

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
THEODORE KAGEN CORP. ET AL.

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

Docket 6893. Complaint, Sept. 24, 1957—Decision, Nov. 19, 1959

Order requiring New York City importers, engaged in assembling watches and wholesaling them to watchmakers, to cease selling watch cases incorporating bezels composed of aluminum treated to simulate gold or gold alloy without clearly disclosing that the bezels were composed of base metal. Charges of falsely marking watch cases on the back as "water-resistant" and "water-protected," and with deceptive use of the word "manufacturers" on invoices and letterheads in connection with watch cases that they purchased from others, were dismissed.

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

Noble, Neuman & Moyle, of Washington, D.C., by *Mr. Ben Paul Noble*; and *Hoffman, Buchwald, Nadel, Cohen & Hoffman*, of New York, N.Y., by *Mr. Irving Margolis*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges that the respondents have engaged in certain misleading practices in connection with the advertising and sale of their watch cases, in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, hearings were held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted and the case has been argued orally before the hearing examiner. Any proposed findings and conclusions not included herein have been rejected.

2. Respondent Theodore Kagen Corp., is a corporation organized and doing business under the laws of the State of New York, with its principal place of business at 48 West 48th Street, New York, New York. Respondent Theodore Kagen is president of the corporation and formulates, directs and controls its policies and practices. Respondent Theodore Kagen also does business under the name T. K. Co. Respondents are engaged in the sale of watch cases, the cases being sold to watch makers and to wholesalers of watch makers' supplies.

3. In the sale of their watch cases respondents are engaged in interstate commerce, selling and shipping their cases to purchasers located in various states of the United States other than New York. Respondents are in substantial competition with other corporations and individuals engaged in the sale and distribution of watch cases in such commerce.

4. Insofar as respondents' advertising and sales practices are concerned the complaint raises three issues: (1) whether respondents' representations that their watch cases are "water-protected" and "water-resistant" are true; (2) whether respondents' practice of selling watch cases containing bezels made of aluminum which has been so treated or processed as to have the appearance of gold is misleading to the public; and (3) whether respondents' representation that they are "manufacturers" is true.

5. As indicated above, respondents have represented that certain of their watch cases are "water-protected" or "water-resistant," the legend being stamped upon the back of the case. It should, however, be noted that use of the "water-protected" representation was discontinued by respondents some five years or more ago, and that since that time only the representation "water-resistant" has been used.

6. At the instance of the Commission, tests of some of respondents' cases were made for the purpose of determining whether the cases were as represented. The first of these tests was in April 1956, and the testing was done by I. D. Watch Case Company of Jamaica, Long Island, New York. At that time three cases (Commission Exhibits 1, 2 and 3) were tested. These cases bore the legend "water-protected" and, as under the trade practice rules promulgated by the Commission for the watch case industry (Commission Exhibit 11) the use of this term is tantamount to use of the term "water-proof," the cases in question were subjected to the "water-proof" test prescribed by the rules. This test is more severe than that prescribed by the rules for cases represented only as being "water-resistant." All three of the cases tested leaked, that is, they failed to pass the test.

7. The second test was also in April 1956 and by the same company. Here the three cases tested (Commission Exhibits 13, 17 and 18) were stamped "water-resistant" and the cases were tested in accordance with the standards prescribed by the trade practice rules for cases so designated. As noted above, this test is less severe than that prescribed by the rules for watch cases designated "water-proof" or "water-protected." Two of the cases (Commission Exhibits 17 and 18) passed the test, while the third (Commission Exhibit 13) failed.

8. The last test made at the instance of the Commission was

during the progress of the hearings. On this occasion four cases (Commission Exhibits 26, 27, 28 and 29) marked "water-resistant" were tested and all failed, that is, all four cases leaked. Here again the test prescribed for "water-resistant" watch cases was used rather than that prescribed for "water-proof" cases. The testing was done by Lucius Pitkin, Inc., of New York City, chemists and metallurgists, who also operate a testing laboratory.

9. There is sharp controversy over the adequacy of this test. It appears that actually two tests were made, the first being somewhat preliminary to the second. After the first or preliminary test, the four cases were found to contain water or moisture; however, it was discovered that the backs of the cases were loose and the test was therefore not considered a fair or proper test. The second test was made on the following day, after the cases had been subjected to a current of warm air for the purpose of drying them out, and after the individual performing the test had tightened the backs of the cases, using his hands and a small tool which he had improvised for that purpose. Again, all four cases leaked.

10. There is testimony on behalf of respondents that watch cases which contain water or moisture cannot be fully dried out by subjecting them to a current of warm air; that in order to thoroughly dry them the cases should be disassembled and new washers inserted. And particularly is there testimony that watch cases cannot be adequately tightened by hand, even though use be made of a tool such as that used here. The testimony is that in order to tighten a watch case adequately a vise and block (such as respondents Exhibits 6 and 7) must be used. This is what is known as "factory tightening" a case, and appears to be the method in common use in the industry.

11. At the instance of respondents, a test of twelve of their watch cases (respondents Exhibit 1A-L) was made by the United States Testing Company, Inc., of Hoboken, New Jersey, on May 19, 1958. All of these cases were marked "water-resistant" and the test appears to have been the appropriate one for cases so described. None of the twelve cases leaked, all passing the test. All of the twelve cases had been "factory tightened" by respondents in the manner described above before they were delivered to the Testing Company.

12. In this connection respondents Theodore Kagen testified that ordinarily their cases are not "factory tightened" before leaving respondents' place of business; that the reason for this is that the cases must be opened anyway by the purchaser (watch maker) in order that the works may be inserted and that the purchaser therefore prefers that the backs be left relatively loose; that if the case is "factory tightened" it is that much harder to open. After the watch

has been completed the watch manufacturer then proceeds to "factory tighten" the case.

13. Upon consideration of all of the evidence on the present issue, it is concluded that the charge in the complaint has not been sustained. The results of the first test made for the Commission by the I. D. Watch Case Company are largely academic, as the cases tested were marked "water-protected" and that designation was discontinued by respondents at least five years ago. The test here used was for "water-proof" cases, which is a more rigid and severe test than that for cases marked "water-resistant."

In the second test made by the I. D. Watch Case Company, this being a "water-resistant" test, two of the three cases tested passed the test satisfactorily.

As to the tests made by Lucius Pitkin, Inc., their probative value is weakened by two factors: first, the doubt which exists as to whether the cases were thoroughly dried out following the preliminary test in which the backs of the cases admittedly were too loose; and second, and more importantly, the doubt that the cases were adequately tightened before the final test. While the individual performing the tests unquestionably is well qualified in his own field, that of chemistry and metallurgy, he is not a watch maker and claims no special competency in that field.

Also, speaking generally regarding the Commission's tests, it appears questionable whether in any of the tests a sufficiently large number of cases were used. Only three cases were used in the first I. D. test, three in the second, and four in the Lucius Pitkin test. None of these would seem to be a sufficiently large number of cases to obtain fully reliable results.

It must also be remembered that twelve cases tested by the United States Testing Company at respondents' instance passed the test. This appears to be the only test in connection with which there is satisfactory evidence that the cases had been thoroughly tightened prior to the test.

14. Many of respondents' cases have backs made of stainless steel and bezels made of aluminum which has been so treated or processed that it has the appearance of gold. The backs are stamped "stainless steel back" but there is no marking on the bezels or elsewhere on the case indicating the true metal content of the bezels.

15. The sale and distribution of watch cases having bezels made of a base metal which has been so treated as to have the appearance of a precious metal, without disclosing the actual composition of such bezels, clearly has the tendency and capacity to mislead the purchasing public as to the content of the bezels. The practice serves also

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to place in the hands of watch manufacturers and dealers, particularly retail dealers, an instrumentality whereby they may mislead or contribute to the misleading of the public.

16. In connection with the use of the name of the corporate respondent on their letterheads and invoices, respondents use also the legend "Manufacturers—Designers—Importers of Watch Cases—Dials—Hands." The complaint challenges the use of the word "manufacturers," charging that respondents are not in fact manufacturers but merely purchase their products from others.

17. Respondents' place of business comprises some 800 square feet of floor space, and their equipment includes presses, air machines, a friction press for inserting crystals, smaller crystal presses, printing machines, tools and dies, jigs for the manufacture of dials, a Swiss curving machine, a French printing machine, an air-compressing machine, and drills. Most of respondents' cases are imported in parts and assembled by respondents. Respondents at least manufacture crowns and dials. While the matter is not free from doubt, it is concluded that respondents' reference to themselves as manufacturers probably is not unwarranted.

CONCLUSIONS

The practice of respondents described in Paragraphs 14 and 15 is to the prejudice of the public and of respondents' competitors, and constitutes an unfair and deceptive act or practice and an unfair method of competition in commerce in violation of the Federal Trade Commission Act. The proceeding is in the public interest.

The other charges in the complaint have not been sustained.

ORDER

It is ordered. That the respondents, Theodore Kagen Corp., a corporation, and its officers, and Theodore Kagen, individually and as an officer of said corporation and doing business as T. K. Co., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watch cases in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts.

It is further ordered. That as to all other issues the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

Respondents are engaged in the interstate sale and distribution of watch cases. In his initial decision, the hearing examiner found that the allegations of the complaint charging misrepresentation by respondents by designating the corporate respondent as a manufacturer on invoices and letterheads and through marking their watch cases as "water-resistant" or "water-protected" were not sustained by the evidence. Counsel supporting the complaint appeal from the latter ruling dismissing the charges concerning the capacity of the cases to resist moisture and water.

The hearing examiner further held that the record supported the complaint's additional charges of deception by failure to disclose the metal composition of the bezels of certain watch cases. The order contained in the initial decision would require respondents to cease and desist from offering for sale or selling in commerce any watch case composed in whole or in part of base metal which has been treated to simulate precious metal unless marked to clearly disclose the base metal content of such treated case or part. Respondents have appealed from that holding and order.

A substantial portion of respondents' watch cases are sold to watch assemblers and others who, after placing watch movements in them, distribute the watches to the purchasing public through retailers or otherwise. The major components of a watch case include the back and the front, or bezel, which contains the crystal. The backs are stainless steel and stamped as "Stainless Steel Back." It is undisputed that the bezels used on one category of respondents' cases are composed of aluminum which has been subjected to an anodizing process resulting in a yellow color. Such bezels do not contain any appreciable amount of precious metal. No marking appears on the bezels or elsewhere on the cases which identifies the bezels as composed of base metal.

Respondents contend that the initial decision's finding that their failure to reveal that the bezels are composed of base metal has had the tendency and capacity to mislead the purchasing public into the belief that the bezels are precious metal is contrary to the weight of the evidence. Respondents' brief emphasizes that a witness called by counsel supporting the complaint testified that the bezels did not look like gold to him and that another trade witness identified the bezels merely as yellow in color without, however, describing them to be gold in color. The testimony of these witnesses taken as a whole, however, does not detract from the hearing examiner's conclusions

that such bezels have the appearance of being composed of precious metal. The first witness referred to, namely, the one conceding that the bezel of the watch case exhibit did not look like gold to him, added in effect that he was able to distinguish it from gold due to his training and experience in fields of watch manufacturing and designing. Moreover, he elsewhere stated in his testimony that the bezels were colored to look like gold.

The witness who identified the bezels as yellow in color without expressly stating that they were gold in color, further testified that he thought when he purchased such cases from respondents that they were rolled gold plate; and he was under the impression that rolled gold bezels could be imported at the price which he was paying. Moreover, respondent Theodore Kagen identified certain of his bezels as having the color of gold and testified that another composed of base metal plated with chrome looked like silver. Hence, instead of establishing appearance dissimilarities, the testimony clearly supports the conclusions that the bezel components used in various of respondents' watch cases have the appearance of being precious metal.

In further support of their contentions that the burden of proof has not been met, respondents stress that no evidence of consumer deception was received. They also argue that because the backs of the cases are truthfully marked as composed of base metal, namely, stainless steel, and because no markings of weight or fineness indicative of precious metal content are used on the cases, all possibilities of deception resulting from the appearance of the bezels are foreclosed. It is not controlling, however, that no evidence was introduced relating to specific watch transactions in which purchases were made under erroneous impressions that respondents' bezels were made of precious metal. Where the exhibits themselves sufficiently demonstrate their capacity to deceive, neither customers who have actually been misled nor experts need be called to testify. *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir., 1944); *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (4 Cir., 1959).

Representative samples of respondents' watch cases were received into the record. The bezel is a prominent component of the case and of the finished watch. Our own examination of those exhibits confirms that the bezels of many of respondents' watch cases are to all appearances composed of precious metal. We have no doubt that a substantial segment of the watch buying public would find it impossible to distinguish such bezels from those made of precious metals. In these circumstances, the fact that the backs are disclosed as being base metal or that no karat markings appear on the cases is immaterial.

That respondents' bezels, due to their appearance, constitute a deceptive instrumentality and have the capacity to engender impressions that they are composed of precious metal in the absence of clear disclosure to the contrary, is thus clearly established by the oral testimony and by the mute testimony afforded by the exhibits. Precious metals are held in high esteem for use in watch cases. The record also contains evidence that cases so composed are more serviceable than base metal ones and better withstand the corrosive effects of body acids and salts. When the appearance of a product is such that the consuming public is unable to distinguish it from competing merchandise which is the subject of marked consumer preference, or finds it difficult to make such distinctions, the public interest requires that such simulative wares be properly labeled by producers to prevent distributors from exercising deception in their resale. *Mary Muffet, Inc. v. Federal Trade Commission*, 194 F. 2d 504 (2 Cir., 1952). Respondents' contentions of failure of proof are rejected.

Respondents also request dismissal of this proceeding on grounds that it is a common and accepted practice in the watch and watch case industry to designate the backs as composed of base metal but to omit any markings in reference to other parts similarly made of base metal. Assuming but not however finding that this situation prevails, a method patently unfair or deceptive to the public does not cease to be so merely because those engaged in competitive and related businesses may not be deceived or adversely affected by the misleading practices. *Federal Trade Commission v. Winsted Hosiery Company*, 258 U.S. 483 (1922); *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175 (6 Cir., 1941).

The remaining contentions of error which are argued by respondents in the brief have been considered. Inasmuch as they are kindred in vein to those discussed above, such additional contentions are likewise rejected.

Our disposition of respondents' appeal warrants brief reference to our prior decision of July 24, 1959, in the matter of *Swiss Watch Case Corporation, et al.*, Docket No. 7040. There, we dismissed without prejudice charges of deceptive practices in the sale of watch cases. The bezels involved included those coated with chrome which counsel supporting the complaint contended simulated silver and stainless steel and those flashed with yellow coloring which he contended simulated gold. The watch case exhibit on which counsel centered and focused his appeal from the hearing examiner's ruling in reference to the gold colored bezels was marked "stainless steel back" and other inscriptions elsewhere on the back included the words "base

metal." In recognition of such added disclosure of base metal composition and other record matters, we rejected arguments that there was adequate showing of likelihood of the bezels being passed off as composed of gold.

Our rejection in the *Swiss Watch* case of counsel's companion contentions of adequate showing of statutory violation through failure to mark the chrome plated bezels likewise was based upon the record. We additionally expressed grave doubts that the language of the complaint in that case adequately raised issues relating to the unlawful passing off of the bezels as composed of precious metals or to deception through failure to mark the watch cases as to their foreign origin. The latter matter also was treated as an issue in the initial decision, but was ruled on adversely to the respondents in that proceeding. In the light of the foregoing, we dismissed the complaint without prejudice. In so doing, however, we were confronted with a difficult problem both as to the sufficiency of the pleadings and as to the quantum of evidence to support the allegations pertaining to that issue, even if we decided that it was properly raised. In that connection we noted in the opinion:

Doubts can be reasonably entertained if * * * [issues] relating to passing off of the bezels as gold or silver were adequately raised by the pleadings. We have power to amend complaints when warranted and to remand proceedings to hearing examiners for reception of such additional evidence as may be necessary to provide adequate bases for informed determinations of questions presented for review. This is a costly and time-consuming procedure, however. Moreover, there is no express showing here that the scope of respondents' commercial activities is such that continuation of these proceedings would serve the public interest. In the situation thus presented, the case is being dismissed without prejudice to the right of the Commission to institute further proceedings or take such further action in the future as may be warranted by then existing circumstances.

