Main Street, Middletown, Conn. For several years last past respondent has been engaged in the manufacture

and in the sale and distribution in interstate commerce of automotive parts, including hydraulic brake parts and cables for use on automobiles, trucks and trailers. Respondent sells its automotive parts to approximately 3,000 distributors located throughout the United States, who are sometimes known and referred to in the trade as automotive parts jobbers. These jobbers resell respondent's automotive parts to service or repair trade which is comprised of repair garages, automobile dealers, gas service stations and specialty brake shops and in some instances they resell to other jobbers. Respondent's total sales amount to approximately 6 million dollars annually.

2. During the times mentioned herein, the respondent has sold its automotive parts to jobber members of various group buying organizations. During the year 1956 the respondent made sales to members of the following group buying organizations:

Ark-la-Tex Warehouse Distributors, Texarkana, Tex.
Associate Jobber Warehouses, Attalla, Ala.
Automotive Co-operative Association, Melrose, Mass.
Automotive Jobbers, Inc., Dallas, Tex.
Automotive Northern Warehouse, Minneapolis, Minn.
Automotive Southwest, Inc., Dallas, Tex.
Cornbelt Automotive Warehouses, Omaha, Neb.
Middle Atlantic Warehouse, Buffalo, N.Y.
Mid-South Distributors, Memphis, Tenn.
Mid-West Warehouse Distributors, Kansas City, Mo.
National Parts Warehouse, Atlanta, Ga.
Northeast Automotive Associates, Allston, Mass.
Northern Distributors, Cleveland, Ohio.
Six-States Associates, Boston, Mass.
Southern California Jobbers, Los Angeles, Calif.
Southwest Automotive Distributors, Los Angeles, Calif.
Southwestern Warehouse Distributors, Dallas, Tex.
Warehouse Distributors, Inc., Atlanta, Ga.
Wholesalers Auto Parts Warehouse, Charlotte, N.C.

3. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. The jobber-customer of respondent who was a member of a group buying organization performed no service for the respondent other than that performed by respondent's regular jobber customers who are not members of group buying organizations. These jobber-members of group buying organizations like respondent's

regular jobber-customers resold respondent's automotive products to the service and repair trade with some sales to other jobbers. The jobber customers of respondent who are not members of group buying organizations will hereinafter be referred to as independent jobbers or purchasers.

4. The issues in this proceeding are limited to price discriminations between purchasers who are members of group buying organizations and independent purchasers, generally, who are in competition with such members of group buying organizations. These price discriminations arise out of the practice of respondent of allowing and paying a so-called redistribution discount or rebate to those jobber customers who resell subjobbers subject to approval of respondent, in addition to sales made to the service and repair trade.

5. The practice of paying rebates differed as between jobbers who were members of group buying organizations and independent jobbers. From 1948 to 1954 no rebate was paid to independent jobbers, except for a small number who were engaged in the resale of automotive parts to jobbers. During the period 1954 to 1956 the independent jobbers were paid a redistribution rebate on approved accounts of 5 percent off recommended jobber resale price list on sales to subjobbers but not to exceed 50 percent of all purchases of each independent jobber, provided said independent jobber purchases a minimum of $1,200 per annum. In January 1956 the redistribution schedule was modified to provide for a rebate to independent jobbers of 7 percent off recommended jobber resale price list on sales to approved subjobbers not to exceed 50 percent of all purchases with a minimum of $2,000 per annum.

6. The practice of the respondent as applied to jobbers who were members of group buying organizations was to allow such jobbers a discount or rebate without reference to redistribution on all purchases without any qualification. From 1948 to 1954 this rebate was 5 percent on brake cylinders and brake fluid, and 10 percent off distributors price list on all other items. In 1954 this rebate was changed to 5.5 percent off distributors price list on all products, and in January 1956 was increased to 7.8 percent off distributors price list on all products.

7. The rebate was granted to all members of the buying groups upon all purchases made by them. The group members who received this rebate were not required to sell to any other distributor, jobber or wholesaler, but were granted this rebate on

their entire purchases, including parts resold to the service and repair trade in competition with the independent jobbers. The amount of discrimination in price is substantial as indicated by the following tabulation which lists the rebates granted to five typical groups, during 1954 and 1955.

Group	*1954 Rebate*	*1955 Rebate*
Six-States Associates	$2,328.81	$3,001.19
Warehouse Distributors, Inc.	4,170.16	6,196.03
Midwest Warehouse Distributors	1,425.38	1,401.07
Southern California Jobbers	1,713.69	2,905.05
Southwest Automotive Distributors	3,453.23	4,881.97

8. Illustrative of the monetary benefits derived by the group jobbers as opposed to the independent jobbers is the following tabulation compiled from figures found on Commission Exhibits 31, 32, 34, 35, and 37:

Comparison of sales and rebates to customers in specified metropolitan trading areas during year 1956.

Location	Customer type		Total sales	Rebate
	Member of buying groups	Independent distributors		
Massachusetts:				
Boston	Standard Auto Gear [1]		$14,751	$1,151
	Hunt-Marquardt [1]		1,213	95
		Brighton Automotive Corp.	1,278	.....
		Modern Auto Parts	2,717	.....
		Watertown Auto Parts	715	.....
		J. S. Auto Supply	472	.....
Fall River	William T. Manning [1]		5,219	407
		Shassets Auto Supply	4,710	43
Washington, D.C.	Phelps-Roberts Corp. [2]		26,927	2,100
		Milnite Wheel & Brake Service	6,847	.....
		National Auto Service	10,055	.....
		Wright's Auto Parts	3,520	.....
		Auto Parts Machine	4,862	.....

[1] Member of Six-States Associates.
[2] Member of Warehouse Distributors, Inc.

9. The substantiality of the discriminations in price are clearly established by the record. All nonfavored jobbers who testified on the point disclosed total annual net profit percentages which were well under the percentage amount of the price discriminations enjoyed by their group jobber competitors. All of the nonfavored jobbers testified that the 2 percent cash discount allowed by their suppliers for prompt payment was of prime importance in the conduct of a successful business.

CONCLUSIONS

1. Respondent's so-called redistributional rebates were not functional rebates as such. These rebates were allowed to independent jobbers only on 50 percent or less of their total purchases and then only if they purchased a minimum of from $1,200 to $2,000 yearly. These rebates were allowed purchasers who were members of group buying organizations regardless of whether the purchaser resold to other jobbers.

2. Respondent did not classify its customers by following real functional differences. Both independent jobbers and jobbers who were members of group buying organizations resold respondent's products to the service and repair trade, and in some instances to other jobbers. Independent jobbers were in competition with each other and with jobbers who were members of group buying organizations in the trade areas where they sold.

3. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's jobbers and competing group buying jobbers, and the effect of such discrimination may be to substantially lessen, injure or prevent competition between respondent's customers receiving the benefit of such discrimination and the customers who did not receive such discriminations, in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

4. The respondent in its proposed findings of facts has raised no issue of fact or law or made any defense of the price discriminations herein found, but instead has raised as an issue the scope of the order that might be issued in this proceeding. It is contended by the respondent that since the issues in this proceeding were limited to price discriminations arising from special rebates allowed purchasers who were members of group buying organizations any order issued should be so limited.

5. The right of the Commission to issue a broad order under the circumstances in this case has been fully adjudicated by the Supreme Court in *F.T.C.* v. *Ruberoid Co.* (343 U.S. 470). On the question of the issues of a broad order, the Court stated as follows:

> * * * Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form

in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. * * *

6. The similarity of facts in the Ruberoid case (supra) with the facts in the present proceeding is readily apparent from the following excerpt from the opinion of the Court:

The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators. The discriminations found by the Commission were in sales to retailers and applicators. The Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

ORDER

It is ordered, That respondent The Eis Automotive Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale for replacement purposes, of automotive parts and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

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

21st day of March 1959, 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.

IN THE MATTER OF

HARTLEY LORD AND BRADFORD JEALOUS TRADING AS LORD & JEALOUS

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

Docket 7320. Complaint, Dec. 2, 1958—Decision, Mar. 21, 1959

Consent order requiring manufacturers in Norfolk, Mass., to cease violating the Wool Products Labeling Act by tagging and invoicing as 100% wool, woolen stocks which contained substantial quantities of reprocessed wool, and by failing to comply in other respects with labeling requirements of the Act.

Mr. Charles W. O'Connell for the Commission.
Respondents, *pro se*.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission on December 2, 1958, issued and subsequently served its complaint in this proceeding against the above-named respondents.

On January 28, 1959, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the

agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondents Hartley Lord and Bradford Jealous are individuals and copartners trading as Lord & Jealous, with their office and place of business located in Norfolk, Mass.

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 Hartley Lord and Bradford Jealous, as individuals and as copartners trading as Lord & Jealous, 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 the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of woolen stocks or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

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

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum

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

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

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

It is further ordered, That respondents Hartley Lord and Bradford Jealous, as individuals and as copartners trading as Lord & Jealous, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of woolen stocks or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Misrepresenting the character or the amount of the constituent fibers contained in such products on invoices or sales memoranda applicable thereto, 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 21st day of March 1959, 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

EVIS MANUFACTURING COMPANY, ET AL.

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

Docket 6168. Complaint, Feb. 5, 1954—Decision, Mar. 23, 1959

Order requiring sellers in San Francisco of the "Evis Water Conditioner" to cease representing falsely that the product had any beneficial effect on water, changed its physical behavior, solved hard water problems, removed unpleasant flavors and improved the taste of beverages and food, saved soap, removed grease and scale, along with a variety of other similar claims.

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

Mr. Edward F. Downs for the Commission.

Pillsbury, Madison & Sutro, of Washington, D.C. and San Francisco, Calif., and *Mr. Noble McCartney*, of Washington, D.C., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSION AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on February 5, 1954, issued and subsequently served upon respondents, Evis Manufacturing Company, a corporation and Joseph T. Voorheis and Arthur N. Wells, individually and as officers of said corporation, its complaint, charging said respondents with unfair methods of competition and unfair and deceptive acts and practices in commerce in the sale of a device for the conditioning of water, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, on April 12, 1954, respondents submitted their answer to the complaint, denying the principal charges thereof and challenging certain of the interpretations of their advertisements contained therein.

Hearings were held in due course. Evidence was received in support of and in opposition to the allegations of the complaint. The hearing examiner filed his first initial decision on April 27, 1956, in which he ordered the complaint dismissed on the ground that the allegations thereof were not supported by reliable, probative and substantial evidence. The Commission, having heard the appeal of counsel in support of the complaint, including oral argument, vacated the aforesaid initial decision and remanded

the proceeding to the hearing examiner for the reception of evidence of further scientific tests of the Evis Water Conditioner. The examiner, after taking such evidence, filed a second initial decision on June 30, 1958, again ordering the complaint dismissed.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint filed an appeal from the initial decision of June 30, 1958, and, the Commission, after considering said appeal, respondents' brief in opposition thereto, the oral argument on this appeal, and the entire record herein, rendered its decision granting the appeal and vacating and setting aside the initial decision.

Thereafter, this matter came on for final consideration by the Commission, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order, which, together with the aforesaid decision on the appeal, shall be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

1. The corporate respondent, Evis Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 40 Boardman Place, San Francisco, Calif.

The individual respondent, Joseph T. Voorheis, was president of the respondent corporation at the time of the issuance of the complaint but is now deceased. Individual respondent, Arthur N. Wells, is vice president of the respondent corporation, and has formulated, directed and controlled the policies and practices thereof.

2. The respondents for more than one year last past have been engaged in offering for sale, selling and distributing, directly to users and through retail distributors, a product designated by them as the "Evis Water Conditioner." Respondents at all times mentioned herein have maintained a substantial course of trade therein in commerce among and between the various states of the United States and in the District of Columbia.

In the course and conduct of such business, respondents have been in substantial competition in commerce with other corporations and with partnerships and individuals engaged in the sale

and distribution of the various types of products intended for similar purposes.

3. In the course and conduct of their business, and for the purpose of inducing the purchase of their product, respondents have disseminated and caused to be disseminated advertisements in newspapers, magazines, leaflets, circulars and other advertising media circulated among prospective purchasers of their product in the various states of the United States and in the District of Columbia. Among and typical, but not all inclusive, of the statements and representations made in such advertisements and so published and circulated are the following:

The Special Processed Cast Metal of the Evis Conditioner imparts a continuous catalytic effect on water, water solids and entrained gases. This catalytic correction changes the physical behavior of water in many beneficial ways.

At long last! The real answer to your costly HARD WATER PROBLEM.

New home water conditioner makes any ordinary water behave "softer."

The amazing NEW EVIS WATER CONDITIONER * * * that makes hard water feel, taste, and act softer—without chemicals—without destroying natural minerals * * * that removes unpleasant odors and flavors * * * removes old scale and prevents new scale * * * saves fuel * * * that gives silky-smooth quality to water for hair, bath, dishes, laundry, car wash * * * that improves coffee and other food flavors.

Makes Even the Hardest Water Behave "Tame"!

Makes Better Tasting Water . . . by reducing or often Entirely Eliminating Unpleasant Odors and Flavors (even of chlorinated water).

Pays for itself Surprisingly Quick from Soap and Fuel Savings Alone!

Saves loads of soap.

Treat yourself to the joys of a catalytically corrected Home Water Supply! Harshness to hands is noticeably reduced. Easily Rinses away Troublesome Soap Scums. Dishes and Glassware Dry Free From Water Stains. Evis-ized Water Gets "More Work" out of soap in most cases. Scale Vanishes from Water Heaters, Pipes and Shower Nozzles. Sanitary Drains Are Freed From Grease Coatings.

Keeps drains and sumps free from scum.

* * * elimination of rust stain and scum.

* * * to eliminate scale and corrosion problems.

Retards pitting of the metal.

Aids operation of base-exchange softeners.

Leach out alkali and salts with EVIS treated water and Mother Nature will do the rest.

Finer Lawns—Fairer Flowers—Fatter Vegetables—Bumper Crops.

Better Growth has been reported for * * * Alfalfa—Cotton—Melons—Berries—Grass—Flowers and many other types of agricultural and orchard products.

The remarkable growth of plants using EVIS-ized water, as against raw water, particularly tomatoes and other potassium hungry plants, would

indicate that the EVIS mineral salt stripping action on clay, provides potassium more abundantly to the plant.

EVIS Water Conditioners are being used with amazing results on cotton farms, alfalfa, orchards and in nurseries, greenhouses, and truck farms.

Dense clay structures become fine textured, hard clods and lumps tend to weaken and the soil becomes useful agriculturally.

Improves texture of soil in lawns and gardens.

. . . one gallon of EVIS-ized water will do the job of at least two gallons of raw water; the evaporation rate is materially reduced.

4. Through the use of the foregoing statements and representations, and others of similar import not specifically set out herein, respondents have represented directly and by implication that their product, the "Evis Water Conditioner:"

(a) Is made of a specially processed cast metal and has a catalytic effect on water passing through it which changes the physical behavior of such water in many beneficial ways;

(b) Will solve hard water problems causing "hard" water to become soft and will make hard water feel, taste and act softer, giving it a silky-smooth quality for hair, bath, dishes, laundry and car wash without the use of chemicals;

(c) Will remove and reduce unpleasant odors and flavors in water, making it taste better, and improve the taste of coffee and other foods;

(d) Will require the use of less soap and will reduce the cost of heating water;

(e) Will eliminate or reduce the harshness of water to the hands and will cause dishes and glassware to dry without leaving water stains;

(f) Will remove grease from drains and will prevent and remove scale from boilers, water heaters, pipes, shower nozzles and other parts of a water system;

(g) Will prevent, reduce and eliminate scum, rust stains and corrosion and retard the pitting of metal;

(h) Will improve the action of chemicals used for water softening purposes;

(i) Will leach out alkali and salts in soil, will improve the growth and production of various agricultural and orchard products and plants, and will improve the texture and structure of soil; and

(j) Will reduce the amount of water required for agricultural irrigation.

5. The record herein contains reliable, probative and substantial evidence, including the opinions of scientific and engineering

experts, that the Evis Water Conditioner will not change the physical behavior of water or beneficially affect water passing through it. Accordingly, the foregoing statements and representations are false, misleading and deceptive with the exception of the representation that the Evis Water Conditioner is made of a specially processed metal, as to which representation the allegtion in the complaint has not been proved. Otherwise and in truth and in fact respondents' product, the "Evis Water Conditioner:"

(a) Does not change the physical behavior of water passing through it by catalytic effect or otherwise;

(b) Will not solve hard water problems or cause hard water to become soft or make hard water feel, taste or act softer or give it a silky-smooth quality for hair, bath, dishes, laundry or car wash;

(c) Will not remove or reduce unpleasant odors or flavors in water or make water taste better, nor will it improve the taste of coffee or other foods;

(d) Will not reduce the amount of soap used or effect a saving of soap expenses, nor will it effect a saving of fuel expenses for heating water;

(e) Will not eliminate or reduce the harshness of water to hands or cause dishes or glassware to dry without leaving water stains;

(f) Will not remove grease from drains or prevent or remove scale in boilers, water heaters, pipes, shower nozzles or other parts of a water system;

(g) Will not prevent, reduce or eliminate scum, rust stains or corrosion, nor will it retard the pitting of metal;

(h) Will not improve the action of chemicals used for water softening purposes;

(i) Will not leach out alkali and salts in soil, improve the growth or production of agricultural or orchard products or plants, nor will it improve the texture or structure of soil;

(j) Will not reduce the amount of water required for agricultural irrigation;

(k) Will not have any beneficial effect on water.

6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has had the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were

true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' product. As a result thereof substantial trade in commerce has been diverted to respondents from their competitors and injury has been done to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

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

ORDER

It is ordered, That respondent Evis Manufacturing Company, a corporation, and its officers, and respondent Arthur N. Wells, individually and as an officer of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their product, known as the "Evis Water Conditioner," or any other product of substantially similar design or construction, whether sold under the same name or under 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 their said product:

(a) Has a catalytic effect on water;

(b) Changes the physical behavior of water;

(c) Will solve hard water problems;

(d) Will make hard water soft;

(e) Will cause hard water to feel, taste or act softer, or have any of the attributes or characteristics of soft water;

(f) Will remove or reduce unpleasant odors or flavors from water;

(g) Will make water taste better;

(h) Will improve the taste of beverages or foods;

(i) Will require the use of less soap;

(j) Will reduce the cost of heating water;

(k) Will eliminate or reduce the harshness of water to the hands;

(l) Will cause dishes or glassware to dry without leaving water stains;

(m) Will remove grease;

(n) Will prevent or remove scale;

(o) Will prevent, reduce or eliminate scum;

(p) Will prevent, reduce or eliminate rust stains;

(q) Will prevent, reduce or eliminate corrosion or retard pitting of metal;

(r) Will improve the action of chemicals used for water softening purposes;

(s) Will leach out alkali and salts in soil;

(t) Will improve the growth or production of agricultural or orchard products or plants;

(u) Will improve the texture or structure of soil;

(v) Will reduce the amount of water required for agricultural irrigation;

(w) Has any beneficial effect upon water.

It is further ordered, That the complaint be, and it hereby is, dismissed as to individual respondent Joseph T. Voorheis.

It is further ordered, That respondent, Evis Manufacturing Company, a corporation, and respondent, Arthur N. Wells, individually and as an officer 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.

Commissioner Kern not participating.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

In this proceeding, which has been brought under Section 5 of the Federal Trade Commission Act, the complaint charges that the "Evis Water Conditioner," a device sold by the respondents, will not have any beneficial effect on water as represented by the respondents in their advertising.

The hearing examiner filed an initial decision in this matter on April 27, 1956, in which he ordered the complaint dismissed. The Commission, having heard the appeal of counsel in support of the complaint from this initial decision, including oral argument, remanded the case to the examiner for the reception of

evidence concerning further scientific tests of the Evis Water Conditioner. The examiner, after taking such evidence, filed a second initial decision on June 30, 1958, again ordering the complaint dismissed. He based his holding on the ground that the disposition of the proceeding must be controlled by the legal principle that when conflicting evidence is in such a state of balance that substantial doubt exists as to the conclusions to be drawn therefrom, the burden of proof has not been sustained, and he who bears that burden must fail. Counsel in support of the complaint has appealed from the initial decision of June 30, 1958, dismissing the complaint.

The general issue to be decided here is whether considering all the evidence of record counsel supporting the complaint has established the allegations of the complaint with substantial, reliable and probative evidence.

The Evis Water Conditioner is a simple appearing device. It is a product of metal construction having the appearance of an oversized pipe coupling with an interior cross post integrally cast in place. It is made of cast iron or bronze or similar metals and coated inside and out with zinc galvanizing. The device is intended to be fitted into water systems for the purpose of beneficially treating and conditioning water.

The following are some of the claims that respondents have made for the Evis Water Conditioner in their advertisements:

> The Special Processed Cast Metal of the Evis Conditioner imparts a continuous catalytic effect on water, water solids and entrained gases. This catalytic correction changes the physical behavior of water in many beneficial ways.
>
> The amazing new Evis Water Conditioner . . . that makes hard water feel, taste and act softer—without chemicals—without destroying natural minerals . . . that removes unpleasant odors and flavors . . . removes old scale and prevents new scale . . . saves fuel . . . that gives silky-smooth quality to water for hair, bath, dishes, laundry, car wash . . . that improves coffee and other food flavors.
>
> Makes Even The Hardest Water Behave "Tame!"

The complaint alleges that the representations contained in these and other advertisements for the Evis Water Conditioner are false, misleading and deceptive because the device will not give the claimed beneficial results.

The usual tests show Evis treated water to be no different from untreated water from the same source. The device allegedly changes something physical in the water, but the record shows that it does not change the usual physical factors like specific

gravity, boiling point, viscosity or surface tension. The Evis Water Conditioner is not magnetized or radioactive and it does not contain electrical particles. It makes no chemical change in the water. Arthur N. Wells, the inventor, during his testimony, described the effect of the device in the following words:

> After the water has passed through the conditioner, there is a change that has taken place and the way that change appears to be exhibited is in the manner in which the water behaves with fine particles and at surfaces, you might say, that what is changed in the water is its behavior in the interface, which applies generally to the contact between a fluid and any other substance.

The effect allegedly produced by the use of the Evis Water Conditioner, according to witness Wells, is the result of the crystalline structure of the device rather than its chemistry. He testified, in effect, that the elements contained in the unit are the same as those found in ordinary cast iron (or ordinary bronze in the case of the bronze unit), but that special processing somehow adds elements. On the advice of counsel, the witness would disclose neither the process nor the identity of the elements added, contending that this information involves trade secrets. It is not clear from his testimony whether the elements said to be added by the special processing can be detected by spectro analysis.

While the usual laboratory tests will not disclose any effect of the Evis Water Conditioner upon water (or apparently distinguish the metal in the device from other similar metal), the claimed difference in the water can be detected, Mr. Wells testified, along the lines of the phenomenon. This apparently means the observing of the results in a field test under usual operating conditions. A test recommended in respondents' literature is to try the feel of two specimens of dirt or mud, one of which has been mixed with Evis treated water and the other mixed with untreated water. The specimen made with Evis treated water is supposed to feel "smooth, slippery and disintegrated" compared to the other specimen.