Here, in contrast to the *Swiss Watch* matter, the issue of deception by failure to mark the bezels is squarely raised by the pleadings. Moreover, in addition to the physical exhibits relied upon exclusively by the hearing examiner in the *Swiss Watch* case, there is here a much more comprehensive record including collateral testimony by a skilled member of the industry that he was deceived by respondents' bezels. Our determinations there and here have been made with due regard to the records in the respective cases and no conflict of legal principles is presented by the differing dispositions of the two cases.

As mentioned before, the appeal of counsel supporting the complaint excepts to the hearing examiner's dismissal of the charges in this proceeding pertaining to misuse of the terms "water-resistant" and "water-protected." Evidence relating to several groups of tests

was introduced by counsel supporting the complaint and respondents also presented evidence respecting tests conducted by an independent laboratory. A detailed discussion of the factual issues inhering in the test procedures would unduly lengthen this opinion. We think, however, that the hearing examiner's conclusions of failure of proof have sound basis in the record and that the dismissal of these charges of the complaint was proper.

The cross-appeals are denied and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals filed by the respondents and by counsel supporting the complaint from the initial decision of the hearing examiner; and the Commission having rendered its decision denying said cross-appeals and adopting the initial decision as the decision of the Commission:

It is ordered, That the respondents named in the caption hereof 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

STEWART & STEVENSON SERVICES, INC., ET AL.

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

*Docket 7002. Complaint, Dec. 19, 1957—Decision, Nov. 20, 1959*¹

Order requiring three franchised wholesale distributors of General Motors diesel engines and replacement parts to cease conspiring to fix or maintain prices and selling conditions for the parts.

Mr. F. C. Mayer, Mr. W. W. Rogal, and Mr. F. A. Snyder for the Commission.

Smitherman, Smitherman, Purcell & Lunn, of Shreveport, La., for United Engines, Inc.

Wells, Thomas & Wells, of Jackson, Miss., for Taylor Machinery Corporation.

¹ Five of the respondents, namely, Stewart & Stevenson Services, Inc.; Lewis Diesel Engine Company (Inc.), of Memphis, Tenn.; Lewis Diesel Engine Company (Inc.), of Little Rock, Ark.; Diesel Power Company; and George Engine Company, Inc., executed agreements containing consent orders effective May 23, 1959. 55 F.T.C. 1872.

Beard, Blue & Schmitt, of New Orleans, La., for William Patrick Kennedy, Jr., trading as Kennedy Marine Engine Company and Kennedy Marine Engine Co.

INITIAL DECISION AS TO CERTAIN RESPONDENTS BY FRANK HIER,
HEARING EXAMINER

PRELIMINARY STATEMENT

Complaint herein issued December 19, 1957, charging the respondents with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) in that they cooperated, combined, agreed and entered into an understanding and planned common course of action to fix prices, discounts, terms and conditions of sale of GM diesel engine parts. Three of the respondents, Lewis Diesel Engine Company (Inc.), of Memphis, Tennessee, Lewis Diesel Engine Company (Inc.), of Little Rock, Arkansas, and George Engine Company, Inc., filed no answer to the complaint, did not appear at any hearings, nor contest in any manner. The remaining respondents filed answers which generally admitted corporate descriptions, interstate commerce and line of commerce engaged in, and denied all else, except that respondent Kennedy Marine Engine Co., Inc., denied everything except its corporate existence and address. Four hearings were thereafter held at Memphis, Tennessee, New Orleans, Louisiana, and Houston, Texas, at which respondents, United Engines, Inc., Taylor Machinery Corporation, William Patrick Kennedy, Jr., and Kennedy Marine Engine Co., Inc., by counsel, appeared and contested the evidence offered by counsel supporting the complaint. The other respondents did not appear or have counsel present, and offered no contest.

Counsel in support of the complaint having rested, all contesting respondents moved to dismiss, supported by briefs, all of which, on consideration, were denied, except that of Kennedy Marine Engine Co., Inc., which was granted. Thereafter, at two hearings in New Orleans, Louisiana, the remaining contesting respondents offered evidence in their defense and the proceeding was closed for reception of evidence on January 8, 1959. The record consists of 600 pages of transcript and 114 Commission exhibits and 17 respondents' exhibits. Thereafter, on March 9, 1959, all contestants filed their respective proposed findings and conclusions. All proposed findings not specifically hereinafter adopted are refused. On consideration of these proposed findings and conclusions, and of the entire record, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Stewart & Stevenson Services, Inc., is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 1718 Congress Street, Houston, Texas.

2. Respondent Lewis Diesel Engine Company (Inc.), of Memphis, Tennessee, is a corporation organized and existing under the laws of the State of Tennessee, with its principal place of business located at 92 West Carolina Street, Memphis, Tennessee.

3. Respondent Lewis Diesel Engine Company (Inc.), of Little Rock, Arkansas, is a subsidiary of respondent Lewis Diesel Engine Company (Inc.), of Memphis, Tennessee, and is a corporation organized and existing under the laws of the State of Arkansas, with its principal place of business located at 3021 East Broadway, in North Little Rock, Arkansas.

4. Respondent Diesel Power Company is a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business located at 1801 N.E. 9th Street, in Oklahoma City, Oklahoma.

5. Respondent United Engines, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 555 N. Market Street, in Shreveport, Louisiana. Incorporated in late 1955, it succeeded in interest its predecessor United Tool Company, in all matters involved in this proceeding.

6. Respondent Taylor Machinery Corporation is a corporation organized and existing under the laws of the State of Mississippi, with its principal place of business located at S. Gallatin Street at Highway 80, in Jackson, Mississippi.

7. Respondent William Patrick Kennedy, Jr., hereinafter sometimes referred to as Kennedy-Biloxi, is an individual trading under the firm name of Kennedy Marine Engine Company, with his principal office and place of business located at 308 Reynoir Street, in Biloxi, Mississippi.

8. Respondent Kennedy Marine Engine Co., Inc., hereinafter sometimes referred to as Kennedy-Mobile, is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business located at 25 S. Water Street, in Mobile, Alabama.

9. Respondent George Engine Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana, with its principal place of business located at 639 Destrehan Avenue, in Harvey, Louisiana.

10. All of the aforementioned respondents, except Kennedy-Mobile, are exclusively franchised wholesale distributors of General Motors diesel engines and parts therefor, which are manufactured by and sold to them by Detroit Diesel Engine Division, General Motors Corporation, Detroit, Michigan.

11. These parts are replacements on diesel engines, such as, but not limited to, liner kits, liners, pistons, ring sets, main bearing shell sets and injectors.

12. These respondents, as enumerated above, except Kennedy-Mobile, are the only franchised wholesale distributors of these replacement diesel engine parts in the 10-state area surrounding their principal places of business in east Texas, Louisiana, Arkansas, Oklahoma, Tennessee, and Mississippi, and as such have the power to fix resale prices, terms and conditions of resale by concerted action.

13. All of these respondents in their distribution activities are engaged in commerce as that term is defined in the Federal Trade Commission Act.

14. All of these respondents compete with each other to some extent, particularly where their assigned but nonexclusive sales territories border or overlap. Resale prices of each are therefore of prime importance to some, if not all, of the others.

15. All operators of diesel engines such as oil drillers, sawmills, cotton gins, rock crushers, timbermen, boat operators, state, county, and municipal governments—are potential customers of respondents. In addition, respondents resell to dealers. Many of these customers have multi-state operations.

16. Prior to January 29, 1954, respondents generally priced their resales at the suggested resale prices of their supplier—Detroit Diesel Engine Division of General Motors Corporation. On this date the latter changed its sales program in that its new price schedule published and distributed to all these respondents omitted any suggested “wholesale” resale prices. This omission created uncertainty and confusion among respondents price-wise as the schedule failed to define clearly who was considered a “qualified wholesale customer,” and what was a wholesale sale. Rebates granted by Detroit Diesel Engine Division varied as between distributive levels, and respondents were accordingly left in the dark as to how much rebate a particular sale would earn, absent clear definition. Resale pricing was therefore thrown into confusion.

17. Accordingly, respondent Stewart & Stevenson Services, Inc., through responsible officials, invited responsible officials of the other respondents, except Kennedy-Mobile, to their offices in Houston, Texas, at which the pricing problem was discussed, and the Stewart &

Findings

Stevenson Services, Inc.'s new prices were distributed to those in attendance, and discussed. The record shows some of these sheets with pencilled notations and changes made or suggested. It is wholly immaterial that some or even all of the participants did not in advance of the meeting, know its purpose, or that the hosts attempted to sell the others, products of their own manufacture, or that all of the participants did not receive or retain the suggested minimum resale prices, distributed. The documentary evidence in this record alone, raises an inescapable inference that the result was agreement on the schedule of minimum prices, as modified, which was passed around and discussed, and an agreement not to depart therefrom without prior notification to all the others.

18. Thus, one of the active, or even enthusiastic, participants, writing on May 13, 1954, to Detroit Diesel Engine Division states: "I want to go on record as saying all parties at that meeting were in agreement on policy. If any outside agency should created [sic] the necessity to change, we were to consult with each other and take joint action." The same individual writing on March 18, 1954, to his Little Rock manager, "The attached plan was approved by all eight distributors." "The meeting was very successful and the spirit of cooperation was fine."

19. That respondents agreed to notify each other of deviations or undercutting from the agreed minimum list is shown by letters to them all by Lewis Diesel Engine Company (Inc.) stating: "Upon returning to Little Rock, I find that cost plus 35 percent will not meet the 'wildcat price.' We are therefore selling these parts to all consumers at cost plus 30 percent" and by telegram plus confirmatory letter from George Engine Company to Stewart & Stevenson Services, Inc., March 9, 1954, stating in effect that since a New Orleans GMC truck distributor was reselling at cost plus 12.5 percent, George Engine Company would do likewise. The telegram also contained the significant phrase "Reference our discussion, we must retract all assurances given." Two days later, March 11, 1954, George Engine Company again wrote Stewart & Stevenson Services, Inc., "A new attempt is being made to get the local GMC outlet to change the present policy. Therefore, please ignore for the moment our letter of March 9 relative to our proposed change in parts pricing."

20. When George Engine Company's price cut intentions became known, those other respondents whose territories abutted, immediately took action to pressure George Engine Company back to the agreed minimums so recently adopted. Thus, Taylor Machinery Corporation wrote Stewart & Stevenson Services, Inc., on April 3,

1954: "Inasmuch as we are all doing business with the major oil companies, we feel it is advisable for our invoices to continue to read the same as in the past, regardless of the GM diesel engine parts price war in Louisiana. This situation was brought about by the failure of George Frierson, president of George Engine Company, New Orleans, Louisiana, to keep his word" and "It is our intention to work with you in every way possible to facilitate a successful operation and we would appreciate your keeping us advised as to further developments." Likewise, Stewart & Stevenson Services, Inc., writing United Engines, Inc. on March 11, 1954, "In reference to your telephone conversation and wire from George Engine, I contacted the owner of the truck distributor in New Orleans and he is advising those people to quit giving parts away." Also on April 13, 1954, Lewis Diesel Engine Company (Inc.), of Little Rock, Arkansas, writing the Detroit Diesel Engine Division of GMC, states in a footnote, "Joe Manning [Stewart & Stevenson Services, Inc.] Bill Kennedy [Wm. Patrick Kennedy] and Harold Jeannes [Taylor Machinery Corporation] are all going to put pressure on George from all sides. However, they are all sticking to their proper price in their own territories and have requested that you and I stick to our present prices adopted April 1." Apparently any price cutting, any downward deviation from the schedule agreed upon was of dramatic importance with mercurial reaction, not only to these respondents, but to the Detroit Diesel Engine Division as well.

21. This price cutting from the agreed minimum of cost plus 35 percent to cost plus 12½ percent by George Engine Company, Inc., continued with the result that Stewart & Stevenson Services, Inc., through a sub-distributor, Nash & Cotton in Galveston, Texas, worked out a complicated subsidy arrangement with a dealer in Morgan City, Louisiana, in George Engine Company, Inc.'s territory, undercutting price-wise the latter's low prices. This was continued until December of 1954 when George Engine Company, Inc. raised its resale prices above the agreed minimums.

22. Since then, respondents have maintained resale prices higher than the agreed minimums, aided by Detroit Diesel Engine Division of GMC, issuing in June 1954, a suggested resale level of about cost plus 41 percent.

23. The facts found above are supported by documents made contemporaneously with the events described. Additional support is found in the oral testimony and admissions of responsible officers of two of the non-contesting respondents, both of whom were participants in the March 6, 1954 meeting at Houston, one of them

the host and both of whom were active in subsequent events. Thus, T. W. Lewis, president of the two Lewis Diesel Engine Companies, admitted the March 6, 1954 meeting resulted in the agreement charged and hereinabove found. Joe Manning, of Stewart & Stevenson, referring to George Engine Company, Inc. breaking the agreement, testified "We simply retaliated by undercutting his price" and "That local situation stopped so we stopped the pressure." Subsequent to the termination of this price war, the same man wrote the Detroit Diesel Engine Division, on May 24, 1955, stating that he was pleased at this time to advise "that this entire matter has been cleared up entirely between ourselves to the complete satisfaction of both George Engine Company and Stewart & Stevenson * * *."

24. The record therefore presents an almost classical case of horizontal price-fixing agreement. All the well-known elements are present: a strong economic motive, in addition to the usual desire to eliminate price competition, a meeting at which minimum prices were discussed, were formalized in writing, and agreed to, plus an agreement to notify the others of deviations, and giving of such notice, subsequent police or punitive price action to force adherence, subsequent termination of the "unstabilizing" force of price competition, and resumption of the agreed levels as minimum levels.

25. Against this the contesting respondents have offered, in addition to the usual denials of any agreement, various and sundry excuses or explanations, several of them timeworn or moth-eaten from much previous unsuccessful usage, one or two of some novelty. Thus, Taylor Machinery Corporation, through testimony, stresses that it had no knowledge of why the meeting was called, that the president and virtual owner did not go, but sent two employees who had no authority to agree to anything, that most of the time at that meeting was taken up by the host attempting to sell the others merchandise of its own make, that the discussion on parts was "interpretation" of GMC's classification of "wholesaler," that in Taylor's trade area, numerous dealers offer the same parts, that only the president had any authority to set or change price policy and had never done so, that the latter never saw letters sent to the company which are in the record and which substantiate the charges, nor made any reply to them, that the company played no part in the price war above described. Prior knowledge of why the meeting was being called or the fact that the host attempted sales pitches therat of its own products are wholly immaterial. The two employees who attended are shown by the record to be highly trusted and responsible, one of them the general manager, whose documented

actions show extensive and binding authority. If only the non-attending president had pricing authority how was it he never saw the sheet of prices agreed on at the meeting which was, nevertheless, found in the company files? Documentation hereinabove set out shows the general manager pledged cooperation to Stewart & Stevenson Services, Inc. in bringing about its end.

26. Contesting respondent United Engines, Inc., through the testimony of its president J. W. Morton, stresses substantially all the same points, except that here its president was a participant in the meeting. He testified he heard no price discussion, never received at the meeting the minimum price list distributed there, did not understand the letters sent him subsequently by other participants, did not reply to them, nor ever wrote to them; that the corporation is smaller in size and territory than the others; that he became incensed when he found no GMC representative present to explain the term "wholesale." I cannot accept as credible the contention that eight or nine men can sit down in a room for any purpose and have half or more of them discuss price maintenance in which they all had such a vital and obvious interest without the others being aware thereof, nor the assertion that if Mr. Morton did not understand letters from other participants in the meeting on that very subject, he did not undertake some way to ascertain their meaning, nor why he retained ambiguities in his files. The size of any respondent is immaterial—the waterfront was thoroughly covered. That there were dealers from whom consumer could obtain these replacement parts, is likewise immaterial. Whether a price-fixing agreement is successful or unsuccessful makes no difference.