Evidence Received in Support of the Complaint

The evidence received in support of the complaint includes a showing that 3,000 installations of the Evis Water Conditioner were failures (by virtue of an admission of counsel), but, more important, a considerable showing in the form of testimony and other evidence covering studies, experiments and tests of the device. With a few exceptions the witnesses testifying for the

complaint were men with extensive engineering or scientific backgrounds; they qualify as experts in their respective fields. A wide variety of scientific tests and studies of the Evis Water Conditioner have been made. These include analyses made of the composition or structure of the device itself as well as tests and experiments on Evis treated water.

Council in support of the complaint introduced twenty-one witnesses, other than the individual respondents and an Evis distributor, all of whom gave opinion testimony based upon their education and experience, or general experience, together with experiments and laboratory tests performed with the Evis Water Conditioner.

The witnesses included those who had performed tests of the Evis Water Conditioner for the Department of Water and Power in the city of Los Angeles, the City of Los Angeles Harbor Department, and the Southern California Gas Company. The results of the various experiments and tests so made were all negative, including tests as to whether the device changes the hardness of water, aids in the operation of base exchange softeners, improves the taste or odor of water, removes scale, and otherwise beneficially affects water.

Tests were conducted at the U.S. Department of Agriculture by Dr. Lowell E. Allison, a soil scientist, to determine any effect of Evis treated water on soil properties and plant growth. Dr. Allison's testimony was that he could detect no significant differences between the Evis treated water used and the control water in laboratory experiments and that Evis treated water made no difference on plant life. This highly trained and experienced scientist testified that he saw no value in the Evis treatment; so much so that he would not further pursue the investigation.

Hugo de Bussieres, a chemical engineer of long experience, made a number of experiments with Evis treated water. He testified that he was primarily interested in the "dielectric constant," a measure of the internal molecular structure of a substance, and tested for characteristics of the water which might change if the dielectric constant changed. He carried out various chemical, spectrographic and other tests. His testimony was that there is nothing about the Evis Water Conditioner that would cause fundamental changes in the character of the water.

Dr. George D. Wagner, Jr., Junior Spectroscopist, Washington

State College, ran a series of infrared spectro-analyses of Evis treated and nontreated water. Such tests are designed to determine if samples of a compound are identical so far as molecular structures are concerned. Dr. Wagner testified that the tests showed the molecular structures of Evis or non-Evis treated water to be the same.

Various tests and experiments conducted at Washington State College, Division of Industrial Research, some of which were in the laboratory and others on field or practical installations, failed to show that the Evis Water Conditioner was of any value in the treatment of water. Dr. Albrook, director of Industrial Research, Washington State College, and Dr. Mark F. Adams, a research chemist of the same institution, in effect so testified. The tests made at Washington State were designed to show, among other things, whether the Evis Water Conditioner would change the hardness of water, whether it would affect the formation of scale in coffee makers and whether it would affect the amount of soap used in dishwashers.

Dr. Robert Weast, an associate professor of chemistry, Case Institute of Technology, conducted tests to determine if the Evis Water Conditioner would remove scale from water pipes. He testified that, in his opinion, the unit does not remove scale from previously scaled pipes.

Dr. James Irvin Hoffman, Chief of the Surface Chemistry Section and Assistant Chief of the Chemistry Division of the National Bureau of Standards, performed tests with the Evis Water Conditioner. He testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it would have no effect upon water.

Since the remand of this case, extensive testing of the Evis Water Conditioner was undertaken by the Engineering Experiment Station of the University of Virginia. Dr. Lewis B. Johnson, Jr., and Dr. Robert Gildea, who worked on and were responsible for these experiments, both testified, in substance, that the Evis unit will not alter the characteristics of water and that it will not produce the beneficial effects claimed for it. The evidence so adduced clearly confirms the scientific showing made prior to the remand.

The hearing examiner has given little weight to the evidence received in support of the complaint. In many instances of tests or studies being made, he questions the results because of the doubt raised on cross-examination about whether the Evis unit

was properly installed. Apparently, not all of the experimentors followed instructions for installation in every particular. This may have a bearing on the fairness of the tests in some cases, but we do not think that a substantial part of the scientific evidence should be largely discounted for such a reason. Manufacturers' instructions should be followed, of course, to achieve the results claimed for a product, but in this case the "instructions" have varied from time to time and apparently are not all contained in any one document. A step indicated as essential in one instruction sheet, for example, may not even be mentioned in another. Under such circumstances, the failure to follow the omitted instruction should not necessarily put doubt on the experiment. Moreover, respondents' witnesses who testified as to claimed beneficial results, admitted in many instances that no particular instructions were followed. Also, respondents in their literature suggest that Evis treated water can be procured simply by running tap water through the Evis Water Conditioner, the implication being that an elaborate hookup is not essential. In addition, certain of the expert witnesses who had experimented with the Evis Water Conditioner testified that failure to follow detailed instructions would have made no difference in the results. This testimony and the admission of Mr. Wells, in substance, that he had no scientific principle to explain the claimed effect of the Evis device, places on the respondents some burden of showing the necessity for the detailed instructions, and no such showing was made. In view of all these considerations, failure to follow installation instructions in some particulars should not substantially detract, at least in most instances, from the weight of the showing based on the tests and studies.

The scientific evidence and testimony such as that above referred to supports the allegations of the complaint, and it is substantial. This evidence is strong, clear and persuasive. Taken altogether, it would be of compelling significance under any circumstances. Here we have the opinions of men of broad training and experience, which opinions were based on studies in the laboratory and field as well as upon general experience. Their qualifications generally are beyond challenge. The hearing examiner discounts the impact of this body of testimony for various reasons (including the installation question mentioned above), but in most of the cases his reasons do not stand close analysis.

He dismisses Dr. Allison's (U.S. Department of Agriculture) testimony, for example, because the tests on soil were not per-

formed under conditions comparable to those obtaining in practical use, as he found, and because of admitted slight differences in favor of the Evis Water Conditioner. There is no basis for a conclusion from Dr. Allison's testimony that the differences had any scientific significance. Moreover, there is every indication that Dr. Allison, who tested the Evis Water Conditioner at the request of an Evis representative, knew what he was testing for, in making these experiments and that he did, in fact, give the device a completely fair test. The real substance of his entire testimony is that the Evis Water Conditioner has no value. The examiner erred, we think, in holding that such does not constitute probative evidence on the issues in this proceeding.

Another example of the examiner's rejection of highly significant evidence concerns the experiments conducted by Dr. George D. Wagner, Jr., of Washington State College. These experiments were of the greatest importance. Dr. Wagner's analysis by infrared spectrogram disclosed that the molecular configuration of Evis treated and non-Evis treated water were identical. It is apparently this characteristic of the water, if any, that is or should be changed if there is any effect to be obtained in the Evis treatment, yet the tests showed no difference. The hearing examiner, however, found that the cross-examination vitiates the basis on which Dr. Wagner's conclusions rest, nullifying the persuasive force of such conclusions. This evaluation of the testimony, we think, is entirely erroneous. The hearing examiner refers to the cross-examination of Dr. Wagner in which the witness admitted that his spectrogram would reveal "very little difference" between a compound in suspension in water, the same compound in solution in water and the same compound in the colloidal state in water. This is true, if important, but Dr. Wagner also said that he doubted you would ever find the compound in solution one time and in suspension another. He testified: "I have never heard of such a thing." Moreover, the respondents' claims for Evis treated water apparently are not based on any contention that the state of the compounds in such water differs in these respects from the state of the compounds in non-Evis treated water; thus, the fact that the spectrogram may not reveal such differences does not appear to be important. For about the same reason, there is no apparent significance to the fact that the infrared examination will not reveal certain types of compounds. The examiner also makes the observation that the tests

were made on water in the static state rather than the dynamic. Here again, this would not seem to be of any significance. Evis treated water, for example, is represented as being effective in the washing of clothes and in such a case the water is static in the sense that it is not moving through a pipe. In our opinion, the testimony of Dr. Wagner is probative and reliable evidence and entitled to substantial weight.

Dr. James Hoffman of the National Bureau of Standards testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it could have no effect upon water. The examiner found, however, that the probative value of Dr. Hoffman's testimony on direct is lessened because he did not preclude the possibility, at some future date, of a change being effected in the physical behavior of water, in a water system, by contact at the interface with a specially processed metal, by means of the energy inherent in such a system. He held that the change which respondents claim to have effected in the behavior of water by passage through their device has not been proven *impossible*. This, we think, is much too high a standard of proof. Dr. Hoffman has clearly testified that the Evis Water Conditioner will not beneficially affect water. To the extent that he may have admitted the possibility of any claimed effect, it was under the qualification that it would be beyond his comprehension if it could be done. He testified on the basis of present day knowledge and his experience with the Evis device. In our view, his testimony should not suffer merely because, as a man of science, he admits the possibility of an occurrence, however remote.

The complaint contains the general allegation that, contrary to respondents' representations, the Evis Water Conditioner is not made of a specially processed metal and it does not change the physical behavior of water passing through it by catalytic effect or otherwise. In our opinion, counsel supporting the complaint has failed to prove that the Evis device is not made of a specially processed metal. A number of witnesses testified to the effect that analyses showed that the cast iron Evis Water Conditioner was substantially the same as ordinary cast iron. From the record it is not clear, however, whether it follows from this that special processing was not used. But this is of small moment. The essence of the general allegation is that the Evis Water Conditioner, special processing or not, will not change the

physical behavior of water passing through it. Expert witnesses testified in substance that hard water, or water loaded with minerals, and the objectionable effect of such water, could not be changed except by chemical means. As the examiner even has observed, if such opinion be correct, the Evis device, which admittedly causes no chemical change in the water passing through it, would be worthless. As heretofore indicated, we give much more weight to the opinions expressed by the experts than has the examiner. We believe that there is substantial evidence to support the general allegation above referred to except as to special processing of the metal. This evidence in turn likewise supports the specific allegations of the complaint. In addition there is substantial evidence otherwise to support most if not all of the specific allegations.

It is obvious that counsel supporting the complaint has made a showing with reliable, substantial and probative evidence that the Evis Water Conditioner will not perform as claimed. We do not think that counsel has shown it is impossible for the Evis unit to produce beneficial results, nor do we think such proof, if it could ever be made in a case of this nature, is necessary. Not all of the evidence in support of the complaint is strong; not all of it is free from defects. Taken in its entirety, however, it covers the views of many scientific and engineering experts in the various related fields and it is almost wholly adverse to the Evis Water Conditioner. The views expressed were not simply opinions based on general experience alone. In almost every case, experiments or tests were performed. Some were in the laboratory and some involved practical installations. In these circumstances, it is evident that the showing of counsel in support of the complaint must be given substantial weight.

Finally, we hold that under the circumstances of this case, the respondents were not privileged to stand upon their refusal to disclose the composition of the metal in the Evis Water Conditioner and the claimed special processing thereof as trade secrets; and their failure to introduce the evidence thus within their immediate knowledge and control, if existing anywhere, relative to such factors which might explain the claimed effects of the device on water, is strong confirmation of the charges in the complaint. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (1944).

Respondents' Evidence

Respondents' evidence is almost entirely connected with the testimony of users of the Evis Water Conditioner. Some evidence was introduced by the respondents which was of a scientific nature, but it appears to be of little, if any, significance. Mainly this was testimony taken concerning a series of tests run at Peninsula Laboratories, Mountain View, Calif. The tests, which included a washing machine experiment, were supervised by Howard Franz, a research chemist and a partner in Peninsula Laboratories, and conducted by Chemists Gloria Sirine and Walter Hasbrook, Jr. The testimony relating to these tests was clearly inconclusive as a scientific matter. Mr. Franz, for example, would not testify that any of the results observed were caused by the Evis unit, nor would the witnesses Sirine and Hasbrook, Jr., do so.

In any event, respondents do not press their cause on the basis of any scientific evidence. They apparently concede that the effect resulting in the benefits to be derived from the use of their device, if any, is a scientific mystery. Respondents' evidence is largely that of the user testimony and the related exhibits.

An examination of this evidence shows that a number of users, including operating engineers and others, believed that they obtained beneficial results from the use of the Evis Water Conditioner. While a number of the witnesses testified about observing results in parallel practical experiments, it nevertheless appears that the observations were not of tests under scientifically controlled conditions. Any one of a number of factors not connected with the Evis Water Conditioner could have caused any differences which may have been noted. This evidence, while relevant, must be considered and weighed in the light of all the surrounding circumstances. In some cases, such testimony may be more important than in others, particularly where there is scientific evidence of considerable weight on both sides of the question. *Cf.* In the matter of *Pioneers, Inc.*, Docket No. 6190 (decided May 16, 1956). That is not the situation in this proceeding. The scientific evidence in the record almost entirely supports the allegations of the complaint. The user evidence, in these circumstances, is of relatively little value.

In conclusion, we hold that the record contains reliable, probative and substantial evidence supporting the allegations of the

complaint with the exception heretofore noted and that it was error for the hearing examiner to dismiss the complaint.

The appeal of counsel in support of the complaint is granted. Accordingly, the initial decision is vacated and set aside, and our findings as to the facts, made on the whole record including the initial decision, and conclusion and order to cease and desist, are issuing in lieu thereof.

Commissioner Kern did not participate in the decision of this matter.

IN THE MATTER OF

COLUMBUS COATED FABRICS CORPORATION, ET AL.

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

Docket 6677. Complaint, Nov. 8, 1956—Decision, Mar. 23, 1959

Order requiring a manufacturer in Columbus, Ohio, and two of its distributors in the New York City area, to cease conspiring to prevent a New Jersey concern, which had been cutting prices on its "Wall-Tex" washable fabric wall covering, from obtaining supplies, and to threaten to boycott suppliers of the price cutter.

Mr. Brockman Horne and *Mr. Jerome Garfinkel* for the Commission.

Geary & Rankin, of Chester, Pa., and *Mr. Richard V. Willcox*, of Columbus, Ohio, for Columbus Coated Fabrics Corporation.

Howrey & Simon, of Washington, D.C., for Philan, Inc.

Mr. Milton Handler, of New York, N.Y., and *Wilentz, Goldman, Spitzer & Sills*, of Perth Amboy, N.J., for Zins Wallpaper Company.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Statement of the Case

Complaint in this proceeding, issued November 8, 1956, charged the three named corporate respondents with entering into and carrying out a planned common course of action and conspiracy among themselves and with and through other distributors and dealers in Wall-Tex, a wall covering, to hinder and restrain competition in commerce in the sale and resale thereof by establishing and maintaining uniform fixed resale prices, exclusive sales territories, boycotting and threatening boycott of dealers who ignored either or both, or dealers who supplied the latter, and enforcing such boycotts by hiring detectives for surveillance of those boycotted and bribing their employees, and finally delaying deliveries to such boycotters.

Answers filed in due course by all three respondents generally admitted corporate existence, commercial activity and relationships as alleged in the complaint, competition and commerce, except that Philan, Inc. denied it was engaged therein. All other allegations were, of course, denied. Motions to dismiss at the

close of the case-in-chief were made, argued, and denied but no appeal was requested.

Fifteen hearings for the reception of evidence were held in New York City, except one in Washington, the testimony being completed on March 26, 1958, accounting for 1,660 pages of transcript, some 71 exhibits received for the complaint and 19 contra. Shortly after hearings commenced counsel for respondent Zins Wallpaper Company entered into an oral stipulation, spread upon the record, with counsel supporting the complaint that this respondent would take the same order which may be entered against the respondent Philan, Inc., and that counsel in support of the complaint would not call as witnesses any officer or employee of the respondent Zins Wallpaper Company. Thereafter, counsel for the latter did not attend any hearings nor further appear in the proceedings.

Counsel for the remaining respondents and counsel supporting the complaint having filed their respective proposed findings of fact, conclusions of law and briefs, upon consideration of the same, together with the entire record in this proceeding, and his observation of the witnesses, the undersigned hearing examiner makes the following findings of fact and conclusions of law. All findings and conclusions proposed, not hereafter specifically found or made, are herewith refused, as are all motions made after the close of the evidence.

FINDINGS OF FACT

The Parties

1. Respondent Columbus Coated Fabrics Corporation (hereinafter referred to as Columbus) is a corporation organized, existing and doing business under the laws of the State of Ohio, with its principal office and place of business located on Seventh and Grant Avenues, Columbus, Ohio. This respondent started in 1900 as the Columbus Elastic Waterproofing Company and was incorporated under the laws of Ohio in 1902 as the Columbus Oil Cloth Company, its name later, in 1929, being changed to its present name. It manufactures and distributes a number of products including a wall covering made by coating a cotton sheeting with several layers of an oil compound to make a durable, scrubbable, decorative wall covering sold under the brand name of Wall-Tex. Total gross sales of this respondent in 1956, exceeded $30 million and sales of Wall-Tex exceeded $5 million.

2. Respondent Philan, Inc. (hereinafter referred to as respondent Philan) is a corporation, organized and existing and doing business under the laws of the State of New York, with its principal office and place of business located at 390 Rockaway Avenue, Brooklyn, N.Y., and is engaged in the wholesale distribution of Wall-Tex. It was formed in 1933 as the Philan Corporation with Philip S. Tashman as its president and directing head. Subsequently, its name was changed to Philan, Inc., and respondent Columbus became a majority stockholder therein, owning currently 147 of the 250 shares, the remainder of 103 shares being held by Philip S. Tashman who is still its president and directing head. Respondent Columbus has two of its officers or representatives on Philan's board of five directors, but exercises no direction or control over its day to day operations. It receives only financial reports from Philan—the officers of which decide independently to whom to sell and on what terms.

3. Respondent Zins Wallpaper Company (hereinafter referred to as Zins) is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 165 Washington Street, Newark, N.J., and is engaged, like Philan, in the wholesale distribution of Wall-Tex. This respondent was owned and operated from the 1920's by two brothers, Jake and Sam Zins, until 1954 when it was sold by them to B. Morton Gittlin who, however, hired the Zins brothers as employees.

Interstate Commerce

4. All of the respondents are engaged in interstate commerce, as "commerce" is defined in the Federal Trade Commission Act, in the conduct of their respective businesses as described above.

Competition

5. All of the respondents in the course and conduct of their respective businesses, in commerce, are, and at all times have been, in competition with other similarly engaged corporations, individuals and firms in the sale of similar and competitive products.

The Product and Its Competition

6. As a washable fabric wall covering Wall-Tex competes directly with other similar coverings—Sanitas, Velvetex, Fabron, Wiggins and perhaps others. Price range of all is narrow and

five cents a roll will switch business. In a larger sense, Wall-Tex competes with all wall coverings—wall paper and paint. Wall-Tex is manufactured in single rolls of 24″ width, six yards in length, or double rolls 12 yards in length—it is also made in 48″ widths in single rolls of 3 yards length. In the late summer or early fall of odd numbered years, a new line of about 200 patterns is introduced, with new pattern or sample books. In the even numbered years, a matching fabric line of about 65 patterns is placed on the market. Wall-Tex is packed for shipment in 8″ x 11″ x 25″ cartons, each containing 24 single rolls or 12 double rolls to a carton and weighing 60 lbs., each carton bearing the brand name Wall-Tex. Each carton on one end bears the style number (pattern) and the lot number. On the other end of the carton is a white shipping label with Columbus' name and address, carton contents, name and address of purchaser, and the order number as it appears on Columbus' records. Respondent Columbus ships Wall-Tex f.o.b. factory in most instances, although it also ships c.o.d. Full freight is allowed on carloads. In less than carloads, freight is paid by consignee with an allowance on the face of the invoice for the number of pounds at the carload rate. Columbus also drop-ships direct to dealers, at a distributor's request.

Exclusive Sales Territories

7. Respondent Columbus sells its Wall-Tex to 63 distributors who resell to dealers, institutions, decorators, jobbers and consumers. In addition, Columbus employs traveling salesmen known as territory men and two known as promotion men. These 63 distributors are located in 54 cities, nine of which have two distributors. Eight of these distributors have "specified sales areas" or "closed territories." One is in Chicago, the other seven are along the Eastern Seaboard from Portland, Maine, to Philadelphia, Pa. Those without "specified sales areas" compete freely with each other as well as with other wall covering dealers handling competitive products such as Sanitas.

8. These "specified sales areas" or "exclusive territories" have been designated by the vice president in charge of marketing coordination of the respondent Columbus who asks the distributors contiguous thereto not to sell in the area designated to a given distributor, but, on the contrary, to regard that as exclusive. There is no written agreement and respondents all insist that there is no understanding.

Population-wise these exclusive sales areas constitute dense and potentially profitable markets.

9. When such a distributor receives an order from outside his designated sales area the common practice is to send it to Columbus, which then forwards it to the appropriately located distributor for acceptance and shipment. Also, there is in the record considerable correspondence indicating a dispute over the correct boundary line between Zins having the northern half of New Jersey and Schultz in Philadelphia having that city plus the southern half of New Jersey. This was a three-way dispute with Columbus acting as umpire trying to negotiate a settlement between the two distributors. It is not shown how, or when, or if, it was settled.

10. On the other hand, there is no substantial evidence in the record to show that Columbus exercised espionage, policing, enforcement or threats thereof to keep distributors from poaching. The record is also clear that Wall-Tex competed freely and vigorously in all these areas with other competitive fabric wall coverings, principally Sanitas; in fact, Wall-Tex dealers below the distributor level almost always bought and resold Sanitas as well. There is no evidence of any lessening of competition at any level between Wall-Tex and competing wall coverings, nor at the retail level in Wall-Tex. In fact, what competition was shown was fierce.

11. Under these facts, there is no illegality. Assuming the understanding alleged, tacit; at the most, horizontally; and express, vertically; the law is clear that exclusive dealership contracts are virtually per se legal, absent monopolization, or absent effective competition at the buyer and seller levels. Neither is present here. *Schwing Motor Co.* v. *Hudson Sales Corporation,* 138 F. Supp. 899, 903, 239 F. 2d 176; *Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F. 2d 418; *General Cigar Co., Inc.,* 16 F.T.C. 537. The *Soft-Lite Lens Co., Inc.* case, 321 U.S. 707, relied on by counsel supporting the complaint, indicates restrictions at all levels, both price-wise and otherwise, far in excess of the facts here. Resale was restricted as to retailer; it is absent here. Resale by retailer was restricted to comsumers; such is absent here. Contract termination was imposed for deviation; there is no such evidence here. It follows that the factual picture here is not in violation of law and the fact is so found.

Resale Price Maintenance

12. Whenever respondent Columbus comes out with a new or revamped line of patterns it, of course, issues new pattern books to its distributors and those to whom they resell. With these, respondent Columbus issues suggested resale prices for all levels, including the consumer. Mostly, these are issued on cards—a different color for each level, headed "Jobber," "Dealer," "Decorator," "Retail," as well as a mill list for distributors, all of whom pay the same price to Columbus.

13. The record shows that 33⅓ percent to 50 percent of the Wall-Tex is resold by these distributor-customers of Columbus at these suggested resale prices, but these sales are in unrestricted or "open" sales areas. There is no evidence of any horizontal agreement—that is, between distributors—to resell at these suggested prices. Where there are exclusive distributorships areawise the distributors themselves frequently issue their own suggested resale prices to the dealers to whom they resell, which often vary greatly from those of Columbus. But the record is clear that there is no horizontal understanding or agreement between distributors to maintain or enforce Columbus' suggested resale prices. In fact, the record is clear, that, because of competition they are not in fact followed. The record is also clear that the suggested resale prices issued by the distributors, whether those of Columbus, or their own, are not followed by the dealers to whom they resell, nor is there any substantial evidence that there is, or ever was, at the dealer level any agreement or understanding to adhere to either set. It is abundantly clear also that there has been no attempt at any level, from Columbus down, to police or enforce adherence. This charge of the case has not been established by the evidence submitted, by any standard, and the conclusory fact is so found.