27. This respondent raises another point—that United Engines, Inc. was not incorporated until November 21, 1955, hence could not have participated in any 1954 price-fixing conspiracy. The record facts are these: J. W. Morton started in the engine business around 1940 as a single partnership under the trade name United Tool Company and as such became a franchise distributor for Detroit Diesel Engine Division of GMC. In November 1955 he split the business into two parts, United Tool continuing in the oil business; the new corporation, United Engines, Inc., respondent here, taking over the franchise and all the engine and replacement part business. J. W. Morton owns or controls both, corporate respondents' customers are the same as those which United Tools previously sold to, the continuity was unbroken—so far as this proceeding goes, United Engines, Inc. is the successor to United Tools, stands in its shoes, and is responsible for what its sibling predecessor did.

28. Contesting respondent William Patrick Kennedy, Jr. raises in his defense substantially the same, but not all, of the above contentions plus the additional one that the meeting was informal, no agenda, no chairman, no minutes, all of which are immaterial. The complete lack of memory as to price discussion, and particularly as to correspondence directed to him by other participants, is in dubious contrast to a recollection of having three martinis before lunch at that meeting and to discussing fishing and reconditioned cylinder heads.

29. Respondent Kennedy Marine Engine Co., Inc., previously dismissed from this proceeding on motion at the close of the evidence received in support of the complaint, is a corporation since 1952. It is not a franchised distributor of the products involved in this proceeding—that distributorship is held by William Patrick Kennedy, Jr., sole proprietor of and doing business as Kennedy Marine Engine Company, of Biloxi, Mississippi. The latter is a stockholder in and a president of the Mobile corporation, but does not own a controlling interest in it. The Kennedy-Mobile cannot secure parts or engines on direct order from Detroit, but must buy from a distributor, in this case Kennedy-Biloxi, as a retail dealership reselling to consumers, at cost plus 5 percent. Economically it is impossible for the Kennedy-Mobile to compete with the sole proprietorship at Biloxi and, as a matter of fact, there is no substantial competition between them. The individual respondent Kennedy was invited to the Houston meeting in his Biloxi dealership capacity and not as president of the Mobile corporation, for the simple reason that neither the host nor most of the other invitees knew of the existence of the Kennedy-Mobile. The agreed upon minimum prices involved here were maintained against this Mobile corporation, not by it. Under these facts, and since this is essentially a horizontal conspiracy between competitors, there is no case made out against the Kennedy Marine Engine Co., Inc., of Mobile, Alabama. It had no discernible reason or power to maintain prices it had to pay.

30. None of the above findings are based in any degree on the testimony of the witness George Frierson, president of the non-contesting respondent, George Engine Company, Inc., in so far as he testified to the March 6, 1954 meeting at Houston, Texas. Such testimony is rejected as not meeting the requirements of substantiality, reliability and probative value. It is in hopeless conflict, incapable of rationalization and largely incredible. The documentary evidence authored, adopted, or received by him, or found in his files, and his testimony in reference thereto are given full weight.

Order

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CONCLUSIONS OF LAW

1. Price-fixing agreements are illegal per se, regardless of motive, intent, results, success, or whether wholly nascent or abortive. *Socony Vacuum Oil Co. v. U.S.* 310 U.S. 160.

2. It matters not, therefore, whether respondents charged post-agreement, the agreed prices or not. *National Lead Company, et al v. F.T.C.* 227 F. 2d 825, 833. Moreover, the agreed prices were minimum prices.

3. Oral testimony, based on recollection and spurred by self-interest, cannot outweigh contemporaneously made documents. *U.S. v. Gypsum Co.* 333 U.S. 364, 396.

4. Even if the individual adherence to list pricing started legally, it became the subject of a conspiracy in 1954, and thereafter was illegal. *Advertising Specialty National Assn. v. F.T.C.* 238 F. 2d 108, 117.

5. The Federal Trade Commission has full, obvious and complete jurisdiction of the acts and practices of the remaining respondents in this proceeding.

ORDER

It is ordered, That the respondents, United Engine, Inc., a corporation, Taylor Machinery Corporation, and William Patrick Kennedy, Jr., trading as Kennedy Marine Engine Company, an individual, and their respective officers, agents, representatives, and employees, in, or in connection with the offering for sale, sale or distribution of replacement parts for diesel engines, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, continuing, or cooperating in, any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more respondents, or between any one or more of them and others not parties hereto, or specifically named in this order, to establish, fix, or maintain prices, terms, or conditions of sale of replacement parts for diesel engines, or adhere to any prices, terms or conditions of sale so fixed or maintained.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to Kennedy Marine Engine Co., Inc.¹

¹ Charges in this proceeding against Stewart & Stevenson Services, Inc., Lewis Diesel Engine Company (Inc.), of Memphis, Tennessee, Lewis Diesel Engine Company (Inc.), of Little Rock, Arkansas, Diesel Power Company, and George Engine Company, Inc., have been otherwise disposed of.

OPINION OF THE COMMISSION

By the COMMISSION:

Respondents are charged by the complaint with violating Section 5 of the Federal Trade Commission Act by cooperating, combining, agreeing, and entering into and carrying out an understanding and planned common course of action to fix prices, discounts, terms and conditions of sale of General Motors diesel engine parts.

Five of the respondents, namely, Stewart & Stevenson Services, Inc., Lewis Diesel Engine Company (Inc.), of Memphis, Tennessee, Lewis Diesel Engine Company (Inc.), of Little Rock, Arkansas, Diesel Power Company and George Engine Company, Inc., acting under §3.25 of the Commission's Rules of Practice, executed agreements containing consent orders to cease and desist, and an initial decision as to these respondents was issued by the hearing examiner on April 6, 1959, and became the decision of the Commission on May 25, 1959. The remaining respondents contested the charges and the hearing examiner, in a separate initial decision, held that the allegations of the complaint were sustained by the evidence and ordered the contesting respondents, except Kennedy Marine Engine Co., Inc., to cease and desist the practices found to be unlawful. William Patrick Kennedy, Jr., trading as Kennedy Marine Engine Company, has appealed from this decision. The case as to respondents, United Engines, Inc., Taylor Machinery Corporation, and Kennedy Marine Engine Co., Inc., was placed on the Commission's own docket for review.

Respondent Kennedy contends on appeal that the evidence does not show that he was a party to a price fixing agreement and his argument is directed against the hearing examiner's interpretation and appraisal of the evidence and his evaluation of the credibility of one of the witnesses. He also contends that there is no present need for an order to cease and desist and that the order contained in the initial decision is too broad.

We are convinced from a study of the record that the evidence fully supports the hearing examiner's findings that the respondents named herein, with the exception of Kennedy Marine Engine Co., Inc., agreed on a schedule of minimum prices at which they would sell General Motors diesel engine parts and that they further agreed not to depart from this schedule without prior notification to the others. The record also establishes that, except for a brief period, said respondents have maintained prices at a higher level than the minimum prices agreed upon. The evidence has been subjected to a thorough and careful analysis, reflecting the skill and perception of a most able hearing examiner, and we are in complete accord

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56 F.T.C.

with his appraisal of the facts and the inferences which he has drawn therefrom. In view of this excellent review of the case, we find it unnecessary to supplement the initial decision in any manner or to refer to the specific testimony and documentation upon which the findings and conclusions are predicated.

Respondent has objected to the hearing examiner's rejection of a portion of the testimony of the witness Frierson, president of one of the non-contesting respondents. The record discloses that prior to the termination of the hearings, the examiner noted that this witness had made certain inconsistent statements in his original testimony and, on his own motion, recalled him for the purpose of obtaining a clarification thereof. This witness, however, under questioning by the hearing examiner, failed to give a satisfactory explanation of his earlier testimony and made other conflicting and contradictory statements. We think that the hearing examiner's refusal to place any reliance on this portion of the witness' testimony was correct.

Respondent also contends that the plan to fix prices was never carried out and that an order to cease and desist is therefore unnecessary at this time. This argument completely ignores the evidence of record and must be rejected. Respondent's argument that the order to cease and desist is too broad is rejected upon the authority of *Maryland Baking Co. v. Federal Trade Commission*, 243 F. 2d 716 (4th Cir., 1957); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952).

Respondent's appeal is denied and the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This case having come on for final consideration upon the record, including the appeal of respondent William Patrick Kennedy, Jr., from the initial decision of the hearing examiner, and the Commission having rendered its decision denying the appeal and directing that the initial decision be adopted:

It is ordered. That the hearing examiner's initial decision filed April 7, 1959, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered. That respondents, United Engines, Inc., and Taylor Machinery Corporation, corporations, and William Patrick Kennedy, Jr., shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the initial decision.

Findings

IN THE MATTER OF

BROOKLYN FASHION CENTER, INC., ET AL.

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

Docket 7092. Complaint, Mar. 26, 1958—Decision, Nov. 20, 1959

Order requiring operators of a retail ladies' clothing store in Brooklyn, N.Y., to cease violating the Fur Products Labeling Act in the offer for sale of 12 fur pieces which were "leftovers" of a stock they had purchased ten years before, by failing to comply with labeling requirements; and by advertising which failed to disclose the true name of the animal producing a fur and named other animals, and failed to disclose the country of origin of imported furs and the fact that some furs were artificially colored, and used comparative prices and represented sale prices as reduced from regular prices without having any records as a basis for such pricing claims.

Mr. Thomas A. Ziebarth for the Commission.

Mr. Jacob S. Spiro, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this proceeding charges that Brooklyn Fashion Center, Inc., a corporation, and Sigmund Schwartz, an individual and officer of said corporation, hereinafter referred to as respondents, violated the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act in their operation of a ladies retail clothing store in Brooklyn, New York. Respondents denied the allegations of the complaint, jurisdiction of the Commission, and pleaded that respondents are not engaged in "commerce" as that term is defined in the Act. A hearing has been held during which evidence in support of and in opposition to the complaint was received. At the hearing, counsel for the parties entered into a stipulation as to some of the facts. Proposed findings of fact, conclusions, and order have been submitted by respective counsel. All findings of fact and conclusions of law not hereinafter specifically found or concluded are rejected. Upon the basis of the entire record herein, the hearing examiner makes the following findings of fact, conclusions of law drawn therefrom, and order:

FINDINGS OF FACT

1. The respondent Brooklyn Fashion Center, Inc., is a corporation organized and doing business under the laws of the State of New

York with its office and principal place of business located at 545 Fulton Street, Brooklyn, New York. The respondent Sigmund Schwartz, an individual, is president of the corporate respondent and controls, directs and formulates the acts, practices and policies of the corporate respondent. His address is the same as that of the corporate respondent.

2. The respondents are charged in the complaint with misbranding and false and deceptive advertising of fur products. With respect to the charge of misbranding, respondents contend that the fur products in question were purchased by respondents prior to the passage of the Fur Products Labeling Act and, therefore, the provisions of said Act have no application to respondents. Respondents further claim that the Act has no application to persons and corporations engaged in the sale of fur products at retail, but only applies to manufacturers and wholesalers. Respondents also deny that they are engaged in interstate commerce and that, therefore, the Act has no application as to them. Most of these contentions have been answered adversely to respondents—*Federal Trade Commission v. Mandel Brothers, Inc.*, decided by the Supreme Court of the United States on May 4, 1959. The evidence introduced at the hearing in support of the complaint shows that, on October 18, 1957, November 13, 15, and 29, 1957, an attorney-investigator for the Commission visited respondents' store and interviewed the individual respondent Sigmund Schwartz, president of the corporate respondent Brooklyn Fashion Center, Inc., and requested that Mr. Schwartz permit the investigator to inspect respondents' records concerning the prices of 9 pieces of fur products which respondents had advertised for sale in the Kings section of the Sunday issue of the New York News of February 10, 1957.¹ The respondents did not have any records showing the history or source of any of their fur products since they were "leftovers" of a stock of fur products which respondents had purchased 10 years before, and so informed the investigator. These 12 fur pieces were hanging on a rack in respondents' store. The investigator inspected the 12 pieces of fur products which remained in respondents' stock and made exact copies of the labels which were attached to four of said four products. These copies were marked for identification as Commission Exhibits Nos. 4, 5, 6 and 7, respectively, and received in evidence at the hearing. Evidently, the investigator was of the opinion that the labels on the other 8 pieces of fur products complied with the provisions of the Act, otherwise, copies of them would have been made and offered in evidence at the hearing.

¹ Respondents had remaining on hand in their stock a total of 12 pieces of fur products but only advertised 9 pieces for sale.

3. Commission Exhibit No. 4-a is a copy of a label attached to one of respondents' fur products. This label describes the fur as dyed "Marmot." Under the terms of the stipulation which was entered into between counsel for the parties, (Commission Exhibit No. 8-B), it was agreed, among other things, that "Marmot" is a fur which is obtained only from sources outside the United States. Therefore, it is found that, since the label identified as Commission Exhibit No. 4-a does not show the name of the country which produced the imported "Marmot" fur, respondents violated Section 4(2)(F) of the Act. *Benton Furs*, Docket No. 6501, August 23, 1957.

4. Commission Exhibit No. 7 is a copy of one of respondents' labels which describes the fur product as dyed "Persian." The Fur Products Name Guide does not list any animal under the name "Persian." Accordingly, it is found that this label does not show the name of the animal which produced the fur, in violation of Section 4(2)(A) of the Act.

5. The label on the fur product received in evidence as Commission Exhibit No. 5 identified the animal which produced the fur as "Coney," whereas, the animal which produced the fur was rabbit. It is found, therefore, that respondents violated the provisions of Section 4(3) of the Act even though the correct name of the animal which produced the fur was used on the lower portion of the label below the perforation. That portion of the label below the perforation is intended to be surrendered at the desk in respondents' store and does not remain attached to the fur product.

6. (a) Commission Exhibits Nos. 4, 5 and 7 demonstrate that said fur products were not labeled in accordance with the Rules and Regulations promulgated under the Act in that information required under Section 4(2) of the Act was mingled with non-required information on labels in violation of Rule 29(a) of the Rules and Regulations. On these particular labels, the names of colors that are not a part of the true name of the animal which produced the fur and the names of types of garments are non-required information and should not appear on the same side of the label used for disclosing required information. (b) Furthermore, Commission Exhibit Nos. 4, 5, 6 and 7 demonstrate that said fur products were not labeled in accordance with the Rules and Regulations under the Act in that information required under Section 4(2) was set forth in handwriting on the labels in violation of Rule 29(b) of the Rules and Regulations.

7. The respondents' advertising complained about will next be discussed. The advertisement which the complaint charges was a

violation of the Act was placed by respondents in the Kings section of the Sunday issue of the New York News on February 10, 1957. In this advertisement, respondents advertised 9 of their 12 pieces of fur products which then remained on hand at reduced prices. These 12 pieces were "leftovers" and had been in stock for 10 years prior to December, 1958. The individual respondent Schwartz testified that there had been no demand for fur products for the past 10 years and, in an effort to dispose of the remaining pieces, he placed the advertisement. Respondents had not purchased any fur products to replace their depleted stock during said 10 year period. The advertisement appeared only in the Kings County (Brooklyn) section of the News. The evidence shows that the circulation of the Kings section is restricted and intended for local distribution only. However, 175 copies of the Kings section were mailed to points outside the State of New York to men in the armed services who are residents of Brooklyn, to former residents of Brooklyn who had moved out of the State and wished to receive the Kings section, and the remainder to clipping services. Respondents contend that such a limited distribution is not sufficient as a matter of law to bring the respondents into interstate commerce. This question has been decided adversely to respondents by the Commission in previous cases—*De Gorter v. F.T.C.*, 224 F. 2d 270 (C.A. -9, 1957), and *Benton Furs, supra*. It is found and concluded that such a distribution in interstate commerce is sufficient to give the Commission jurisdiction.

8. Among the fur products included in said advertisement which are alleged to be in violation of the Act are the following:

(a) A "Persian Paw" fur coat and a "Natural Fox" coat are advertised. With respect to the "Persian Paw" coat, there is a failure to disclose the true name of the animal which produced the fur, namely, Lamb. With respect to the "Natural Fox" coat, the advertisement failed to disclose the member of the Fox family that produced the fur as required by the Fur Products Name Guide. Accordingly, it is found that respondents violated the provisions of Section 5(a)(1) of the Fur Products Labeling Act.

(b) A "Mouton Lamb" coat was included in said advertisement. Paragraph 12 of the stipulation entered into between Counsel (Commission Exhibit No. 8(b)) provides that the Mouton Lamb Coat referred to in the advertisement was composed of dyed mouton processed lamb. It is found, therefore, that respondents violated Section 5(a)(3) of the Act.