Boycott

14. This is the nub and bitter core of this proceeding. It revolves around the commercial relationships between the respondents and a Jersey City, N.J., wall paper dealer. Some background is necessary.

15. Philan, Inc., the largest distributor of Wall-Tex, has for many years pushed inventory stocking among its customers by selling at a substantially lower price ($2.03 vs. $2.47 per roll) where the purchaser takes 50 cartons or more of assorted pat-

terns. These dealers are called stocking dealers and account for about 95 percent of Philan's volume. Nonstocking dealers buy from hand to mouth, a roll or two at a time, as needed. Obviously, a dealer who has his own money invested in a stock will make more aggressive efforts to sell it, than the nonstocking dealer, and the encouragement of stocking is to the mutual advantage of both Columbus and Philan. Of the 3,000 or so Wall-Tex dealers in Philan's area, 500 purchase directly from Philan, 100 as stocking dealers, 400 as nonstocking dealers, the remainder as customers of Philan's stocking dealers. Sixty percent of the Wall-Tex sold in this territory is sold by nonstocking dealers. Philan's "area" for many years was, and is, metropolitan New York, except Staten Island, Hudson County, N.J., and several counties in Connecticut.

16. Several decades ago, about the time Wall-Tex began to be marketed, a wall paper concern, subsequently incorporated in 1954 as N. Siperstein, Inc., was formed in Jersey City, Hudson County, N.J., and began buying Wall-Tex for resale, from Philan. The founder Nathan had four sons, Oscar, Morris, Herbert, and Harry. Oscar succeeded his father as directing head with Herbert and Morris as subordinate officers and Harry as a sometime stock boy, order clerk for old patterns, and subsequently, for a time, a vice president of a subsequently acquired store in Linden, N.J.

17. Apparently, almost from the start, N. Siperstein, Inc., hereinafter referred to as Siperstein, was a price cutter because sometime in the 1930's Philan cut off its supplies and refused to sell. The same thing again happened in 1946 or 1947. Each time though, Philan resumed selling him because the cutoff did not accomplish anything—supplies were still obtained through agents and resold at cut prices. By 1954, Siperstein had become Philan's largest New Jersey customer and in early 1955 was buying at the rate of $50,000 a year. It operated a wholesale business under the name of Montgomery Wallpaper Company, at Jersey City, N.J.

18. Early in 1955, Siperstein began selling in substantial quantities at wholesale—at an average of $2.25 per roll, and sometimes as low as $2.13, in Essex, Bergen and Passaic counties, which were in Zins' "area" and in direct competition with Zins, whose dealer price at this time was $2.47 per roll. Siperstein at this time was buying from Philan as a stocking dealer 200 cartons, every number, at $2.03 per roll in carton lots.

19. Columbus' officials were aware of this, except they had no specific price, but did know that Siperstein was price cutting and that it had been cut off in previous years for it. This price cutting was, of course, obviously hurting Philan also, since its wholesale price was substantially the same as Zins' and dealers could buy from Siperstein at 22 cents per roll cheaper than from Philan.

20. Early in March 1955, Philip S. Tashman, president of respondent Philan, called Oscar Siperstein on the telephone saying he would like to have a chat with him, although he had not visited him for quite a few years, but during the last half of 1954 had received many complaints from Hudson County, New Jersey dealers about Siperstein's "vicious" price cutting. The next day Tashman visited Siperstein.

21. There are several versions of what was said—those of Oscar Siperstein, Tashman's first and second versions and the version of Richard Tashman, Philip's son and executive vice president of respondent Philan. Richard was not present, but discussed the call of his father on his return. Sifting the wheat from the chaff from these divergent versions, it appears that Philip asked Oscar why he was selling at an unprofitable price, to which Oscar replied he was satisfied with his profit. Tashman then said Oscar was driving Philan's other stocking dealers out of business and asked Oscar to bring his price up from $2.14 to at least $2.23, or preferably to $2.45 or $2.47. Oscar refused. Tashman further complained about the price cutting by Siperstein in Zins' area—Essex, Bergen, and Passaic counties, that it was deteriorating the market there. All other statements by these three witnesses in reference to this call are rejected.

22. About a week or so later, Sam Zins and Morton Gittlin, of respondent Zins, came to Jersey City and met Oscar Siperstein at a corner luncheonette (none of them would meet at the other's store). Zins wanted to know if Oscar was selling in Essex, Bergen, and Passaic counties. Oscar admitted he was competing with another Hudson county dealer selling in those counties, and if some of Zins' business was taken away it did not make much difference to Oscar. Zins offered to stop this other dealer saying he had ways. Oscar refused to quit selling and Zins became angry, threatening to open a "border" store and sell at $2.03 and "murder" Siperstein, who replied it was up to him. This is Oscar Siperstein's version of this meeting—there is no other. It is accepted and found as fact because cross-examination produced

neither falsification nor serious discrepancy and because respondents did not produce either of the other two participants to contradict or modify.

23. A week or ten days later Richard Tashman and Lillian Friedman, manager of the order department in Philan's and having an interest in the business, took Oscar Siperstein to dinner in Jersey City. She was brought along as oil on troubled waters, being the only one in Philan with whom Oscar was friendly. The personal animosity between Oscar and the Tashmans was not only testified to as of long standing, but was obvious in the court room. Here again we have four versions of what took place —a first and second version by Richard Tashman, and one by each of the others.

24. The acceptable gist is that Richard Tashman complained to Oscar about the prices at which the latter was selling saying that stocking dealers were buying from him instead of from Philan and that stocking dealers also were losing business because non-stocking dealers could buy from Oscar at less than from Philan's stocking dealers. He asked that Oscar raise his prices, not to Columbus' or Philan's suggested resale prices, but "higher" to "make it more interesting for everyone." Apparently sales area was not discussed. Other details, highly conflicting and confusing, of this conversation as related by the participants are rejected either as incredible, immaterial, unsubstantiated, or contradicted by other evidence in the record.

25. In 1954, Philan's sales in Hudson County decreased some $45,000 over the previous year, although its volume in New York increased.

26. Sometime before the end of March, Philan sought and obtained oral legal advice from its counsel that it could cut off Siperstein so long as it did so independently. This opinion was later formalized in writing April 18, 1955, and Philan on or about March 31, 1955, cut off any further sales to Siperstein. There is no substantial, reliable, probative, or credible evidence that respondent Columbus directed this decision although it was aware of the situation in general and, of course, was directly affected.

27. On or about March 21, 1955, before the cutoff, Philan employed the Pinkerton Detective Agency to find out who was supplying Siperstein with Wall-Tex. The information given Pinkerton, as well as its *modus operandi,* are set forth in full herewith:

1500 Decision

JOURNAL-GENERAL

N.Y. Ex.	R.M.	D.M.	Mgr.	Newark
JOC	ERK	CJG		Rate
WBB				

New York Journal No. L-980
Account of: Philan, Inc.
Operation: Inv. Montgomery Wallpaper Co.
Bills and
Reports to: Mr. A. Albert Cooper,
390 Rockaway Avenue,
Address: Brooklyn, N. Y.

Service	Day	Hour	Month
Inv.	24.00	3.00	
	24.00	3.00	
Surv.			
Sec.			
Test			

Plus Expenses (x) Special Rate( )
Confirmed (x) Retainer ( )
Financial responsibility established by Reputation

REMARKS: How business received: Client telephoned DATE ORDER RECEIVED: Mar. 21, 1955
POSITION: Advertising & Sales Mgr.

CLIENT: BUSINESS Wall coverings
Regular ( ); New (x); Understands: Rate (x); Overtime (x); Expense charges (x); Including auto hire (x)

REPORTS: Daily (x); Consolidated ( ); By initials (x); By number ( )
Plain paper ( ); Form No. 82
Number client's copies (2); Tissue copies to: N.Y. & Newark

ADDITIONAL REMARKS:

CLIENT'S PROBLEM: City New York Date March 21, 1955.

Interview was had with Mr. Philip S. Tashman, President, and Mr. A. Albert Cooper, Advertising & Sales Manager, who submitted the following:

Client company is the Metropolitan Distributor for Wal-Tex, a waterproof wall covering, and supplies what is called "Stocking Dealers," who sell direct to the retail stores. Montgomery Wallpaper Company, owned and operated by N. Sipperstein & Sons, 369 Montgomery St., Jersey City, N.J., is a "Stocking Dealer" for client company, and has recently been selling Wal-Tex below the established price (which is not fair-traded) to certain of its customers, causing complaints from other retailers who cannot meet the ensuing competition. Client company has cut down on the amount of merchandise shipped to Montgomery Wallpaper Company, saying they are out of or short on the styles ordered, but Montgomery is still delivering Wal-Tex at a reduced price, indicating that they are receiving the merchandise from other distributors. The business of the Montgomery Wallpaper Co. is conducted by four brothers, Oscar Sipperstein, Pres., and Herbert, Harry and Sam Sipperstein. Nathan

Sipperstein, father of the four brothers, is frequently about the plant, but is not supposed to be active in the management.

CLIENT DESIRES TO ESTABLISH:

Who is supplying Wal-Tex to the Montgomery Paper Company.

PLAN: Refer this matter to the Newark Office who will first detail an investigator to attempt to obtain a job with the Montgomery Paper Company, preferably in their shipping and receiving department. From his knowledge of the Montgomery Company client believes the only opportunity of obtaining a job will be as a loader or laborer of some sort, and such a job would enable the investigator to observe incoming shipments and develop who is making the deliveries. Wal-Tex is shipped in tan cardboard cartons size 8"x11"x25", each carton containing 12 rolls. Along one side of the carton, starting at one end, is a solid red block about 4"x10" with the name Wal-Tex printed in white letters thereon. The carton is distinctive and cannot be confused with any other. At one end of the carton is printed in red the words "Style No." and underneath this, "Lot No." These numbers are of no use for identification purposes and are to be disregarded. A white shipping label about 6" square is pasted on one end of the carton and bears the heading "From COLUMBUS COATED FABRICS CORP., COLUMBUS, OHIO. PACKAGE CONTENTS." (This is the firm which manufactures the product.) At the bottom of the label are two lines which will disclose the information desired. At the beginning of the first line appears the word "For," after which is filled in the location of the Distributor, such as Phil., Newark, New York, Bridgeport, etc., in pencil. At the beginning of the second line appears the words "Our Order No." after which is filled in the order number in pencil. At the middle of the second line is printed in red ink the number of the label, such as "5743." Client desires if possible we obtain several of these labels from cartons received, or if not the whole label the bottom section described above. If it is not possible to obtain the label or significant part thereof the information is to be copied and rendered in report. The investigator will also endeavor to obtain the information by roping other employees if necessary.

Should an investigator, who should be between 20 and 30 years of age and capable of handling 50 lb. cartons, not be able to obtain a job surveillance of the plant at 369 Montgomery Street, Jersey City, covering the receiving department, which may be located on the street at the rear end of the plant, is authorized. One investigator with car for cover allowed. Client is not sure of the hours plant is open, but believes it may be from 8:00 a.m. to possibly 8:00 or 9:00 p.m. and desires surveillance be maintained during working hours. It is believed any significant delivery will contain 10, 15 or more cartons, and will be unloaded from delivery vehicle onto a conveyor which leads into the plant. Should the surveillance investigator observe cartons as described above being unloaded he could leave his car and possibly obtain the necessary information from the label on the cartons; also obtain the name and address from the truck making the delivery, or license from a private car or station wagon.

The operation will continue until discontinuance is ordered by client, probably one or two weeks, dependent upon developments.

Sample of the end of a carton, with shipping label attached, is being forwarded to the Newark Office.