(c) A "Black Seal Dyed Coney" coat, a "Let Out Mink-Dyed Marmot" coat and a "Beaver-Dyed Raccoon" coat were also adver-

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tised. The stipulation (Commission Exhibit No. 8-B) provides that the "Black Seal Dyed Coney" coat referred to in the advertisement was made from the fur of rabbits. The term "Marmot" used in the advertisement was used to describe dyed Marmot. The term "Beaver-Dyed Raccoon" was used to describe the fur of a raccoon. Accordingly, it is found that said advertisement contained the names of animals other than the names of the animals which produced the fur in violation of Section 5(a) (5) of the Act.

(d) A "Persian Lamb" and a "Let Out Mink-Dyed Marmot" coat are also advertised. The name of the country of origin of the furs contained in said fur products are not disclosed. Paragraph 9 of the stipulation above referred to (Commission Exhibit No. 8(b)) provides that Persian Lamb and Marmot are furs which are and have been obtained only from sources outside the United States. It is found, therefore, that respondents violated Section 5(a) (6) of the Fur Products Labeling Act.

9. Paragraph 8 of the complaint alleges that, in said advertisement, respondents used comparative prices and represented that said fur products were reduced from regular or usual prices. It is also alleged that respondents failed to maintain full and adequate records disclosing the facts upon which such representations were based in violation of Rule 44(e) of the Rules and Regulations. As examples of the comparative prices set forth in said advertisement, were the following: "Reg. \$149 MOUTON LAMB COAT \$40"; "Reg. \$199 NATURAL FOX COAT \$25"; Reg. 59.50 KIDSKIN JACKET \$15." A subpoena duces tecum was served upon the individual respondent Sigmund Schwartz directing him to produce at the hearing respondents' invoices, records, etc., concerning the origin and history of each of said fur products. Mr. Schwartz appeared at the hearing and testified that he did not have any records of said fur products; that they had been purchased by him 10 years prior to the hearing, before the passage of the Fur Products Labeling Act, were "left-overs," and, after their disposal, respondents did not intend to engage in the sale of fur products in the future. Even though respondents purchased said fur products prior to the passage of the Fur Products Labeling Act, said Act became effective on August 9, 1952, and, thereafter, it was the lawful duty of respondents to comply with its provisions. Mr. Schwartz further testified that respondents had not sold any fur products for 10 years prior to the hearing. This being so, actually there were no regular prices for the fur products advertised in Commission Exhibit No. 1. It follows, therefore, that the representations of so-called "regular" prices in said advertisement were false. Accordingly, it is found that the allegations contained in Paragraph Eight of the complaint have been established.

CONCLUSIONS OF LAW

1. The respondents are engaged in commerce as the term is used and employed in the Fur Products Labeling Act. The acts and practices of the respondents as herein alleged are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Brooklyn Fashion Center, Inc., a corporation, and its officers, and Sigmund Schwartz, as an individual and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, transportation or distribution of fur products, in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, "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 in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Setting forth on labels affixed to fur products the name or names of any animal or animals other than 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.

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 mingled with non-required information.

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

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

1. Fails to disclose:

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

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

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

2. Contains the name or names of any animal or animals other than the name or names provided for in Section 5(a)(1) of the Fur Products Labeling Act and as prescribed under the Rules and Regulations.

C. Making price claims or representations in advertisements respecting comparative prices or reduced prices unless there are maintained by respondents adequate records disclosing the facts upon which such claims or representations are based.

OPINION OF THE COMMISSION

By TAIT, *Commissioner*:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision. The complaint charges respondents with misbranding and false advertising of fur products and the failure to maintain records in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. The only issue raised by the appeal is whether that portion of the order in the initial decision which pertains to misbranding is too limited in scope.

The complaint alleges in Paragraphs Four and Five, respectively, that certain of respondents' fur products were misbranded in violation of Section 4(3) of the Fur Products Labeling Act and that certain fur products were misbranded in violation of said Act in that they were not labeled in accordance with the provisions of Rule 29(a) and (b) of the Rules and Regulations promulgated under the Act. Although the hearing examiner found that these allegations were sustained by the evidence, he failed to include in the order contained in his initial decision any provision with respect to the practices covered by such allegations.

The initial decision does not explain why the hearing examiner did not inhibit these particular practices, and we can only assume that his failure to do so was an oversight. His findings with respect to the aforementioned allegations are supported by the record and

the unlawful practices found to have been employed by respondents should have been prohibited.

The appeal of counsel supporting the complaint is granted and the initial decision will be modified to conform with this opinion.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission having rendered its decision granting the appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents, Brooklyn Fashion Center, Inc., a corporation, and its officers, and Sigmund Schwartz, as an individual and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, transportation or distribution of fur products, in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Setting forth on labels affixed to fur products the name or names of any animal or animals other than 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.

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 mingled with non-required information.

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

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

1. Fails to disclose:

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

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

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

2. Contains the name or names of any animal or animals other than the name or names provided for in Section 5(a)(1) of the Fur Products Labeling Act and as prescribed under the Rules and Regulations.

C. Making price claims or representations in advertisements respecting comparative prices or reduced prices unless there are maintained by respondents adequate records disclosing the facts upon which such claims or representations are based.

It is further ordered, That the hearing examiner's initial decision as modified hereby be, and it hereby is, adopted at the decision of the Commission.

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

IN THE MATTER OF

RELIANCE WOOL & QUILTING PRODUCTS, INC., ET AL.

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

Docket 7165. Complaint, May 28, 1958—Decision, Nov. 20, 1959

Order requiring manufacturers in Bronx, N.Y., to cease violating the Wool Products Labeling Act by such practices as labeling and invoicing as "100% Reprocessed Wool," etc., quilted interlining materials which contained substantial quantities of non-woolen fibers, and by failing to label said wool products as required.

Mr. John T. Walker for the Commission.

Mr. Sol H. Sleppin, of New York, N.Y., and *Shipley, Akerman & Pickett*, of Washington, D.C., by *Mr. Alex. Akerman, Jr.* for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act. A stipulation has now been entered into between counsel supporting the complaint and counsel for respondents which provides, among other things, that respondents admit all of the material allegations of facts in the complaint and that the hearing examiner may proceed upon the stipulation to issue his initial decision in the proceeding, all intervening procedure being waived.

2. Respondent Reliance Wool & Quilting Products, Inc., is a corporation organized and existing by virtue of the laws of the State of New York, with its principal place of business located at 40 Canal Street, West, Bronx, New York.

Respondents Idel Greenfeld, Jacob Hoffman, Sam Cymbrowitz, and Morris Volman are president, vice president, secretary, and treasurer, respectively, of the corporation, and formulate, direct, and control its acts and practices.

3. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1956, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in that Act, wool products, as "wool products" are defined therein.

4. Certain of such wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such wool products were quilted interlining materials stamped or tagged as "100% Reprocessed Wool," whereas in truth and in fact such interlining material was not composed of 100% reprocessed wool, but contained substantial quantities of non-woolen fibers.

5. Such wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under

Order

the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder. The wool products contained fibers in various amounts which were not set forth on the fiber content tags attached to such products.

6. In the course and conduct of their business, respondents are in competition, in commerce, with corporations, firms and individuals likewise engaged in the sale of interlining materials.

7. The acts and practices of respondents constitute misbranding of wool products and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

8. In the course and conduct of their business respondents invoiced their interlining materials as "100% Reprocessed Wool," "100% Reprocessed Wool Exclusive of Ornamentation," and "80/20," meaning 80% reprocessed wool, 20% other fibers, whereas in truth and in fact such materials contained substantial amounts of fibers other than 100% reprocessed wool, 100% reprocessed wool exclusive of ornamentation, and 80% reprocessed wool and 20% other fibers, respectively.

9. The acts and practices set out in paragraph 8 have the tendency and capacity to mislead and deceive purchasers of such products as to the true fiber content thereof, and to cause such purchasers to misbrand products manufactured by them in which such materials are used.

10. The acts and practices of respondents set out in paragraph 8 are to the prejudice of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

11. The proceeding is in the public interest.

ORDER

It is ordered. That the respondents, Reliance Wool & Quilting Products, Inc., a corporation, and its officers, and Idel Greenfeld, Jacob Hoffman, Sam Cymbrowitz, and Morris Volman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the 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 interlining materials 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 identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to affix labels to wool products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents, Reliance Wool & Quilting Products, Inc., a corporation, and its officers, and Idel Greenfeld, Jacob Hoffman, Sam Cymbrowitz, and Morris Volman, 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 interlining materials, or any other materials, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers thereof on invoices or other shipping memoranda or in any other manner.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

In the initial decision filed by him, the hearing examiner found that the respondents had engaged in misbranding violative of Sections 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act and that they had misrepresented the constituent fibers of their interlining materials on invoices in violation of the Federal Trade Commission Act. Respondents have filed appeal. Such appeal does not except to the findings as to the facts contained in the initial decision but contends error respecting the scope of the order to cease and desist.

The respondents named in the complaint as parties to this proceeding are a corporation and four individuals serving as its officers, such individuals being joined in their representative capacities as officers and also as individuals. The order to cease and desist contained in the initial decision, which requires cessation of the acts and practices found unlawful, similarly names those respondent individuals both as officers and as individuals. Respondents do not object to being held in the order as officers, but contend that their inclusion

as individuals was erroneous and that such provision conflicts with our decision in *Kay Jewelry Stores, Inc., et al.*¹

In that decision, we held that certain admissions in the answer by the individuals there named respecting their serving as officers and directing the acts and practices of the corporate respondents, did not constitute adequate showing of necessity that they be joined in the order in their capacities as individuals. After duly considering the testimony and other evidence presented in support of and in opposition to additional allegations in that complaint which were not admitted, we further held that there was no showing that joining them in their individual capacities was required in the public interest. The factual situation there differs from that presented in the instant case, however.

Here, a stipulation as to the facts in lieu of other evidence was entered into whereby the respondents admitted all material allegations of fact contained in the complaint. The complaint herein alleges, the stipulation as to the facts therefore has admitted, and the hearing examiner duly found, that certain of the wool products "were misbranded by respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act" in the manner there specified; and it was similarly alleged, admitted and found that such products "were further misbranded by respondents" because not stamped or labeled as required under Section 4(a) (2) and that respondents had invoiced their interlining materials as being of designated fiber contents when, in fact, they contained substantial amounts of other fibers. We think the record clearly supports inferences of roles of prime responsibility and active personal participation by the respondent individuals in the acts and practices found unlawful. In these circumstances, the provision of the order joining the respondent individuals in their personal capacities is appropriate.

The hearing examiner having found misbranding in violation of Section 4(a) (2), the initial decision's order requires that respondents affix labels containing the information prescribed by that section of the Act. Under such section, an article subject to the Act is misbranded unless a label is attached showing (1) the identity and percentages of the constituent fibers of the product in the manner specified in subsection (A); (2) the percentage of any nonfibrous loading, filling or adulterating materials present as required by subsection (B); and (3) the name of the manufacturer or other persons designated in the Act as prescribed by subsection (C). The evidentiary

¹ In the matter of *Kay Jewelry Stores, Inc., et al.*, Docket No. 6445 (decided November 12, 1957).

matters relating to violations of Section 4(a) (2) which are recited in the aforementioned stipulation are limited to failure to correctly show fiber constituents as required by subsection (A). There accordingly is no evidentiary showing of prior failure by respondents to supply the labeling information prescribed by the companion subsections. In excepting to the order, respondents argue that its requirement that the label contain the information prescribed by subsections (B) and (C) contravenes principles applied by the Supreme Court² in a recent decision passing on the validity of an order issued by the Commission in a proceeding instituted under the Fur Products Labeling Act. The Court there expressly approved an order comparable in scope to the one here attacked.

Although the information contained in the instant record does not permit precise arithmetical tabulations of respondents' prior acts of misbranding, it does not follow that the scope of the order is improper. The stipulation contains no reservational language expressly identifying respondents' statutory infractions as few in number or concerned only with limited quantities of merchandise. Under the allegations of paragraph 3 of the complaint, the wool products misbranded as to the character and amount of their constituent fibers in violation of Section 4(a) (1) included, but were not specifically limited to, those falsely stamped as solely composed of reprocessed wool. Respondents' violations thus are comprised in the aggregate of those noted above, their violations of Section 4(a) (2), and those violative of the Federal Trade Commission Act resulting from the various categories of false and deceptive invoicing engaged in by them with respect to fiber constituents. Hence, the record clearly supports inferences of extensive and substantial misbranding and other statutory violations by respondents incident to a defined practice of supplying false fiber information respecting products subject to the Act; and the incidents of failure to comply with the requirements of Section 4(a) (2) have been integral facets of that over-all program. In these circumstances, a requirement that respondents' future labels supply all of the information made mandatory by Section 4(a) (2) has sound basis in law and public policy. Respondents' contentions to the contrary are rejected.

In the light of the previously mentioned decision in *Mandel Brothers, Inc.*, we agree that the form of the order, though not its substance, should be revised. To the extent that the appeal requests such revision, it will be granted but the appeal is otherwise denied.

The initial decision, thus modified, is being adopted as the decision of the Commission.

² *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385 (decided May 4, 1959).

FINAL ORDER

This matter having been heard by the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and the Commission having rendered its decision denying the appeal in part and granting it in part and having determined, for reasons stated in the accompanying opinion, that the initial decision should be modified:

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

It is ordered, That the respondents, Reliance Wool & Quilting Products, Inc., a corporation, and its officers, and Idel Greenfeld, Jacob Hoffman, Sam Cymbrowitz, and Morris Volman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the 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 interlining materials 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 identifying such products as to the character or amount of the constituent fibers included therein;
2. Failing to affix labels to wool products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents, Reliance Wool & Quilting Products, Inc., a corporation, and its officers, and Idel Greenfeld, Jacob Hoffman, Sam Cymbrowitz, and Morris Volman, 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 interlining materials, or any other materials, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers thereof on invoices or other shipping memoranda or in any other manner.

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 respondents named in the preamble of the order to cease and desist 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

FEDERAL EMPLOYEES' DISTRIBUTING COMPANY, INC.,
ET AL.

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

Docket 7289. Complaint, Nov. 5, 1958—Decision, Nov. 23, 1959

Order dismissing, for failure to sustain the charges, complaint charging a Los Angeles five-store buying service with representing falsely that it was a non-profit corporation affiliated with the Federal Government, that membership was limited to Government employees, and that only members who had paid a \$2 fee could make purchases; that all profits were passed on to its purchasing members; and that the retail price of its merchandise was cost plus 5%.

Mr. Eugene Kaplan for the Commission.

Mr. Edward L. Butterworth of *Butterworth & Smith*, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding is one brought under the provisions of the Federal Trade Commission Act, the complaint charging in substance that by reason of false advertisements relating to the nature and operations of respondent corporation and its business the public are misled and the respondents are, therefore, guilty of unfair and deceptive acts and practices and unfair methods of competition in commerce. The respondents deny having made any false, misleading, and deceptive representations and further deny that they have maintained a substantial course of trade in commerce and pray dismissal of the complaint. The charges will be hereinafter recited in detail, and the evidence pertaining thereto fully analyzed and discussed.

In this initial decision the hearing examiner dismisses the complaint and proceeding for reasons hereinafter more fully set forth. The complaint herein was issued November 5, 1958, and was there-

after duly served upon respondents, who, after certain preliminary motions had been disposed of, filed answer on February 26, 1959. A formal prehearing conference was held in Los Angeles, California, on February 18, 1959, as a result of which the time required for the hearing of the case was substantially curtailed. Hearings on the case-in-chief and the defense were also held in Los Angeles from March 2 to 4, 1959, inclusive. Upon the Commission's case having been rested, several motions to dismiss were made on behalf of respondent corporation and its officers, which motions were denied by the hearing examiner without prejudice to their renewal at the close of all the evidence (R. 205-213). The respondents thereupon proceeded with their defense, after which both parties rested (R. 348). The parties in due course filed their respective proposed findings of fact, conclusions of law, and orders, and the case was orally argued at length in Washington, D.C., on July 28, 1959, and final submission taken. The record is comparatively short, consisting of some 468 pages including over 100 pages of oral argument. The evidence itself consists of the testimony of an attorney-examiner of the Commission, the respondents Bishop and MacFarlane, officers of respondent corporation, and one G. F. Von Mueffling, its general manager. Documentary evidence consists of eleven exhibits of the Commission and 71 exhibits of the respondents pertaining to incorporation, business operations and the advertising questioned therein. The case was ably tried, briefed, and argued by the respective counsel and all issues necessary for determination fully presented. The proposals of the parties insofar as adopted are set forth herein, and all others have been rejected.

There is very little substantial dispute in this case as regards the evidence, although the contentions of the parties as to the nature and effect of the evidence are in direct contradiction. The burden of proof under Section 7(c) of the Administrative Procedure Act and Section 3.14(a) of the Commission's Rules of Practice for Adjudicative Proceedings rests upon counsel supporting the complaint, and as hereinafter more specifically found he has failed to maintain this burden with regard to the charges of false, misleading, and deceptive advertising, which are the gist of the complaint. It is found, however, that the Commission has jurisdiction of the subject matter of the complaint.

Respondents have raised the question of the Commission's jurisdiction on the premise that there is no substantial evidence upon which it can be found that the respondent corporation was engaged in interstate commerce. Since this question must be disposed of adversely to respondents, it will be decided before passing to the

merits of the case although reference will be made to certain factual findings which are more specifically referred to in the subsequent findings on the merits.

The complaint charges, in substance, that the respondent corporation, among other things, solicited memberships and also transmitted other advertising matter through the United States mails to members of the public located not only in California but in a nine-Western State area; that they also received payment for and distributed their membership cards by such mails and shipped certain commodities handled by said corporation from the State of California to purchasers thereof in other states and territories in a substantial volume of business in commerce. It is further charged that the merchandise offered for sale by respondents throughout their said business operations "are all commodities commonly sold, but not limited to, items normally offered for sale and sold in department stores, such as men's and women's wearing apparel, household goods and appliances, drugs, cosmetics, etc." Respondents admitted all of said matters except the alleged substantiality of their business in commerce and that they deal in "drugs." The further allegations as to the five alleged false, misleading and deceptive advertising practices of respondent corporation in interstate commerce state cause for complaint under both §§5 and 12 of the Federal Trade Commission Act and if such allegations were supported by the evidence, such findings would require the issuance of an order against respondents herein.

The Commission, of course, is a body of limited jurisdiction and in a certain limited sense a failure of proof on the merits might be considered to be failure of jurisdiction. But it is basic that the jurisdiction of a tribunal is not confined to deciding matters correctly (*State of Iowa v. F.P.C.* (C.A. 8, 1950), 178 F. 2d 421, 428, and *Coates v. C.I.R.* (C. A. 8, 1956), 234 F. 2d 459, 463). A court or agency is not confined to one set of standards and principles of judgment if it acts within the jurisdiction conferred upon it (*Pyramid Moving Co. v. U.S.* (D.C., N.D. Ohio, E. Div. 1943), 57 F.S. 278, affirmed 322 U.S. 714 (1944), rehearing denied 323 U.S. 811 (1944)). The power to hear and decide is what constitutes jurisdiction. Error in the decision which is rendered, while ground for an appeal, is not a failure of jurisdiction.

In the proceeding at bar the complaint alleges a cause of action under §5 of the Federal Trade Commission Act. With respect to the substantiality of the interstate business done, respondent claims, and with justification on the record, that the amount of sales made in interstate commerce are not proved with certainty. This is prem-

ised upon the testimony of the Commission's attorney-examiner Marita Kellum, who investigated the case, the testimony of corporate respondent's manager Von Mueffling, and a stipulation of record, which comprise the entire evidence pertaining to the volume of such interstate business. Miss Kellum testified without contradiction, in substance, that respondent Bishop told her in the course of her investigation that the mail order business done by respondents was "about one percent" of the total sales of corporate respondent (R. 146-147). Commission's Exhibit No. 6, a stipulation executed by respondents, stated that its annual gross sales in 1957 and 1958 were in the respective amounts of \$27 million and \$30 million. Upon this evidence, counsel supporting the complaint has urged that about one percent of respondents' gross sales in 1958 would be about \$300,000, which is, of course, a very substantial amount of business. But respondents contend that the testimony of Von Mueffling was to the effect that their sales outside the State of California were "an infinitesimal amount," "a very minor fraction of one percent" (R. 116). This speculative and uncertain evidence does not sustain a finding that sales made to people residing outside of the State of California were substantial. This, however, does not preclude the attachment of the Commission's jurisdiction. Von Mueffling also testified that some 7,000 to 9,000 copies of The Fedco Reporter were mailed out of the State of California each month (R. 117). This magazine, the evidence discloses, is substantially the only form of advertising that respondent corporation employs. Advertising is an integral part of a concern's business of production and distribution (*Ford Motor Co. v. F.T.C.* (C.C.A. 6, 1941), 120 F. 2d 175, cert. denied (1941), 314 U.S. 668; and *General Motors Corp. v. F.T.C.* (C.C.A. 2, 1940), 114 F. 2d 33, cert. denied, 312 U.S. 682); advertisements in commerce cannot be separated from the sale of goods and are themselves a part of interstate commerce, *Progress Tailoring Co. v. F.T.C.* (C.C.A. 7, 1946; 153 F. 2d 103); and interstate communication by newspapers as interstate commerce, (*Associated Press v. U.S.* (1937), 301 U.S. 103, 128-129).

In any view of the case the transmittal of some 7,000 to 9,000 magazines monthly which are chiefly advertising matter to members outside of the State of California who are prospective purchasers of respondents' merchandise is a substantial amount of interstate advertising regularly disseminated by mail and whether local sales are made in California (*Darr v. Mutual Life Insurance Co.* (D.C. S.D., N.Y., 1947), 74 F.S. 80, 84) or not made at all (*Jaffe v. F.T.C.* (C.C.A. 7, 1943), 139 F. 2d 112) is immaterial since the business as a whole constitutes interstate commerce.

Furthermore, in this proceeding the complaint alleges a cause of action under §12 of the Federal Trade Commission Act inasmuch as it clearly charges that respondent corporation, among other things, sells drugs and cosmetics. The evidence sustains such charges. The Fedco Reporter advertising such products is mailed monthly to 360,000 members. Respondents do not dispute the sale of cosmetics although they deny they sell drugs. Nevertheless, they have advertised drugs for sale. See Commission's Exhibit 2, p. 23, and the following exhibits of respondents: 39, p. 9; 62, p. 5; 63, p. 13; 64, pp. 5 and 13; 65, p. 15; 66, pp. 6, 10, and 14, and 69, p. 29, where vitamin tablets are advertised for sale. Vitamins are either a drug or a food under §15 (b) or (c) of the Act. See *F.T.C. v. National Health Aids, Inc., et al.* (D.C., Md. 1952), 108 F.S. 340, 345, and order granting temporary injunction, November 13, 1952, reported at F.T.C. Statutes and Decisions, 1949-1955, at pp. 780-784; and 49 FTC 601.

The respondents' said monthly magazine also advertises various foods and drinks which come under the definition of food in §15(b) of the Federal Trade Commission Act, such as candy, meats, liquor, nuts, fruit, and cheese. See Commission's Exhibits 1, pp. 5 and 25; and 2, pp. 2 and 15; and the following exhibits of respondents: 59, pp. 13, 26, and 32; 61, p. 10; 62, p. 11; 63, pp. 3 and 10; 64, p. 16; 65, p. 16; 66, p. 5; 68, pp. 13 and 26; 69, p. 31; 70, pp. 13 and 21; and 71, p. 2. Respondents also advertised cosmetics within the terms of §15(e) of the Act. See Commission's Exhibit 1, p. 5, and Respondents' Exhibit 69, p. 29. Respondents admit selling such latter products. While the advertisement of articles of food is not specifically alleged, it doubtless is included under the "etc." in the allegation of the complaint above referred to. It is probably unnecessary to determine specifically whether the extensive advertisements by respondents in their said monthly magazine of optical goods and services and hearing aids are devices under §15(d) of the Act, although within the said alleged "etc." they undoubtedly are such. Respondents also advertised furs extensively but that is immaterial here since this proceeding is not brought under the Fur Act. It cannot be urged that none of these advertisements misrepresented the quality or character of the goods so advertised because under §12 of the Act it is not necessary that an advertisement to be false relate to such matters. It is sufficient if any false advertisement is transmitted either by the U.S. mails or in commerce by any means "for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics." Respondents' advertisements certainly do this. In H.R.

No. 1613, 75th Congress, August 19, 1937, it was said with reference to this definition:

The definition is broad enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which there could be a practical remedy.

See *FTC v. Thomsen-King & Co., Inc.* (D.C.N.D., Ill., 1940), reported in Statutes and Decisions, FTC, 1939-1943, pp. 658-662, supersedes as denied C.C.A. 7, 1940, 109 F. 2d 516. In *F.T.C. v. National Health Aids, Inc.*, *supra*, the injunction granted was premised against distribution of cosmetics, not because there was any false representation as to their composition or quality but because they were advertised by U.S. mails or in commerce otherwise under a prize puzzle contest which amounted to a gambling transaction. See also *F.T.C. v. Winship Corp., et al.* (D.C.S.D., Iowa, 1940), reported in Statutes and Decisions, FTC, 1939-1943, pp. 663-666. It is now well-established that the Commission has jurisdiction over advertising by mail in the case of such products whether or not any sale has been made if the advertising was false in any particular. See *Shafe v. F.T.C.* (C.A. 6, 1958), 256 F. 2d 661, 664; *Muel-ler v. U.S.* (C.A. 5, 1958), 262 F. 2d 443, 446-447; and *Wybrant System Products v. F.T.C.* (C.A. 2, 1959), 266 F. 2d 571, 572; also *Gilbert S. Bishop, et al.*, FTC Docket No. 6554.

It is, therefore, manifest that the Commission has jurisdiction in the present proceeding under either §§5 or 12 of the Federal Trade Commission Act or under both sections. The respondents did not raise the question of whether respondent corporation was one of a type included under the definition of "corporation" in §4 of the Act but, inasmuch as jurisdiction over the subject matter cannot be conferred, that question has been fully explored by the hearing examiner and will be discussed in a subsequent portion of this decision which relates to the charge that the corporate respondent has falsely advertised itself as a non-profit corporation as charged in paragraph 4(d) of the complaint.

Counsel supporting the complaint called no consumer witnesses to testify concerning their dealings with the respondents or their reliance upon an interpretation of respondents' advertising. He was not required to do so. See *Zenith Radio Corp. v. F.T.C.* (C.C.A. 7, 1944), 143 F. 2d 29, 31, and *New American Library, etc. v. F.T.C.* (C.A. 2, 1954), 213 F. 2d 143, 145. It is clear from his proposals and oral argument that he desires such matters determined by the hearing examiner in the first instance as a matter of expertise.

Since it is conceded on the record that the respondents at the time of trial had approximately 360,000 regular and associate members, most of whom resided in the Los Angeles area or elsewhere in southern California not far from the place where the hearing was held, had there been complaining members of respondent corporation, their testimony would have been readily available. When Miss Kellum investigated the case, the membership rolls were open to her, and at that time there were about 270,000 (R. Ex. 22, p. 2, Nov. 23, 1957).

But in the absence of the testimony of any consumer witnesses as to the meaning or effect of the advertisements in the record which are indisputably those of respondent corporation, the hearing examiner must determine from his experience in dealing with such matters "the natural and probable result of the use of advertising expressions" contained in the challenged advertising. See *E. F. Drew & Co., Inc. v. F.T.C.* (C.A. 7, 1956), 235 F. 2d 735, 741. In the opinion of the examiner, if he possesses expertness in this field it is from his experience as indicated in the *Drew* case, *supra*. Experience in the interpretation of advertising by the Commission or its examiners arises from frequent dealing with that particular subject just as a domestic relations judge becomes familiar with the problems arising out of divorce cases or a criminal judge becomes familiar with the various types of evidence and trial tactics met with in such causes. Expertness does not imply the right to assume non-existent facts or to make unreasonable and unfair inferences. It is now well-established that in federal administrative law, "an administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven." See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, as quoted and followed in *Radio Officers v. N.L.R.B.* (1954), 347 U.S. 17, 48-49. See also *F.T.C. v. Pacific States Paper & Trade Assn.* (1927) 273 U.S. 52; *Brown Fence & Wire Co. v. F.T.C.* (C.C.A. 6, 1933), 64 F. 2d 934; *E. F. Drew & Co., Inc. v. F.T.C.*, *supra*. The doctrine of expertise is not a mysterious grant of unusual authority to the Commission or its examiners, but as the Court said in *Radio Officers v. Labor Board*, *supra*, at page 49, it had but restated,

* * * a rule familiar to the law and followed by all fact-finding tribunals—that it is permissible to draw on experience in factual inquiries * * * [50] (A) fact-finding body must have some power to decide which inference to draw and which to reject * * *.

In the following findings with respect to what the advertisements of respondents in question would mean, the hearing examiner has given consideration to the foregoing principles as well as the following ones: "(W)hatever statements are made, must be taken with and accepted in their ordinary sense." *DeForest's Training, Inc. v. F.T.C.* (C.C.A. 7, 1943), 134 F. 2d 819, 821. "Words mean what they are intended and understood to mean." *Bennett, etc. v. F.T.C.* (C.A.D.C., 1952), 200 F. 2d 362, 363. The Commission cannot interpolate language into advertising that is not there in order to construe it as misleading. *International Parts Corp. v. F.T.C.* (C.C.A. 7, 1943), 133 F. 2d 883, 888. "Advertisements must be considered in their entirety and as they would be read by those to whom they appeal." *Aronberg v. F.T.C.* (C.C.A. 7, 1942), 132 F. 2d 165, 167. See also *Ford Motor Co. v. F.T.C.* (C.C.A. 6, 1941), 120 F. 2d 175, 182, cert. denied 314 U.S. 668. "The important question to be resolved is the impression given by the advertisement as a whole * * * (A)dvertisements which create a false impression, although literally true, may be prohibited." *Rhodes Pharmacal Co. v. F.T.C.*, 208 F. 2d 382, 387, and authorities cited. If the advertising has a capacity and tendency to deceive there is no requirement that anyone be actually deceived, or that there was an intent to deceive.

In determining the facts in this proceeding upon the whole record as required by law, the hearing examiner has given full and impartial consideration to all the evidence and to the fair and reasonable inferences arising therefrom. He has carefully examined the pleadings and found those facts alleged in the complaint and admitted by the answer to be true. Thus, upon consideration of the whole record, including the factual matters already referred to, and, from his personal observation of the conduct and demeanor of the witnesses, the examiner makes the following:

FINDINGS OF FACT

Respondent, Federal Employees' Distributing Company, Inc., is a corporation existing and doing business under, and by virtue of, the laws of the State of California, with its principal offices at 2944 East 44th Street, Los Angeles, California, and its principal place of business or merchandise store located at 3928 West Slauson Avenue, Los Angeles. It also has four other such stores elsewhere in Southern California. It is a "non-profit" corporation (respondents' Exhibit 18) under Section 9200 of the Corporations Code of the State of California, which provides:

Findings

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A nonprofit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of nonprofit corporations or lines of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up.

Respondent David D. MacFarlane is president of the corporation; respondent A. Patrick Harrison is its vice-president; respondent Francis M. Bishop, its treasurer, and respondent Samuel W. Patterson, its secretary. These four constitute all the officers of the corporation and they are also members of the Board of Directors, which also is comprised of several other members of this non-profit corporation. All of the individual respondents reside in Southern California. It is undisputed that the Board of Directors, including the individual respondents herein, formulate, direct, and control the policies, acts, and practices of the corporate respondent, which trades under the name of FEDCO, Inc. It so trades by and through another California non-profit corporation "FEDCO, Inc." (see respondents' Exhibit 19), which was organized by respondents in 1954 for the purpose of effectuating, protecting, and preserving the trade name of FEDCO, which is the name under which the respondent corporation had built up its goodwill. It not only does its commercial business under that name but by that name alone it is known to or recognized by its membership at large or to those members of the outside public who are eligible to membership therein and to whom advertising relating to attaining such membership may be appealing. The corporation uses the name FEDCO on all its business forms, such as envelopes, letterheads, sales slips, and interoffice forms. It uses this name exclusively, in its signs both inside and outside of its several stores. It has used the full corporate name of Federal Employees' Distributing Company, Inc., only in official documents and where it has been advised by counsel that the law requires the use of such name since the long regular name of the corporation had no commercial value and was cumbersome. A large number of the exhibits in the case are current photographs of the exteriors and interiors of respondents' several stores where the name FEDCO appears on the large signs and other insignia and nowhere does the long regular corporate name appear. (See respondents' Exhibits 23 to 28, incl. and 37 to 51, incl.)