1500 Decision

CAUTIONS TO BE OBSERVED: That the identity of the Agency or our client is not divulged.
WORK TO BE DONE IN ACCORDANCE WITH: 0.113. and 0.139.
Referred to: Newark Office

B. BERGER

Handled at NY by:
Ast. Mgr. E. J. Payson

W. A. Solversen

25-B
3-21-55

28. It will be noted the careful directions to get Columbus' order number, which, by contacting Columbus, would reveal the distributor who resold to Siperstein. Columbus sells only to distributors and it alone could translate. It is also noted that Philan was uninterested in any markings or labels which it itself placed on the cartons, hence its customers were not suspect. This dispels completely the subsequently asserted excuse that Philan suspected some of its own employees of pilfering from its inventory and delivering directly or indirectly to Siperstein.

29. There is credible evidence from Columbus' vice president that in 1952, when Philan and Zins were shipping back and forth and not staying in their own areas, Columbus used markings of P and Z in order to ascertain the origin of the Wall-Tex "if we ran into them in odd places." This official further testified that he would give Philan the identity of the distributor if requested.

30. Philan's officials testifying at various times have given various reasons for this cutoff: the unsavory (criminal) reputation of the Siperstein brothers in the trade, the criminal record of Harry Siperstein, beginning 1935 and running down to 1952, fraudulent returns of allegedly imperfect rolls of Wall-Tex to Philan for credit by Siperstein and price cutting. Only the latter is found to be the true one. Criminal reputation or record was twice waived by resumption of selling. The deliberate defacement of Wall-Tex rolls by Siperstein is not sustained by the preponderance of the required proof, asserted quite late, and subsequently waived.

31. The Pinkerton effort to place an agent on Siperstein's staff was never successful nor were any of the latter's employees successfully "roped." For more than two months Siperstein was under constant surveillance at a cost of more than $2,000. Even Siperstein's trash was poked through. The license numbers of all trucks in and out of Siperstein's were reported. However, since the sleuths could not get into the Siperstein store room or

delivery entrance, the desired labels apparently could not be obtained although some of them were seen. According to the Tashmans the results overall were negative.

32. The clear purpose of this surveillance obviously was not only to ascertain from whom Siperstein was still obtaining Wall-Tex but to stop any such flow. This could only be done with the cooperation of respondent Columbus. Zins also cooperated as will later appear.

33. Early in April, Philip Tashman informed Columbus by telephone of the Siperstein cutoff and of his counsel's legal opinion thereon. A copy was sent Columbus by Philan, without covering letter sometime before April 18, 1955. It was read and referred to Columbus' legal counsel. Columbus also knew of the hiring of Pinkerton detectives by Philan about this time—when the first batch of daily reports by the sleuths were received. Zins must also have been apprised or become aware of developments since he asked Richard Tashman at Columbus, "How are you making out on this thing?" "Naturally he knew what we had done," according to Richard Tashman.

34. In addition to the Pinkerton surveillance, Philan and Zins, through salesmen and by inquiry, attempted to find out if any of their customers were reselling or trading Wall-Tex to Siperstein. Thus one, I. Willensky, a stocking dealer in Wall-Tex and buying it from Philan for his Bayonne (Hudson County, N.J.) store, ordered three cartons. He was switched to the telephone of Philan's sales manager, who had previously directed the order department to refer to him any orders that appeared to them to be in excess of their normal purchases. He thought the excess was going to Siperstein and accused Willensky of this, whereupon, the latter hung up, which ended their commercial relations. Willensky's version of this conversation is rejected as unreliable because of contradictions in the testimony, not because Willensky is the father-in-law of Herbert Siperstein.

35. The Pittston Wallpaper Company at Pittston, Pa., is a distributor of Wall-Tex of Columbus. Oscar Siperstein heard of this source of supply sometime in 1955, telephoned to the owner Mrs. Wilner, who said she would sell him if he came down, which he did, in a rented truck. She sold him several thousand dollars worth, including old patterns, which he took to get the new patterns, from stock but refused to give him an invoice. He paid in cash. Oscar brought the Wall-Tex back to New Jersey, removing all markings from the cartons. Subsequent efforts to obtain

additional supplies were unavailing. This version of this transaction by Oscar Siperstein is accepted because there is no other. Mrs. Wilner was not produced by respondents to contradict or explain.

36. The president of the Clifton Paint & Wallpaper Supply Company, buying and reselling Wall-Tex for 26 years, as a stocking dealer, from Zins, increased his purchases in the spring of 1955 in order to trade Wall-Tex to Siperstein for Sanitas in return. In September of 1955, "One of the representatives of Zins came to see us and he informed us that there was a certain 'case of material' that was manufactured by Columbus Coated. In fact, it was the only case of material that went into this area and it was traced through us to Mr. Siperstein and he asked us not to sell him." No threats were made. Witness could not remember which of two or three salesmen calling on him it was. He quit selling or trading Wall-Tex with Siperstein thereafter. This testimony was likewise uncontradicted.

37. Next is the Katz incident. This wholesale and retail dealer for 19 years in Linden, N.J., had been buying from Zins and reselling 25 rolls a month to Siperstein in 1955. In September that year, Gittlin and salesman Taylor, of Zins, visited him and inquired if he were selling to Siperstein. After affirmative reply, they told him Siperstein was a cutthroat (cutting prices) and told the witness not to sell him or he would be cut off from a Wall-Tex supply. The witness promised not to supply Siperstein, and thereafter did not. In January 1956, this witness sold his business—the St. George Paint & Wallpaper Supply—to Siperstein and has since worked for them as an employee about 50 hours a year. Opportunity to contradict this testimony was not availed of.

38. Lastly, there is the Boston cloak and dagger transaction. Columbus' distributor there is Northeastern Wallpaper Corporation, owned by one Karofsky and one Dulman as coowners, who also operate a subsidiary dealership in the same premises as the B. & D. Wallpaper Company. Through a friend, Oscar Siperstein learned he could obtain Wall-Tex from this distributor in Boston. On April 18, 1955, they flew to Boston, met one Kolikoff, a wall paper manufacturer's representative, who knew Alvin Dulman. All three took a cab to the latter's place of business. From here, the testimony becomes confusing, conflicting and disconnected. The versions of Karofsky, who was not present, but who testified much later, and Kolikoff are given little weight. Both were evasive, unwilling and less than frank, as witnesses. Dulman was

never produced. Sifting fact from fiction and relying on that which is believed credible and particularly the *ante motan litem* documents produced, it is found that through Kolikoff, Oscar Siperstein bought 127 cartons of Wall-Tex from the B. & D. Wallpaper Company, giving his check to Kolikoff for $5,669.28, who in turn paid B. & D. in cash, that Oscar and friend then returned to New York, that on April 29, 1955, Kolikoff wrote him. "I got them to ship whatever they had—(65 cartons). They still did not get their shipment from Columbus. Please remove goods from cartons, flatten them out, tie up and ship them back express collect to B. & D. As a favor to me, please take care of this at once so that my connection here will still be good. B. & D. wants it that way. * * *" On May 5, Kolikoff again wrote Oscar Siperstein. "Enclosed is B/L for 62 cartons of cloth. This makes the order complete * * * please make sure all markings are taken off." Later Kolikoff again wrote Oscar Siperstein: "Received your letter and contents carefully noted. Have contacted my party and he tells me it may take several weeks before he can fill the order. Just as soon as I have a favorable reply, I will call you." No call ever came. Kolikoff was unable to obtain any more Wall-Tex for Siperstein. Columbus' salesman Chatellier apparently visited Northeastern Wallpaper Corporation shortly after the sale. Columbus did know Northeastern had stopped deliveries to Siperstein. The first shipment came to Siperstein's where Oscar removed the markings from the cartons; the second was halted by him in transit in New York City, where he drove in a rented truck and picked them up. Siperstein during this period always removed markings from cartons "being that every time we tried to buy it somewhere our source of supply would stop."

39. Complaint herein was not filed until November 8, 1956, but investigation began in January of that year. It was at this time that Siperstein bought the St. George Paint and Wallpaper Supply in Linden, N.J., which, under its former owner, Katz, had for many years been a stocking dealer in Wall-Tex buying from Zins. In spite of this, Zins refused to fill an order for Wall-Tex, according to Oscar Siperstein, although they accepted an order for wall paper. This was in January 1956. On February 7, 1956, Oscar and Herbert Siperstein had dinner with Jake Zins and Bob Taylor, a Zins salesman, the purpose of which was to arrange for buying Wall-Tex from Zins by the St. George store. Siperstein reminded Zins he was having trouble with Philan. Zins replied

he would not discuss Philan. Zins asked if Siperstein was cutting prices at the St. George store, to which Siperstein replied he was not—that sales there were practically all at retail, also saying that if he bought he was going to resell it wherever he pleased, to which Zins agreed. Siperstein gave them a small order that night and Taylor was to come by the next day for a stock order of 35 to 50 cartons, but did not. However, at 5 p.m. that night Zins calls Siperstein and told him he would have to order 15 cartons for the Jersey City store from Philan, that this requirement came from higher up than Tashman. Siperstein refused and was told by Zins that he could not supply the St. George store with Wall-Tex unless Siperstein ordered the 15 cartons from Philan. That night Siperstein mailed an order for 15 cartons of Wall-Tex to Zins retaining the carbon and registered return receipt. The next day Taylor again told him Zins could not supply unless the Philan order was given. The same thing happened again three days later. It was not until around March 5, 1956, that the 15 carton order from Philan demand was dropped and Zins filled Siperstein's order for Wall-Tex. In the meantime, significantly, a Federal Trade Commission investigator had twice called on Philan for several days of interview and interrogation with the two Tashmans and their counsel, and also on Zins. This is Siperstein's testimony, but respondents did not call Jake Zins or Bob Taylor to refute it, hence it is accepted. Furthermore, it is partially corroborated by retained documents and by notes made contemporaneous with the events.

40. These repeated instances of both Philan and Zins attempting, and apparently, upon occasion, succeeding in shutting off supplies of Wall-Tex to Siperstein are too much of a pattern to reasonably infer what respondents contend, that each was going his separate way. The contrary inference that this was a planned and cooperative course of action with a common aim, especially whereas here, knowledge of what was going on was fully known, is compelling, and so found.

41. How does all this implicate Columbus? It has been pointed out that the cutoff was relayed to Columbus, that the legal opinion was sent to it, that the Pinkerton activities and their purpose was also made known to it in April 1955, that the progress of the boycott was discussed by Zins with Philan at its office and that any distributor supplying Siperstein could not have been identified by Philan except with Columbus' cooperation. It is this latter fact, and a carbon of a letter addressed to Columbus

found among Philan's retained records which convinces this hearing examiner that Columbus was cooperating in this attempted boycott.

42. This letter reads as follows:

June 23, 1955

Columbus Coated Fabrics Corp.
Columbus, Ohio

Mr. Luther Lalendorf

Dear Mr. Lalendorf:

Mr. Tashman has asked me to write you about an incident which occurred this week.

On Monday we received an order from one of the smaller Hudson County dealers for the following:

6 singles each 3648 and 3694
24 singles 3268
1 Curtain Noel White

As we suspected that he might be buying the merchandise for Siperstein, we wrote and told him that we were temporarily out of stock on all the numbers. However, we had our Jersey salesman go in there on Tuesday, to try to find out whether the order was for him or Siperstein. He showed Bob that he had the merchandise. He had picked it up from Siperstein. We have tracked down the shower curtain. Turns out that Hygiene had sold Siperstein direct . . . shower sets in March and he probably has a good stock of them. By the way Al has asked Hygiene not to sell them in the future.

I called Zins to see if we could track down the Wall-Tex. Since the Zins brothers are both away this week spoke to Harry Zins. He told me that he hadn't sold these quantities to anyone in the past month.

Incidentally when Bob visited the account in Jersey he told him that he wanted to be sure he wasn't getting merchandise for Siperstein. Our account told Bob that Siperstein had told him that he was getting whatever he needed in Wall-Tex but that this time he was making sure that none of it came out of Philan territory since he didn't want us to make the profit on the sale. It is quite apparent that he has made contacts who are able to feed him whenever and whatever he requires.

I am also enclosing a card that Siperstein sent out to accounts in New York.

Yours very truly,
PHILAN, INC.

43. The attempted explanations of this episode strain credulity past belief. Lillian Friedman, who wrote the letter for Philip Tashman, testified she had discussed the matter with him and he suggested "I write Mr. Lalendorf about the incident." The letter was sent to the mailing department. However, the sales manager reads all mail sent out by the sales and orders department. He read the letter and, according to him, "felt this was no concern to Columbus"—so he tore the letter up. This official works at will—having no contract. When asked, he admitted he had no

authority to intercept or tear up letters of the president, that he had never before or since done so, that he was subsequently reprimanded for it. He had no satisfactory explanation for retaining the carbon such a length of time. His testimony is that in place of the president's letter he wrote the following:

PHILAN INCORPORATED

390 Rockaway Ave.,
B'klyn 12, N.Y.
HYacinth 8-7000

Exclusive Distributors

Wall Tex
Canvas Wall
Covering

Bontex
Shade Cloth
Durable–Artistic Pyroxylin Impregnated
Washable

June 23, 1955

Columbus Coated Fabrics Corp.
Columbus 16, Ohio

Mr. Phil M. Bidlack, V. P.

Dear Phil:

Yesterday I learned that "Hygiene" had sold a dealer to whom we had recently discontinued service on Wall-Tex.

When I first contacted Noel Levine I brought up the subject of direct sales to dealers, carefully explaining the type of people we sell and the territory we cover. When I phoned Mr. Levine he wasn't there and I spoke to Rashbaum, who is his office manager. Rashbaum seemed to know nothing about the situation but promised that he would carefully watch all orders to prevent a recurrence.

It doesn't seem to me that "Hygiene" is too anxious to cooperate with us in taking this attitude. It seems to us that a good deal of additional business has resulted from a co-ordination with his shower curtains that he wouldn't normally have. Some protection for your distributors is indicated.

Yours very truly,
PHILAN, INC.
/s/ Al
A. Albert Cooper

AAC:ah

44. The latter letter Columbus acknowledges receiving but not the former, and its official denies all knowledge thereof.

45. It is incredible to this hearing examiner that the sales manager did what he said, and it is also incredible that Friedman, one of the top four employees who had been with Philan for many years and had an interest in the business, would write such a letter unless she knew that Columbus was interested in all

details of the boycott and deemed it her duty to keep them advised. Philip Tashman was unable to give any satisfactory explanation.

46. One of respondent Philan's insistent defenses is that this proceeding is essentially a private fight between it and Siperstein. This insistence would have substance if Philan had merely quit selling Siperstein and stopped there, but the public interest in stopping a concerted boycott by several relatively strong economic units of a price cutter from obtaining supplies from anywhere is too apparent to warrant argument.

47. Corollary to the above is Philan's argument that the entire case hangs on the testimony of Oscar Siperstein, that he is unworthy of belief on any score because of several misstatements, discrepancies, or claimed falsifications in his testimony. There are such, and as a consequence no reliance is placed thereon. But where his testimony is corroborated by admitted facts in the record, by documents or records made long prior to the controversy, or in a day-by-day routine manner, where his testimony is corroborated by others, and where respondents had available to them refutation thereof through the testimony of others, whom they did not call as witnesses, it has been accepted.

48. Counsel for Philan then attempted to discredit all other witnesses by relationship—either that the witness is a father-in-law, brother, tenant, creditor or employee of Oscar Siperstein and that, therefore, every witness appearing against respondents is a liar, or at least his testimony is unreliable. I do not find it so. As yet, we do not incriminate in this country by ties of either blood or marriage—whether Harry Siperstein has a long criminal record or not cannot affect the credibility of his brother about business transactions. Nor are mere arrests without proof of conviction accepted as affecting credibility. This negative defense is rejected and credibility has been assessed on all the record facts, the demeanor and attitude of the witness and any bias he may have displayed or is apparent from other facts in the record.

49. Complaint in this proceeding was filed November 8, 1956. Mailed for service on November 15, 1956. On November 17, 1956, respondent Philan offered to sell Siperstein again which fact, in and of itself, destroys whatever validity Philan's various excuses for the 1955 cutoff may have had. Buying was resumed for a while but then discontinued as Siperstein currently buys from Zins through his St. George store and then transfers the

Wall-Tex thus purchased to its Jersey City store, where it is resold. Zins has, however, refused to deliver Wall-Tex to Siperstein's Jersey City store.

50. The conclusory finding on this boycott activity, as specifically found above, is that all three respondents, acting in cooperation with each other entered into a conspiracy, agreement, understanding or planned common course of action to boycott Siperstein to prevent him from obtaining supplies of Wall-Tex for resale and have threatened to boycott any such source of supply.

Delivery Showdown

51. This charge is not substantiated by reliable probative or substantial evidence. Only one instance appears in the record, that of Landy Bros., Inc., a Wall-Tex dealer in Newark, N.J., buying from Zins and trading with Siperstein at acquisition cost, his Wall-Tex for Siperstein's Sanitas. He testified he had ordered 25 patterns from Zins for about $1,400 in August of 1955, but the order was not delivered as promptly as usual. However, when he threatened to cancel, the salesman came around and the matter was ironed out and the delivery made. There is some evidence that he was delinquent in payment. There is no satisfactory evidence to connect respondents Columbus or Philan with this. Furthermore, counsel in support of the complaint requests no affirmative finding on this issue and his proposed order ignores it.

CONCLUSIONS OF LAW

1. A vendor may independently and unilaterally refuse to sell or cease selling a given customer for any reason whatsoever or no reason at all. *U.S.* v. *Colgate & Co.* 250 U.S. 300; *F.T.C.* v. *Raymond Brothers-Clark Co.* 263 U.S. 565.

2. However, the right stops there. Such vendor may not legally combine, conspire, agree or cooperate, with others to prevent such customer from buying the same product from others. *F.T.C.* v. *Beech-Nut Packing Company* 257 U.S. 441; *Fashion Originators Guild* v. *F.T.C.* 312 U.S. 457.

3. Acquiescence or assistance in effectuating the purpose of the boycott hereinabove found is sufficient to implicate. *Soft-Lite Lens Co., Inc.* v. *U.S.* 321 U.S. 707, at 723. No overt act beyond conspiring, agreeing or understanding is necessary and may be

wholly nascent, or abortive, or successful. *U.S.* v. *Socony-Vacuum Oil Co.* 310 U.S. 150, 224.

4. This proceeding is in the public interest.

5. The planned common course of action, conspiracy, agreement and understanding and the acts and practices of the respondents as hereinabove found, are all to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, all corporations, and their respective officers, agents, representatives and employees, directly, or through any corporate or other device, in connection with the offering for sale, sale, and distribution of wall-covering products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy with each other, or with persons not parties hereto, to threaten to boycott, attempt to boycott, or to boycott any corporation, partnership, association or individual who wishes to purchase such products.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, so far as involved in these appeals, charges respondents, under Section 5 of the Federal Trade Commission Act, with carrying out a conspiracy among themselves and with others, in the sale and distribution of Wall-Tex to restrain competition by:

1. Establishing and maintaining uniform fixed suggested dealer resale prices;

2. Establishing and maintaining exclusive sales territories for distributors;

3. Threatening to, and boycotting certain dealers.

Early in the hearings, Zins Wallpaper Company (Zins) stipulated with counsel supporting the complaint that Zins would take the same order which might be entered against Philan, Inc. (Philan) and that counsel supporting the complaint would not

call as witnesses any officer or employee of Zins. Thereafter, Zins took no further part in the hearings.

After the hearings, the hearing examiner dismissed the charges based on 1 and 2 above, and entered an order against all respondents on 3. Counsel supporting the complaint, Columbus Coated Fabrics Corporation (Columbus), and Philan appealed and filed briefs and presented oral argument on all issues involved. Zins filed a written brief as to charges 1 and 2.

APPEAL OF COUNCIL SUPPORTING COMPLAINT

Columbus, of Columbus, Ohio, manufactures and distributes a number of products, including a washable cloth wall covering known as Wall-Tex. It competes with at least four other similar coverings, of which Sanitas is most frequently mentioned. Price range of all is narrow and a small difference in price will switch business. To some extent, also, Wall-Tex competes with all wall coverings, such as paint and wallpaper.

Columbus sells Wall-Tex to 63 distributors in 54 cities. Eight of the distributors have designated sales areas, of which seven are located along the Atlantic Seaboard from Portland, Maine, to Philadelphia, Pa. The choice of the locations of distributors and the designated areas (where they exist) are made by Columbus. Distributors outside, but contiguous to a designated area, are requested not to sell in such area.

There is no evidence of any agreement, either written or oral, as to these allocations. Nor is there any substantial evidence that Columbus made efforts to require observance or to police the unilateral arrangements it made. In practice, a dealer receiving an order from outside his designated area sends it to Columbus which, in turn, forwards it to the appropriately located dealer. It appears also that any distributor or dealer may sell Wall-Tex anywhere he wishes. He can also choose his own customers and is free to handle competing products. In fact, many do handle such products.

Among the reasons given by Columbus for these designated sales areas or exclusive dealerships within such areas are: first, to encourage promotional work (including shows and advertising) by assuring the distributor that he will reap the benefit; second, to insure efficient handling of complaints.

There is no evidence of any threat to monopolize, or of injury to competition. The legality of the arrangement presented here is indicated by cases such as *Schwing Motor Company* v. *Hudson*

Sales Corporation, 137 F. Supp. 899; *Packard Motor Car Company* v. *Webster Motor Car Company,* 243 F. 2d 418, et seq.

Other cases are cited in the brief. Many of them involve factual situations not involved here. We agree with the hearing examiner that "the factual picture here is not in violation of the law."

The same may be said of the charge of establishing and maintaining uniform fixed dealer resale prices. The facts show that Columbus, from time to time, suggests resale prices, usually in connection with its regular issuance of new patterns. The distributors who have a designated sales area frequently suggest resale prices to their dealers, and such prices often vary from those suggested by Columbus. There is no evidence of any agreement between distributors to enforce Columbus' suggested prices or to enforce their own. Nor is there evidence of agreement among dealers to agree to or to enforce either. While the price range of competing products is a narrow one, the record indicates that prices are a result of the competitive situation at the time of a particular sale rather than of any agreement or of any attempt to enforce a suggested price.

The appeal of counsel supporting the complaint is accordingly denied.

APPEAL OF RESPONDENTS COLUMBUS AND PHILAN

This has to do with the charge that respondents conspired to prevent a dealer, N. Siperstein, Inc. (Siperstein), from securing Wall-Tex.

Philan, whose principal place of business is 390 Rockaway Avenue, Brooklyn, N.Y., is the largest wholesale distributor of Wall-Tex. Its designated territory includes metropolitan New York (except Staten Island) and Hudson County, N.J. Zins, with its principal place of business in Newark, N.J., ranks third as a distributor. Siperstein operated in Jersey City, Hudson County, N.J. Its directing head was Oscar Siperstein. Associated with him were three brothers and, to some extent, his father.

Ninety-five percent of Philan's sales are to "stocking" dealers, that is, dealers who maintain an inventory and therefore buy in large quantities than "nonstocking" dealers, who buy in smaller quantities as needed. Philan's area contains 3,000 dealers, of whom 500 buy direct from Philan, 100 as stocking dealers and 400 as nonstocking dealers. The remaining dealers buy from stocking dealers. Such purchases account for 60% of the Wall-

Tex sold in the area. Philan sells to stocking dealers at a substantial reduction in price.