The history of the corporation is quite interesting and illustrates the phenomenal growth that is possible in a cooperative enterprise under the economic conditions which have prevailed generally the past ten years or so. In August 1949, a small group of federal employees in the Los Angeles area, realizing that there was then little prospect of an increase in pay to federal employees generally despite the rapidly increasing cost of living, organized the respondent corporation, whose principal purpose was to procure and distribute household appliances to federal employees at prices below those which prevailed in the Southern California area. They, therefore, incorporated under the provisions of Title I, Division II, Part I, Article II of the Corporation Code of the State of California as a non-profit corporation. The material section of the California Corporation Code, Section 9200, has hereinbefore been fully quoted. The charter of respondent corporation sets forth its purposes in detail (see Respondents' Exhibit 18). Its express purposes were set forth in Paragraph IV of its Articles of Incorporation and include two general basic purposes: (1) the fostering and cultivation of the social, educational and business relations of the members, the broadening of their interests in their occupations, the improvement of their standards of efficiency and production, a closer personal acquaintance, a friendly spirit of mutual cooperation, the gathering and disseminating of valuable information to its members including mutual assistance and vocational guidance, and the general welfare and prosperity of its members; and (2) the procurement of goods, materials, and services through cooperative effort and combined buying power of the members, thereby to effect savings for its members for their mutual benefit, and the purchasing, leasing, etc. of real and personal property, the carrying on of a general merchantile or merchandise business as well as the buying, selling, and dealing generally in all classes of goods, wares and merchandise and articles of trade, and the purchase, lease, etc., of necessary stockrooms, warehouses, and stores to effectuate such purposes.

At the commencement of this corporation some 200 federal employees each contributed a \$2 membership fee for a lifetime membership in respondent corporation. With this small capital, business naturally began on a very small scale. There was a small store and only one paid employee, the directors and other members helping in their spare time until the business got underway. Customer members ordered their merchandise from catalogues, and the respondent corporation ordered these specific items from manufacturers or dealers, and when the item had been produced the purchaser paid the item price plus 5 percent, which was an arbitrary figure to cover the cor-

poration's cost of doing business. As the membership increased, it became necessary to enlarge the company's quarters, to hire more assistants, and some of the officers found it necessary to give up their government employment and spend full time in connection with the business. While there have been some changes in the official personnel, the membership in attendance at the Annual Meetings, empowered by the charter and by-laws to vote in person or by proxy, have found the methods of operation so satisfactory that some of the officers and directors have continued throughout the approximate ten years of corporate existence. The membership continued to grow rapidly, and, since the profits of the corporation could not be distributed, they were eventually employed in expanding the business, which then moved to much larger headquarters, and finally led to the establishment of four large additional stores in the Southern California area.

In 1956 the pressures upon the corporation to enlarge the classes of persons eligible to membership were finally yielded to. At that time the corporation had approximately 200,000 members. Associate memberships were then provided for and "issued only to persons on the payroll of any of the several States or Territories of the United States of America or any employee of any political or municipal subdivision of such States or Territories, either in an active or a retired status" (R. Ex. 17, p. 1). Regular memberships were confined as before "to persons on the payroll of the Government of the United States of America, either on an active or a retired status, and to persons regularly receiving disability compensation or pensions through the United States Veterans Administration" (*Id.*). Honorary memberships were also granted at the same time in a limited number, but all voting power was vested exclusively in the holders of regular memberships (*Id.* p. 2). Any assets remaining on dissolution, however, were distributable pro rata to the then holders of regular and associate memberships (*Id.* p. 3). In 1958 there was a further expansion of the associate memberships "to employees of non-profit corporations organized and operating exclusively for educational, scientific or religious purposes" (R. Ex. 16, p. 1).

While the corporation's business is mainly retail sales made directly through its five stores in Southern California, it also makes occasional sales throughout certain States of the United States, including the former Territory of Alaska, and Guam. It does not, however, in any way purport to be or operate as a mail order company, its sales being for the pure accommodation of its members, and the evidence shows that these sales are only occasional and total but

about one percent of the business. Respondent corporation operates its said stores much as regular mercantile establishments do. Its officers are paid substantial salaries which are not out of line with those of comparable institutions and they devote their full time and attention to the management of such stores. The employees, such as salespeople, warehouse workers, etc., are union-organized and receive union wages under appropriate contracts. The respondent corporation pays regular federal corporate income taxes annually as well as state corporate income taxes to the State of California. The general manager is paid a straight salary plus a percentage based on the annual sales. In addition to its retail sales, respondent corporation receives as part of its income rent from concessionaires in its stores and income from advertising space purchased by manufacturers for their ads in The Fedco Reporter.

Respondent corporation extends credit in certain instances and makes credit loans on purchases of large items in collaboration with certain local California banks. It also has its own credit system for smaller purchases by the use of a so-called FED SCRIP which it handles within its own organization on special accounts. While delivery and installation services are furnished to member customers, such charges are not included in the listed and posted prices of merchandise as special arrangements and charges must be made for such services. Respondent corporation pursues its defaulting debtors in order to clear balances due it in substantially the same manner as any other retail mercantile store would do.

From a meagre 200 members at the time of organization in 1949, with a small one-room store, the rental for which was \$85 per month, and had but one paid employee, in a short decade, the company, as shown by the record, had developed into a large organization of over 360,000 members with five large retail stores, and from 325 to 500 paid employees who are dealt with by the corporation through union contracts. In January 1957 it had assets aggregating nearly \$4,000,000, capital arising from its \$2 membership fees of nearly \$600,000, and an earned surplus from its business operations of over \$1,600,000. Reference has already been made to the gross business of the corporation which aggregated \$30,000,000 in 1958. Growth in the early years was not rapid but was progressive and has rapidly expanded in the last six years as shown by numerous exhibits in evidence. To illustrate this, on November 21, 1953, there were 50,623 members; on April 22, 1955, 93,055; on April 23, 1956, 145,902; on November 26, 1956, 185,433; on April 15, 1957, 212,078; on February 10, 1958, 278,060; in April 1958, over 300,000; and at time of trial on March 2, 1959, approximately 360,000 (See Respondents' Exhibits 2-15,

20-22, 65, 69; R. 76 and 106). The number of Fedco Reporters mailed out monthly has naturally lagged somewhat behind the actual membership but the record discloses that up to June 1958, the total mail circulation of all such publications had been over 7½ million copies. A few copies are handed out in the stores but they are not mailed to non-members, the membership growth depending upon word-of-mouth, the members' privilege of bringing in two guests at a time to visit the stores, and the inclusion of an application form in the monthly magazine which members are occasionally urged to present to and have executed by their eligible friends.

This extraordinary growth of the membership of this particular corporation is probably a phenomenon best explained by two fundamental factors: (1) the rapidly increasing population and economic development of Southern California, and (2) the business policies of respondent corporation: (a) in keeping advised as to the level of retail prices in Southern California of the various commodities it handles; (b) in selling at anywhere between ten and fifty percent below the going retail rates for such commodities in that area; and (c) in not carrying any items for sale in its stores on which it cannot undersell its competition. Other facts particularly relevant to the specific charges of misrepresentation involved herein will be stated pertinently in connection therewith.

The complaint charges, paragraphs 4 and 5, that for the purpose of developing their business and encouraging the sale of products sold by them respondents have falsely represented and are now falsely representing to the general public and to its membership, both directly or by implication, that (a) said business is connected with, or sponsored by, the Federal Government; (b) that membership is limited to individuals employed by, or connected with, the Federal Government; (c) that only those persons who have paid a \$2 membership fee may purchase merchandise at respondents' stores; (d) that corporate respondent is a non-profit corporation and all profits are passed on to the purchasing members; and (e) that the retail price of merchandise is its cost to respondent corporation plus five percent. All of these allegations are specifically denied by respondents, paragraphs IV and V, of the answer. Each will now be considered in the order in which it is alleged.

As to the alleged claim of respondent corporation's connection with or sponsorship by the Federal Government, counsel supporting the complaint relies chiefly upon the use of the word "Federal" in the corporate title, Federal Employees' Distributing Company, Inc. Respondents contend that in all of their dealings with the public, except where reference to the exact corporate name is necessary, said cor-

poration has used the name and style of FEDCO, has had that name adopted officially as a trade name, has formed an operating corporation under that name, and has protected it in divers actions in the California courts. It further contends that in no event is the use of the word "Federal" illegal or deceitful. Counsel supporting the complaint, in addition to several general principles of Federal Trade Commission law, with which respondents do not disagree, relies chiefly on the following cases: *Federal Coaching Institute*, 49 FTC 1138 (1953); *The Capitol Service, Inc.*, 51 FTC 198 (1954); and *F.T.C. v. Army & Navy Trading Co.*, 21 FTC 541, 88 F. 2d 776 (C.A.D.C., 1937). Respondents correctly argue that these cases are not in point. Careful analysis shows that in each of them a private corporation organized for individual profit was using advertisements and literature definitely indicating a connection with the United States Government. *Federal Coaching Institute* and *The Capitol Service* cases, *supra*, each involved the sale of correspondence courses to prepare students for U.S. Civil Service positions, unmistakably indicating the seller's connection with the Federal Government itself, which alone can provide such Civil Service positions. In the latter case, it also appeared that sales agents made certain other false representations and that the advertising material pictured the dome of the U.S. Capitol under such conditions as to mislead prospective purchasers to believe that there was some connection between that respondent and the United States Government. Even in that case the use of the picture was not prohibited, but was permitted if accompanied by words stating clearly that respondent was a private correspondence school. In this latter connection, counsel supporting the complaint urges that the membership and the public dealing with respondent corporation are misled by a small picture of a domed building back of the column in *The Fedco Reporter* called "Washington Report," by the well-known Washington correspondent Jerry Kluttz, whose syndicated column on matters of special interest to federal employees appears in the *Washington Post* and other publications. The examiner has carefully considered Mr. Kluttz's column and the heading thereof and does not believe that the picture of the building there shown would mislead any person into believing that Jerry Kluttz was the Federal Government or that his report on proceedings in Washington affecting federal employees was a part of the official acts of the Government of the United States. This is also true as regards a large picture of the Capitol in Washington, which appeared only once on the outside cover of the July, 1958, issue of *The Fedco Reporter*. In the *Army & Navy Trading* case, *supra*, there were false representations that Army and Navy goods were for

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sale when a very small portion of the merchandise carried by the respondent were such goods. The use of the words "Army" and "Navy," of course, clearly implied official connection. Nor are other cases cited by counsel supporting the complaint relevant to the case at bar—*A.P.W. Paper Co. v. F.T.C.* (C.C.A. 2, 1945), 149 F. 2d 424, prohibiting the use of the term "Red Cross," and *Perloff v. F.T.C.* (C.C.A. 3, 1945), 150 F. 2d 757, prohibiting the use of the term "packing" where respondent was not a packer. It is also to be noted that in at least some of the foregoing cases consumer witnesses testified they were deceived by the advertising there in question.

Respondents' counsel has carefully analyzed all Commission cases involving the word "Federal," stating in their brief (p. 32): "During the period 1916 to 1958, the FTC instituted approximately 33 proceedings against respondents whose name began with the word 'Federal.' In 27 of these 33 proceedings, the word 'Federal' in respondents' name appears to have been ignored by the Commission." Counsel supporting the complaint does not challenge this statement. The remaining six cases are thereupon carefully analyzed and reveal that the word "Federal" standing alone is not *per se* deceptive, but must be used in connection with other words clearly connoting Governmental connection. In *Federal Civil Service Training Bureau*, 25 FTC 444 (1937), we have another Civil Service advertising case such as those above referred to. In *Federal Military Equipment Corp.*, 43 FTC 357 (1943), the advertising indicated that respondent was selling federal military equipment. In *Federal Organization, Inc.*, 29 FTC 504 (1939), respondents used a seal which stated their product was "a certified federal product approved by the Federal Research Laboratories * * *." In *Federal Institute of Meats & Marketing*, 24 FTC 199 (1936), a mail order correspondence course in butchering, respondent, located in Michigan, had its letterhead labelled "Central States Division Federal Institute—Meats—Marketing, Washington, D.C." with the name of its owner as the "Divisional Director" in the "Central States Office." In *Federal Bond & Mortgage Co.*, 8 FTC 194 (1924), it was held that the bonds offered were *per se* deceiving, respondent offering bonds referred to as "Federal bonds" throughout all its advertising. The sixth case is *Federal Coaching Institute*, *supra*, already referred to as a correspondence course providing Civil Service training. In most of these cases there was evidence that the consuming public was in fact deceived. In any event they are all clearly distinguishable from the use of the word "Federal" as respondents have incorporated it in their official corporate title here. There has been no flagrant attempt to use this name as a flamboyant "lead" to sell merchandise, and the record dis-

closes that the coined word "FEDCO" has been used almost exclusively in all of respondents' advertising matter as well as in all signs within and without all of their retail stores. The necessary, unemphasized small-type references in the monthly Fedco Reporter to the fact that it is published by the Federal Employees' Distributing Company, or in the application-for-membership forms do not appear to be deceptive. The word "Federal," as urged by respondents, is always modified by the word "Employees" wherever it does appear, and certainly the term "Federal Employees'" does not connote ownership by the Federal Government, as its employees are definitely individuals clearly distinguishable from the Government itself. The use of the full corporate name in the life-membership cards is required by California law, since such cards constitute securities under the California Corporations Code, and their issuance must be approved by the Corporation Commissioner. At any rate these membership cards are received by members after they have joined and not prior thereto; hence, it cannot even be found that they constitute a representation to procure members, let alone that they are misleading to the public in any way.

It is urged by counsel supporting the complaint that the term "Federal" should not be used "in any form or fashion directly or indirectly" by respondents as the use of this word is a fraud upon the public. He proposes that the use of the word "Federal" be prohibited. This corporate title has been used and employed by respondents for ten years; they have not misused it; this name was authorized by the California law, and approved and reapproved repeatedly by the proper California regulatory authorities. Of course this does not mean that the Federal Trade Commission is powerless to act if practices in commerce violate any law which it has the duty to enforce. See *Royal Oil Corporation v. F.T.C.* (C.A. 4, 1959), 262 F. 2d 741, 743, and cases cited. Excision of a corporate trade name is required only when no less drastic means can accomplish the protection of the public. See *Elliot Knitwear, Inc. v. F.T.C.* (C.A. 2, 1959), 266 F. 2d 787, 790-791, and cases cited. The word "Federal" has been, and is being, used by countless corporations and others throughout the country, just as the words "National," "Government," and "United States" are used. One needs only to look in the telephone directory of nearly any city of substantial size in the United States to see dozens of concerns using such words in their names. Does anyone for a moment believe that Government Employees Insurance Companies are agencies of the Federal Government or that U.S. Steel, U.S. Rubber, the National Broadcasting Company, Federal Storage Company, or National Bis-

cuit Company are Government corporations and not private enterprises?

All of the advertising matter used by respondent corporation has been carefully read and analyzed by the hearing examiner and he can find nothing therein which in his opinion tends to deceive or mislead the public with respect to this charge, and concludes with respect thereto that no eligible person has been, or can be, misled by the respondents' use of the name "Federal Employees' Distributing Company" into believing that this organization is connected with or sponsored by the Federal Government. Such name is only used by respondents where it is legally required, and it is not emphasized or placed in deceptive context anywhere. He therefore finds that respondents have not represented that the corporate respondent or its business is in any way connected with or sponsored by the United States Government.