Although Philan had previous troubles with Siperstein, the present difficulty was precipitated about April 1, 1955 when Philan cut off Siperstein as a customer. It is the claim of respondents that in so doing, Philan was acting independently and his conduct was therefore lawful. *U. S.* v. *Colgate Company,* 250 U.S. 300. It is also urged that others who may have been involved were acting independently.

On the question of whether this was done independently or as part of a conspiracy, a great deal of evidence was taken. It falls into several categories:

1. Evidence as to Philan's reasons and possible motives.

It is pointed out that Siperstein had a bad reputation and a record of arrests. Nevertheless, the evidence establishes that the real reason was Siperstein's price cutting activities. Philan had cut off Siperstein in 1930 and again in 1946 or 1947. Each time Siperstein was able to secure supplies through others and kept up his price cutting and Philan eventually resumed selling to him. That price cutting was the real reason is also indicated by evidence of two meetings held between Oscar Siperstein and officials of Philan, and one meeting between Oscar Siperstein and officials of Zins. Although accounts of what happened differ somewhat, the hearing examiner concluded that complaint was made of Siperstein's price cutting and he was asked to raise his price but refused.

It appears also that Philan was selling at $2.03 per roll to stocking dealers who bought 50 cartons or more while charging other dealers $2.47 per roll. Siperstein was buying from Philan at $2.03 and selling to other dealers in both Philan's and Zins' areas at prices less than those charged by either Philan or Zins.

Thus merely cutting off Siperstein as a customer would not entirely solve the difficulty. If Siperstein could make purchases from other distributors, he could still outsell Philan and Zins and cut substantially into their profits. In fact in 1954, Philan's sales in Hudson County (where Siperstein operated) fell off $45,000 over the previous year, although its volume in New York increased. Therefore, it would seem important for Philan to learn who was supplying Siperstein as a necessary preliminary step to any further action that might be taken.

2. Philan's surveillance of Siperstein.

About March 21, 1955, Philan employed the Pinkerton De-

tective Agency to keep under secret watch deliveries of Wall-Tex to the warehouse of Montgomery Wallpaper Company (Siperstein's wholesale warehouse in Newark). After an interview with the president and the advertising and sales manager of Philan, the Pinkerton agent reduced to writing his ideas of the purpose and the methods to be employed. This report contained the following:

CLIENT DESIRES TO ESTABLISH:
Who is supplying Wall-Tex to Montgomery Paper Company.

The report also contained directions to secure, if possible, from any Wall-Tex delivered to Siperstein, the name of the consignee and the order number on the carton. Having this number, upon application to Columbus, the identity of the consignee could be learned.

3. Siperstein's experience in buying Wall-Tex through others.

The president of the Clifton Paint and Wallpaper Supply Company testified he bought additional quantities of Wall-Tex from Zins in the spring of 1955 in order to trade it to Siperstein for Sanitas; that in September, 1955, a representative of Zins came to see Clifton and advised that a shipment had been delivered to Siperstein and he asked Clifton not to sell to Siperstein.

Harry Katz, who had for some time been buying from Zins and reselling to Siperstein, was told by Zins not to sell to Siperstein or he, Katz, would be cut off from his supply.

Oscar Siperstein testified that he bought several thousand dollar's worth of Wall-Tex from Mrs. Wilner, owner of the Pittston Wallpaper Company at Pittston, Pa.; that he paid cash; that Mrs. Wilner declined to give him an invoice; that Siperstein made delivery in his own truck and removed all markings from the cartons; that he tried to make subsequent purchases but was not able to do so.

In Finding 38, the initial decision sets out the dealings of Siperstein with the B & W Wallpaper Company, Boston, Mass., dealers in Wall-Tex. On about April 18, 1955, Siperstein bought 120 cartons of Wall-Tex from B & W. The deal seems to have been made through outside parties. The whole transaction was handled with a view to secrecy both in transportation and removal of markings from the cartons.

Various items of evidence are material on the question of the participation of Columbus in the boycott.

For some time prior to 1955, Columbus has been a majority

stockholder in Philan and two of its officers or representatives are on the Board of Directors. This arrangement was for credit reasons. Although Columbus receives some financial reports from Philan, the latter decides independently on matters of selling and operating the business generally.

Columbus employed salesmen and promotion men who traveled about its trade areas and was also frequently in touch with Philan by telephone. Thus, Columbus was kept well informed of the situation existing among its distributors and dealers.

There is no evidence that Columbus took any part in the decision to cut off Siperstein. Its officials deny participation in the matters referred to herein and also deny knowledge of most of them until after they had happened. Its officers did know that Siperstein was a price cutter and had been previously cut off because of it. It also appears that Philan notified Columbus by telephone of the 1955 cutoff. Philan secured an opinion of its attorney concerning its right to quit selling to Siperstein and sent a copy thereof to Columbus. One of the items of information which Pinkerton planned to secure was the order number placed on the cartons by Columbus. Having this information, the consignee could be determined, but only with the assistance of Columbus. After the cutoff, Siperstein attempted and sometimes succeeded in buying Wall-Tex from Columbus distributors other than Philan and Zins. Certainly the direct way to learn the facts about that and to block it was through Columbus. Columbus was the logical ally for Philan and Zins in their war against Siperstein.

In Finding 42, the initial decision sets out a carbon copy of a letter found in Philan's files. It was dated June 23, 1955, addressed to Columbus, and was written by an important employee of Philan at the suggestion of Philip Tashman, an official, and concerned an "incident which occurred this week." The incident concerned an order received by Philan from a Hudson County dealer who was suspected of buying for Siperstein. Philan, for that reason, did not fill the order. The letter also indicated cooperation with Zins in tracking down transactions of this character and attempting to prevent supplies from reaching Siperstein.

Philan's officers and employees testified that the original of this letter was never sent to Columbus because the sales manager "felt this was no concern of Columbus," and that the letter was torn up, although the employee doing so exceeded his authority in so doing. Columbus denied receiving the letter.

It is not possible to set out all the evidence or to discuss the inferences which may properly be drawn therefrom. There is much contradictory testimony. Some of the witnesses were interested parties. Some displayed considerable bias or even hostility. The initial decision indicates that the hearing examiner made due allowance for this in determining the credibility of the various witnesses.

In Finding 50, of the initial decision, the hearing examiner said:

> The conclusory finding on this boycott activity, as specifically found above, is that all three respondents, acting in cooperation with each other entered into a conspiracy, agreement, understanding or planned common course of action to boycott Siperstein to prevent him from obtaining supplies of Wall-Tex for resale and have threatened to boycott any such source of supply.

From an examination of the entire record, we conclude that the evidence supports this conclusion.

Claimed Procedural Errors

On July 16, 1957, and after the case-in-chief was concluded, Philan filed a motion asking:

1. That counsel supporting the complaint be required to produce for examination documents in his possession containing statements, or reports thereof, to any Commission investigator, made by eleven designated witnesses, including Oscar Siperstein.
2. That the hearings be reconvened to permit the recall of such witnesses for further cross-examination.
3. In the alternative, that the testimony of such witnesses be stricken.

The hearing examiner granted the motion in part and denied it in part. On an interlocutory appeal by Philan to the Commission, the rulings of the hearing examiner were upheld for reasons set out in the Commission's opinion.

On February 20, 1958, Oscar Siperstein was called as a witness by respondent Philan. He was examined as to various documents and records of his company, which he had brought into the hearing under a subpoena duces tecum. He was then asked:

> Mr. Siperstein, prior to the time this proceeding began, did you at any time have correspondence with the Federal Trade Commission or any agent or employee thereof concerning activities of the respondents Philan, Inc., Columbus Coated Fabrics Corporation, or Zins Wallpaper Company about which you testified in this proceeding?

Other questions amplifying the above were also asked. The hearing examiner did not permit answers on the ground that the questions were an attempt by Philan to impeach its own witness.

It is well settled that a party cannot ordinarily impeach his own witness. There are exceptions in cases of entrapment, hostility or surprise, resulting in the party seeking to impeach being misled by the witness and prejudiced thereby. In such circumstances, allowing a party to impeach his own witness is largely within the discretion of the trial court whose decision may be reversed only for abuse in its exercise. 98 C.J.S. *Witnesses*, Section 477, et seq.

This situation has not been changed by Section 3.16(c) of the Rules of Practice for Adjudicative Proceedings which provides:

> *Adverse Witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

This subparagraph simply calls attention to the fact that a hostile witness may be impeached by the party calling him in accordance with principles and procedures laid down by the courts. Among these principles are a requirement that the proper foundation must be laid and that the party calling the hostile witness has been misled by that witness and prejudiced thereby.

As bearing on the question of the discretion of the hearing examiner and also as to any possible prejudice, attention is called to other facts appearing in the record.

On September 9, 1957, at the beginning of respondents' case, Philan's motion, which had been filed July 16, 1957, was considered by the hearing examiner. The latter called attention to the testimony of Oscar Siperstein to the effect that a Federal Trade Commission investigator had called on him. From this, the examiner concluded that interview reports may have existed and he requested counsel supporting the complaint to produce them. The reports were turned over to the examiner who excised part of them as irrelevant and turned the balance over to respondents' counsel. The reports are not in evidence; nor does the record show that any use was made of them.

The controversy on the second appearance of Siperstein as a witness has to do with correspondence with the Commission rather than with interview reports. Whether this correspondence contains anything not in the reports, or how much, if any, was

confidential under the law, does not appear. Nor is there any reason given why this material was not sought in respondents' motion of July 16, 1957.

Furthermore, it does not appear that the ruling of the hearing examiner was prejudicial in any event. There is considerable evidence in the record on the important issues other than that given by Oscar Siperstein. On this point, the hearing examiner said:

> One of respondent Philan's insistent defenses is that this proceeding is essentially a private fight between it and Siperstein. This insistence would have substance if Philan had merely quit selling Siperstein and stopped there, but the public interest in stopping a concerted boycott by several relatively strong economic units of a price-cutter from obtaining supplies from anywhere is too apparent to warrant argument.
>
> Corollary to the above is Philan's argument that the entire case hangs on the testimony of Oscar Siperstein, that he is unworthy of belief on any score because of several misstatements, discrepancies, or claimed falsifications in his testimony. There are such, and as a consequence no reliance is placed thereon. But where his testimony is corroborated by admitted facts in the record, by documents or records made long prior to the controversy, or in a day-by-day routine manner, where his testimony is corroborated by others, and where respondents had available to them refutation thereof through the testimony of others, whom they did not call as witnesses, it has been accepted.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied. It is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint and the appeal of respondents, Columbus Coated Fabrics Corporation and Philan, Inc., from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to each appeal, including a brief of respondent Zins Wallpaper Company; and the Commission having rendered its decision denying both appeals and adopting as its own the findings and order in the initial decision:

It is ordered, That the respondents, Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, corporations, shall, within sixty (60) days after service upon them of

Other questions amplifying the above were also asked. The hearing examiner did not permit answers on the ground that the questions were an attempt by Philan to impeach its own witness.

It is well settled that a party cannot ordinarily impeach his own witness. There are exceptions in cases of entrapment, hostility or surprise, resulting in the party seeking to impeach being misled by the witness and prejudiced thereby. In such circumstances, allowing a party to impeach his own witness is largely within the discretion of the trial court whose decision may be reversed only for abuse in its exercise. 98 C.J.S. *Witnesses*, Section 477, et seq.

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The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied. It is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint and the appeal of respondents, Columbus Coated Fabrics Corporation and Philan, Inc., from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to each appeal, including a brief of respondent Zins Wallpaper Company; and the Commission having rendered its decision denying both appeals and adopting as its own the findings and order in the initial decision:

It is ordered, That the respondents, Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, 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 contained in the aforesaid initial decision.

Commissioner Kern not participating.