The second charge is that respondents have falsely represented by their advertising matter that their membership is limited to individuals who are employed by, or connected with, the Federal Government. While counsel supporting the complaint concedes that as originally intended and first organized the respondent corporation was a service to a group of federal employees, he contends that now by reason of its growth and practices it is no longer such an organization, but has become a regular commercial "discount house" which, under the cloak of its original corporate charter, is misleading to the purchasing public and unfairly diverts trade from its competitors. The evidence pertaining to the expansion of the corporation's membership has heretofore been fully set forth. Respondents meet this issue in their answer by admitting that in prior years they did represent the corporate membership was limited to employees of the Federal Government, but deny each and every other allegation pertaining to said charge. The record discloses that each time the class of membership has been changed respondents have correctly advised all persons concerned of such change through their regular monthly publication, and that such changes have been duly made by appropriate amendments to the by-laws through legitimate action of the board of directors. Nothing in the corporate charter limits the corporate membership to present or former Federal employees, and, the by-laws having been appropriately amended to include new classes, the question then arises as to who can properly complain thereof, if anyone. Certainly the members who are already a part of the corporation cannot make complaint, and even if they had any valid complaint that the corporate officers had acted wrongfully in expanding the original membership, their remedy would appear to

be a judicial one in the courts of California, not a proceeding before the Federal Trade Commission. Counsel supporting the complaint does not make clear as to just how the outside public, who theretofore had not been eligible to membership, can properly complain or why the Federal Trade Commission should complain on their behalf. There certainly have been no false representations with respect to the classes of persons eligible to membership. To the contrary, they have been openly and correctly stated at all times, as hereinafter specifically found.

Prior to February 26, 1955, of course, there had been only one class of members, present or former U.S. Government employees—as the membership application forms then in force made manifest. On said date the board of directors received a report of its legislative committee proposing an amendment of Article I of the by-laws creating associate memberships for the first time. Honorary members are not important herein, since they paid nothing and were limited to an authorized maximum of 12 per year (R. Ex. 15). Actually, a half dozen such memberships have been granted “during the lifetime of the corporation” (R. 64-65). Subsequently the by-laws were amended in accordance with Article VII thereof, and the several classes of memberships were duly set forth in Article I as appears in respondents' Exhibit 17 under date of November 1, 1956. The associate memberships thereby provided for could “be issued only to persons on the payroll of any of the several states or territories of the United States of America, or of any political or municipal subdivision of any such states or territories, either in an active or retired status” (R. Ex. 17, p. 1, Art. I, §1(b)). Thereafter the classes of persons who might obtain associate memberships were further expanded to include “members of non-profit corporations organized and operated exclusively for educational, scientific, or religious purposes” (See R. Ex. 16, by-laws, as of March 22, 1958, Art. I, §1(b)).

The Fedco Reporter had properly published eligibility for corporate membership prior to any of these by-law amendments by stating that the applicant was required to be “on the payroll of the Government of the United States, or on an active or retired status.” See Fedco Reporter, February 1954, p. 10, R. Ex. 60; *idem*, July, 1954, p. 9, R. Ex. 6; *idem*, August, 1954, p. 8, R. Ex. 62; and *idem*, February, 1955, p. 10, R. Ex. 63. It is noted that in said February, 1955 (R. Ex. 63) publication a warning appeared at page 7, “Please do not sign a membership application for any person who you are not personally sure is an employee of the Federal Government.” As already stated, in February, 1955, consideration was given to enlargement of the membership, which thereafter became effective. All

concerned were fully notified of this change when it had been effected. See R. Ex. 64, p. 1, Col. 1, June, 1955 Fedco Reporter. Also, on page 12 of the July, 1955, issue of the publication, R. Ex. 65, the application form had been expanded to include the associate membership eligibility of state and local subdivision employees. This was true also in the next issue of the Fedco Reporter, p. 12, R. Ex. 66. After the later expansion of the Associated membership in March, 1958, to include members of certain types of non-profit corporations, the Fedco Reporter issues for March and subsequent months in 1958 (in evidence as Respondents' Exhibits 59 and 68 to 71, inclusive), each sets forth in a heavy-type column near the membership application form a clear, specific statement as to just who is eligible for FEDCO membership, and the application forms have been amended to include all such new classes of memberships.

In order to sell its memberships, the corporation was required to advise the California Corporation Commissioner just what the eligibility qualifications for corporate membership were before a permit would be granted for the issuance and sale of such membership certificates. Respondents' Exhibit 2 recites the original regulations regarding membership qualifications. Their Exhibit 3, dated April 22, 1955, shows the addition of associate memberships of state and municipal subdivision employees, while their Exhibit 14, dated February 10, 1958, sets forth the additional group of non-profit corporation employees who are eligible for membership.

The record abundantly shows that respondents, desiring that the corporation might grow, frequently gave precise information as to the qualifications for membership. This information was always factually correct at the time it was set forth in respondents' publications. There is, therefore, a complete failure of proof of the second charge, and it is found that respondents have not made any false, misleading, or deceptive representations, directly or indirectly, or deceptive representations, directly or indirectly, concerning the qualifications for membership in respondent corporation as charged in the complaint.

The third charge is that respondents have falsely represented that only those persons who have become members after paying a \$2 membership fee are permitted to purchase merchandise at corporate respondent's stores. It is true that the spouses of members may so purchase but if any unmarried member of respondent corporation might have such a specious objection, marriage would certainly cure any such inequality that might exist among the membership. As heretofore shown, other groups have been brought in to the corporation in recent years by virtue of the amendment of the by-laws. In

1956 the prior policy of not permitting guests to actually purchase merchandise in respondents' stores was changed and that subsequent thereto each member has been permitted to bring two guests who are permitted to buy on their own account. While members of families other than spouses have no absolute privilege of buying, they might enter the stores as guests. It is contended that this is an unfair practice in that the public has been misled into believing that they were gaining an exclusive privilege by paying a \$2 fee for membership. It does not appear that there has been any abuse of the guest privilege by any member or that such privilege has been denied to any member, and the argument of counsel supporting the complaint to the effect that this will bring in to respondents' stores the entire population of the area as customers, which practice would be unfair to the membership, seems far-fetched and without practical foundation. There is no evidence to indicate that if guests are permitted to purchase merchandise in the store members cannot get in or that there will be a shortage of merchandise for members desiring to buy the same.

In his brief, counsel supporting the complaint joins his argument upon this third charge with that relating to the second, and premises his contentions on both charges on the ephemeral conjecture that people pay a \$2 membership fee to join respondent corporation because of a "psychology of exclusiveness" or "snob appeal" which arises from respondents' advertising. This is a sort of argumentative shadow-boxing which is neither reasonable, practical, nor convincing. The examiner finds from this record that the sole reason eligible people ever joined this organization in such large numbers was to be enabled to purchase merchandise in respondents' stores at from ten to fifty percent cheaper than they could buy it elsewhere in the Southern California area. The corporation's extensive growth is in itself strong evidence that by and large they have been greatly satisfied and have spread the good news to their neighbors and friends. Respondent corporation never has been a social organization but only one which the Commission does not question actually provided high-class products at very low prices. Respondents' advertising shows that the brands of household equipment and other merchandise in many lines sold in the several FEDCO stores were leaders, such as, for example, Zenith, Philco, General Electric, and RCA-Victor television sets, and Admiral, Westinghouse and Hotpoint refrigerators. There is not a scintilla of evidence from which any fair and reasonable inference can arise either that any member ever joined the corporation except for the remarkable price advantages he expected to receive, or that merchandise and prices were not up to the advertisements thereof.

Counsel supporting the complaint contends that this case is analogous to *Parke-Austin & Lipscomb v. F.T.C.* (C.C.A. 2, 1944), 142 F. 2d 437, cert. denied 323 U.S. 753, wherein the respondent, a private profit corporation which was a book publisher, made false and misleading statements in its literature and other aids supplied to its salesmen by which the public were falsely advised that the respondent was a representative of the Smithsonian Institution which was the real sponsor of the books being sold and the solicited person was one of a specially selected small and exclusive group. There is utterly no valid analogy between that case and the one at bar. Other differences are that sales in that case were made by door to door salesmen using respondents' false preliminary advertising as a basis for their sales pitches. In the case at bar under substantial security measures, only members, their spouses, and friends come into respondents' stores, buy what they actually see and want without any pressures whatsoever, as and when they choose, and they do so without any preliminary misrepresentations.

It is, therefore, found that respondents have not in any way deceived or misled their prospective members among the public or their current members at any time into believing that only those who held \$2 life memberships could enter and purchase merchandise in respondents' stores. The third charge of the complaint, therefore, is not sustained by the evidence.

The fourth charge is that in their advertising respondents have falsely represented to the public that the corporation is a non-profit corporation. Respondents have not challenged the Commission's jurisdiction upon the ground they were not a profit corporation with the definition of "corporation" in §4 of the Federal Trade Commission Act (R. 396). Respondent corporation is in fact a non-profit corporation duly organized and existing under the non-profit corporation statute of California, already quoted herein. There can be no question whatsoever as to the non-profit character of respondent corporation under its charter. The said non-profit corporation law of California is rather unusual. The language of the statute provides that such a corporation "may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves." Certainly the business of respondents is a legitimate one. It has not been pointed out that it is unauthorized under California law or that the general nature of its business is in any way immoral or illegal. The sole charge is that the advertising practices are false, misleading, and deceptive under the Federal Trade Commission Act. A cursory ex-

amination of the many judicial decisions of the California Supreme Court and Courts of Appeals, under this non-profit corporation law, as collated in Volume 25, West's, Annotated California Codes, §§9200 et seq., reveals that many types of business organizations have been recognized by the California judiciary as being non-profit in character. In his argument, however, counsel supporting the complaint erroneously equates any corporations organized under this statute with eleemosynary corporations. It is true the statute says by way of illustration immediately after its language just above quoted: "such as religious, charitable, social, educational, or cemetery purposes." Certainly such corporations are authorized by and do exist under this statute. But immediately after the foregoing quoted language the following language also appears: "or for the rendering of services, subject to laws and regulations applicable to particular classes of non-profit corporations or lines of activity." This language clearly indicates that a non-profit corporation may be organized for the purpose of rendering any lawful services and that is exactly what the basic purpose of respondent corporation appears to be. Not every corporation that is non-profit is a charitable corporation. Whether or not a corporation is one for pecuniary profit or one of non-profit character depends, of course, upon the particular statute under which it is organized, but as a general proposition of law "non-profit corporations are not confined to those which are eleemosynary or charitable, but include business or auxiliary corporations not for profit, as well"—Volume I Fletcher's Cyclopedia of Corporations, page 238, §68 citing numerous cases. The California statute under consideration here has been given a like practical construction for many years by the authorities charged with its administration. And, specifically, respondent corporation here has not only been chartered as a non-profit corporation under said law (respondents' Exhibit 18) but has repeatedly appeared during a number of years before the Department of Investment, Division of Corporations, of the State of California, as a non-profit corporation under this statute and has been specifically authorized as such to issue membership certificates each time it has altered its membership qualifications or otherwise needed the issuance of additional certificates because of its increasing membership. (See respondents' Exhibits 2-14, inclusive.)

Another unusual feature of the said California statute is that it definitely recognizes the fundamental truth that no corporation, even one not organized for profit, unless richly endowed, can long survive and carry out its purposes unless it takes in more money than it expends. The statute expressly provides that no corporation formed or existing thereunder "shall distribute any gains, profits, or

dividends to any of its members as such except upon dissolution or winding up." Here it is contended, however, by counsel supporting the complaint that the advertisements in the San Diego newspapers at the time of the opening of respondents' store there in October, 1957, tend to mislead the public into believing that respondent corporation is a stock corporation declaring profits because of an expression in its large ads contained in such newspapers. The particular statement attacked is: "FEDCO is completely owned by its members. More than 240,000 lifetime owner-members are now collecting their dividends in the form of savings on all the purchases they make" (See Commission's Exhibits 8, 9, and 10). It is argued that the word "dividends" clearly indicates to the public a profit corporation, presumably issuing shares of stock on which dividends are declared. This does violence to the actual language of the challenged advertisement which clearly limits the meaning of the word "dividends" to be "in the form of savings on all the purchases they make." At any rate there is no evidence as to the size and spread of the San Diego newspapers' respective circulations and no official notice can be taken that any substantial number of such publications ever crossed the boundaries of the State of California. Hence these publications in any view could not constitute a misrepresentation in interstate commerce. They did not advertise any foods, drugs, cosmetics or devices and would not establish a §12 case even if mailed in large numbers within the State of California.

Of course, it is the general rule that in determining a corporation's character for tax or other purposes the charter is not necessarily controlling. It might be a charitable or non-profit one but still be held liable for taxes, for torts or otherwise (see Annotation 119 A.L.R. 1012, 1022-1027). Cooperative corporations have become quite numerous in recent years where there are no "profits" as such but where there is a distribution or accumulation of savings made through the cooperative operations (see Vol. I Fletcher's Cyclopaedia of Corporations, p. 398, §109). Many corporations of this character which are non-stock corporations conduct certain business operations and are still held not to be a corporation for profit (see Annotation 16 A.L.R. 2d 1345, 1349-1350).

There is no evidence that respondents have in any way violated the California statute by distributing profits to their members except in the form of such savings as they may effect in buying merchandise at respondents' stores. And respondents contend that with the expanded membership and increased buying power these savings naturally become greater and more assured.

Counsel supporting the complaint contends that the purchasing

public would not know that respondents are not permitted to distribute any gains under the California law but believe that a non-profit corporation does not keep its profits and therefore should sell at absolute cost. The examiner is unable to follow this reasoning as such counsel has also argued that a non-profit corporation is of necessity a charitable organization. If so, how can it have any profits? And why would the people believe that it would distribute profits? The simple truth is that no one believed, because of the non-profit character of respondent corporation, that in joining it they were joining a charitable organization, or that the \$2 lifetime membership fee would entitle them to go into respondents' stores forever and receive free merchandise. At least the orthodox view of charitable organizations is that they do not receive any moneys for the services they render or the clothes, food, and other articles they distribute to the poor and needy. Of course, even under California law when in the operation of a business charitable institutions make earnings over and above actual expenses of operation they are taxed like any profit corporation (see, for example, *Sutter Hospital v. City of Sacramento* (1952), 39 Cal. 2d 33, 244 P. 2d 390, where the hospital was held not entitled to a tax exemption since it is operated for the purposes of producing a surplus to retire bonded indebtedness and expand existing facilities). It is urged by respondents that the expertise of the Commission does not permit it to speculate upon what the public believes a non-profit corporation can do under any statute, the California statute in particular. It is not necessary for the examiner to resolve such a question however, since the respondents did not use the term "non-profit corporation" in direct connection with the advertisement of their goods but only where the law required, such as in the certificates of membership or in the statement in the magazine as to who the actual publisher was. Since it was merely stating the truth when it said it was a non-profit corporation and there was no effort to use such language to mislead the public, the examiner does not find that such legal use of the term in such limited ways is false, misleading, and deceptive. As already stated, in substance, people take out memberships in respondent corporation in order to procure high class merchandise at low prices. Of course, as they advertised in opening the San Diego store the membership received their dividends, not in the form of a check but "in the form of savings on all purchases they make." Furthermore, the facilities and services are brought closer to the membership when respondents open new stores from time to time which are effectuated by the use of any surpluses left in the corporate treasury above the cost of doing business. This in turn passes on more savings to more mem-

bers, and the examiner can see utterly nothing deceitful or unlawful in such business activities. It is urged, in essence, by counsel supporting the complaint that the management can not only earn a comfortable living but can pay themselves bonuses and otherwise unjustly enrich themselves. The ten-year record of this corporation does not support any such unjust inference respecting the individual respondents, but in any event the Federal Trade Commission has no jurisdiction to take over and regulate the internal affairs of respondent corporation, its authority being strictly limited to finding they have engaged in unfair practices which are deceitful of the public which is the basis of the present proceeding.

The cases relied upon by counsel supporting the complaint on this fourth charge are not in point. In *National Secretaries Assn., et al.* (1945), 40 FTC 352, a non-profit corporation was organized and incorporated as not for profit but was actually operated by its officers as a private business to promote the sale and distribution of their own books for profit. In the matter of *Albert Lane t/a Consumers Bureau of Standards* (1941), 32 FTC 1330, (C.C.A. 9, 1942), 130 F. 2d 48, it was held that respondent's claim that he operated as a non-profit trust gave the Commission no jurisdiction over him was invalid as the business actually was operated as purely one for private profit although advertised as a non-profit consumer research and educational organization; and in *Educators Assn. v. F.T.C.* (C.C.A. 2, 1939), 108 F. 2d 470, rehearing denied 118 F. 2d 562, respondents represented to purchasers that their books were published by non-profit concerns whereas in fact such books were sold for the private profit of the president of respondent corporation.

It is also urged that the recent decision in *Gov-Mart, et al.*, Docket No. 7049, is authoritative in the case at bar. The evidence there insofar as it proceeded in contest reveals a very different state of facts from those presented here and is therefore not in point. But in any event that case resulted in a consent order under agreement of parties and is not a precedent in other cases for any purpose. For the same reason counsel supporting the complaint cannot rely upon the consent order decisions in *Universal Training Service* (1955), 52 FTC 298, and *Oklahoma College of Audiometry, et al.* (1955), 52 FTC 558.

It is, therefore, found that the respondents have not falsely represented in any way that the corporate respondent is a non-profit corporation and that all profits earned are passed on to its purchasing members. Under its charter, of course, the said corporation, in event of its dissolution, would distribute its assets equitably among the then surviving voting and associate members. The fourth charge of the complaint should be dismissed.

The fifth charge of the complaint is that respondents have falsely represented that the retail price of merchandise sold in the corporation's stores is the cost of such goods to said corporate respondent plus five percent. This charge has been apparently premised on statements made in the Fedco Reporters for September and October, 1957 (Commission's Exhibits 1 and 2). In connection with the indicated price of merchandise advertised on page 2 of each of said publications appears the following: "Note: To all prices add 5% and 4% sales tax." This is preceded by an asterisk and in the listed merchandise the cost follows the price thereof. Elsewhere in each of said publications there also appear similar asterisks with the expression at the bottom of the page following another asterisk: "Add 5% and sales tax." The burden of the argument of counsel supporting the complaint is that from reading such expressions in the advertisements those who were induced to purchase merchandise in respondents' stores believed they were paying its actual cost to respondents plus five percent and have not been informed either that there would be additional charges for delivery and installation of products bought or that the corporation was buying such merchandise in quantity for less than the unit price. It is urged that this belief was further engendered by references in respondents' monthly publication to its non-profit character, as hereinbefore discussed.

When the corporation started its business in a very small way, it could not afford to buy merchandise for display or to rent space in which to display it. It was at that time really nothing more than a catalogue house and the members of that small organization came, examined catalogues, and selected and ordered their choice of hard goods items, such as refrigerators and television sets. Then someone from the store would go to the supplier in another part of the city, buy such article at the unit wholesale price, and bring it back to the store where the purchaser, after being notified it was ready, came and paid for it and transported it away. The practice grew up, therefore, of taking such catalogue unit price of any hard goods items, adding five percent thereto to cover the estimated cost of the store's operations, and giving the customer of an item two figures, one the actual unit cost and the other five percent thereof, the total of which was the price to him. There is no evidence in the record that the members were ever advised as to what the first figure meant or just why the combination of two figures was used. Their lack of capital and store space constituted the necessary and natural historic reason for setting prices in this manner in the early days of the business. As operations increased and business grew, however, the purchasing power became greater and display and storage space was

available so that by gradual stages the corporation was enabled to purchase and carry in its own stock substantial amounts of these hard goods products to display and sell right in the store. Respondents were then financially able to buy from the wholesaler or supplier at quantity discounts. Price tags on merchandise throughout the store, however, continued to carry a stated figure with an added five percent indicated thereon. It was stipulated that merchandise is sold by corporate respondent to its members at a retail price substantially in excess of five percent of the invoice cost of such merchandise to corporate respondent, and there is no claim by respondents that this markup is merely *de minimis*. The issue is not what the retail prices actually were but whether they were misadvertised by respondents.

During her investigation, on September 23, 1957, the Commission's attorney-examiner, Marita Kellum, entered the respondent's Lakewood branch store in Los Angeles with a friend her guest, and purchased some items of merchandise. It appears that both on the merchandise tags and on the adding machine slips she received in connection with her purchases that 5 percent and the sales tax were added to the base figure, which constituted the total cost of the items to her. (See Commission's Exhibits 11-A, B, C and R, 132-134, and 197-198.) Whether Miss Kellum ever advised respondent officers or others in the employ of the corporation about such purchases does not appear in the record. It is inferred that she did not do so, since it was not only unnecessary but contrary to the general practice of the Commission for its investigators to discuss the progress or findings of their investigation with the person under such investigation. It is therefore not inferred or found that cessation of these practices occurred because of the Commission's investigation.

At any rate, on November 23, 1957, by action of the board of directors, this practice of adding five percent to a stated figure as a pricing practice and advertising pertaining thereto was discontinued, effective as of January 2, 1958 (respondents' Exhibit 22, R. 255). The evidence shows there were three fundamental reasons for this action on the part of the board of directors. First, a recessionary period existing in late 1957 had created a competitive situation of much lower prices, particularly on hard goods, in the Los Angeles area, and the formula was no longer workable, as respondent had to reset prices based on the actual conditions. Unless it underpriced its competition it could not effect savings to its members, the prime cause of its very existence. Respondent's members are close shoppers and fully aware of going prices in their trading areas. Second, this pricing formula had long since ceased

to be practicable, since it had been established for the hard goods which were the only commodities sold in the early days of the company. They had expanded their operations to include soft goods, to which such fixed sales formula was inapplicable. Third, as the corporation grew, the clerical and bookkeeping expense of checking items, determining the five percent figure and adding it to the single unit price became burdensome and expensive. The last two reasons are continuing and permanent ones. Respondents have now taken over various concessions to which the former pricing practice could not apply, and have found greater efficiency and economy in selling on a "one-figure price" basis. It is extremely unlikely that there will be a resumption of such former two-figure pricing practice on their part. It no longer has any utility in the company's operations, and is wasteful and expensive to it in actual operation. The board of directors have also given every possible assurance that under no circumstances will they revert to such a practice, even offering to enter into a stipulation satisfactory to the Federal Trade Commission regarding such practice. The examiner, however, rejected such a proffer on the ground that it was an administrative matter over which he had no jurisdiction in a quasi-judicial matter (although from his observation of the witnesses he has utterly no doubt of the good faith of the offer). Such a pricing practice had been discontinued nearly a year before the instant proceeding was instituted. The facts clearly indicate that there is no reasonable probability that such a practice will be resumed. The evidence, therefore, comes within the criteria clearly recognized by the Commission for dismissal of charges on the ground of discontinuance in its recent opinions in *Ward Baking Co.*, Docket No. 6833 (June 23, 1958) and *The Firestone Tire & Rubber Company*, Docket No. 7020 (January 9, 1959) and cases cited in each of said decisions.

Even if the representations with regard to pricing were false, dismissal of the fifth charge on the ground of abandonment of such practices would, therefore, seem to be warranted in the exercise of a sound discretion. The examiner dismisses this particular charge, however, for a more basic reason. There is no proof that the respondents' advertising has ever misled or deceived their customer members into believing that this former pricing practice was the actual cost of merchandise to the corporate respondent plus five percent. It cannot be inferred reasonably that the addition of these two figures would lead the customers to believe that the five percent was only a handling cost while the basic figure was the actual

cost to the corporation. The examiner disagrees with the contention of respondents that the drawing of inferences by the use of "expertise" can only occur where there is an intent to mislead, a patently false representation, or a previous line of decision condemning such pricing practice. The examiner merely finds that upon the evidence he cannot determine with any degree of certainty that the public believed what counsel supporting the complaint contends for. There is not a scintilla of evidence that anyone was concerned in the least with the two-figure price but only whether the total price to the purchaser was less than such purchaser could buy the product elsewhere. The positive evidence in the case given by respondents' officials negates any extreme inference that might possibly be drawn respecting this matter. Both treasurer Bishop and president MacFarlane testified positively that the corporation had never represented directly or indirectly, by any devices or advertising, that it sold merchandise at cost or at five percent above cost, and there was no cross-examination to break down these positive statements. To the contrary, the evidence shows that the cost of doing business had increased very substantially during recent years and that the corporate policy of selling to its customers at lower cost than they could purchase elsewhere has always kept down the actual cost of merchandise sold. The evidence contradicts any inference that respondents were interested in deceiving the public as to their actual price savings at respondents' stores over prices charged by competitors.

It is, therefore, found that the fifth charge is not sustained by the evidence and that respondents have never misrepresented in any way that the retail prices of merchandise sold by them is the cost of such merchandise plus five percent.

FACTUAL CONCLUSIONS

While the record is comparatively short, both counsel, by extensive and eloquent written and oral arguments and numerous proposals, have presented so many matters that to pass specifically upon each in this decision would unduly extend it. Only the basic contentions are sought to be determined herein. In concluding that counsel supporting the complaint has failed to sustain each of the five charges in question, the examiner has endeavored to apply the rule of reason to the evidence relevant thereto, viewed from the standpoint of those members of the public who were or are eligible prospective members of the respondent non-profit corporation.

While some Government employees and those of eleemosynary institutions certainly do not possess the superior intelligence of those in the highest offices and places, the examiner has preferred not to consider such persons as in an extremely low grade of intelligence, as appears to be urged by counsel supporting the complaint, but rather to consider them as the "unthinking, the ignorant, the credulous." An advertisement must be considered, it is true, in its entire context, i.e., "from its general fabric, not its single threads," as stated in *Ford Motor Co. v. F.T.C.* (C.C.A. 6, 1941) 120 F. 2d 175, 182, as counsel supporting the complaint has urged. But neither must it be given a technical, forced, or unnatural construction in order to sustain any charge. In the case at bar none of the challenged practices of respondent, either past or current, are false *per se*. To infer that any of them may have the capacity and tendency to mislead or deceive, such inferences must be based upon the evidence in the record fairly considered. "The 'expertise' of a commission usefully serves in evaluating the evidence, but that expertise cannot supply evidence" (*Capital Transit Co.* (C.A.D.C., 1953), 213 F. 2d 176, 185-187). The examiner, after careful deliberation under the foregoing principles and others quoted or referred to elsewhere herein, has not found that any of the prospective members of the respondent corporation have been in the past or could be in the future deluded in any way by the advertising statements alleged in the complaint to be false, misleading, and deceitful.

Furthermore, a fair consideration of the whole record reveals no facts establishing the existence of any real, substantial, and specific public interest in this proceeding. There is no evidence that respondents have charged those who bought merchandise improper or exorbitant prices, or sold them inferior goods, or otherwise deceived them by any advertisement or other alleged misrepresentation, and it does not appear that any person has ever made complaint of having suffered loss by reason of having been misled by the alleged unfair practices of respondents. The record affirmatively shows that the Commission's investigator devoted considerable time to the examination of respondent corporation's membership rolls; that she actually called upon and interviewed some ten members; that she took verbatim notes in shorthand of what they said to her; and that she then officially reported such matters to her superiors. During her testimony, upon objection, the examiner refused to direct her to produce her confidential notes. But the record shows that at the time she made her investigation in the fall of 1957 there were some 270,000 members of respondent corporation

and that some 18 months later, at the time of hearing, such membership had increased to about 360,000, most of which vast membership lived within the Los Angeles area; thus many thousands of member customers were not far from the place where the hearing was held. But not one of them was called to testify. As aptly held in *S. Buchsbaum v. F.T.C.* (C.C.A. 7, 1947), 160 F. 2d 121, 123-124:

* * * We find in this record no evidence of any injury to any dissatisfied customer, indeed, there are no dissatisfied customers so far as this record discloses. It is intimated that the injury will occur to those who have been "long accustomed to the worth and use of glass." If this class of customers would consult their lexicons and inform the merchants as to the kind of glass they desire they will never be misled. Certainly they can not be misled or injured by petitioner's advertisements.

The Commission contends that actual deception of purchasers need not be shown in its proceedings, and that representations which have a "capacity" to deceive may be proscribed. This is quite true * * *. However, even though there be no proof of actual deception required, there must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest (15 U.S.C.A. sec. 45(b)). Here the Commission made no finding that the deception, if any, had ever resulted in or had any tendency to result in detriment to the purchasing public. We find nothing in the findings to support the conclusion that the acts and practices are "all to the prejudice and injury of the public."

Counsel supporting the complaint has requested an order which, among other things, would prohibit respondent corporation from using the name "Federal Employees' Distributing Company" or any other similar name or contraction of any such name, and prohibiting any representation that respondents are "engaged in a non-profit enterprise." The most probable effect of any such an order would be to put respondents completely out of business for no demonstrable legal reason. The least that such a capricious order would do would require respondents to disrupt their entire organization and membership by reincorporating under a different statute and an entirely different name with great loss of business, good will, cash, and other assets. The examiner is loathe to exercise any authority for purely destructive purposes when the record discloses that respondents have created a vigorous competition in the Southern California area in the merchandise they deal in and have sold high class merchandise at extremely low prices. The whole purpose and trend of Federal legislation for the past seventy years has been to prevent monopoly and reduce the cost of commodities and services to the American public. To issue the drastic order

requested would violate these basic tenets of antimonopoly law and could have the probable effect of increasing prices to the public in Southern California. Certainly this Commission has no authority to change the statutory law of California. If respondent non-profit corporation is violating its charter, the only legal action available is *quo warranto* brought by the State of California itself (see *Vesper v. Forest Lawn Cemetery Assn.*, 20 Cal. A. 2d 157, 169, 67 P. 2d 368, 374, and cases cited). While it is insisted by counsel supporting the complaint that respondents' enterprise has become nothing more or less than an ordinary discount house, they vigorously deny this. In the examiner's opinion, it is immaterial what respondents' business may properly be called. It is in essence a buying service. Perhaps such a buying service is an unorthodox manner of doing business, at least when that business grows large enough to form an effective competition to others dealing in the same commodities in the same area. But unless the practices such an enterprise engages in are unfair in commerce, the Commission has no authority to proceed further. It is stipulated in the record that respondent corporation has competition, but only in Southern California. It is, of course, unnecessary to prove the existence of competition in commerce if unfair acts and practices in commerce are established (see *Progress Tailoring Co. v. F.T.C.*, *supra.* at page 105). But the Federal Trade Commission Act cannot be expanded by the examiner under quasi-judicial fiat merely in order to prohibit a California non-profit corporation from competing with others in ways that he or others might possibly believe to be unusual or distasteful. The expertise of an administrative agency does not empower it to rewrite the laws it is charged with enforcing, which is a function of Congress itself (see *Atalanta Trading Corporation v. F.T.C.* (C.A. 2, 1958). 258 F. 2d 365, 374).

Upon the findings of fact hereinbefore made, the examiner makes the following:

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding.
2. None of the respondents have committed any unfair and deceptive acts or practices, or used unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.
3. There is no clear, specific and substantial public interest in this proceeding.

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

It is ordered, That the complaint be, and the same hereby is, dismissed in its entirety as to each and all of the respondents.

DECISION OF THE COMMISSION

The Commission having considered the hearing examiner's initial decision, filed on September 24, 1959, wherein the complaint in this proceeding was dismissed, and having determined that said initial decision is appropriate in all respects:

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

IN THE MATTER OF

MAX H. GOLDBERG TRADING AS NOVEL COMPANY

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

Docket 7360. Complaint, Jan. 14, 1959—Decision, Nov. 23, 1959

Order requiring a Chicago distributor of dolls, clocks, electric appliances, and other merchandise, to cease furnishing to operators and members of the public, push cards and instructions for their use in selling his merchandise.

Mr. William A. Somers for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 14, 1959, issued and subsequently served its complaint upon the respondent Max H. Goldberg, trading under the name of Novel Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. Respondent filed his answer in due course, whereupon hearings were held before the undersigned hearing examiner upon the issues presented by said complaint and answer. At the close of all evidence proposed findings of fact, conclusions of law, and order, together with reasons therefor, were filed by counsel for respondent and counsel supporting the complaint. Upon consideration of the entire record herein, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Max H. Goldberg is an individual trading as Novel Company, with his principal place of business located at 216 West Jackson Boulevard, Chicago, Illinois.

PAR. 2. Respondent is now, and for more than six months last past has been, engaged in the sale and distribution of dolls, clocks, electric appliances and other articles of merchandise and has caused said merchandise, when sold, to be transported from his place of business in Chicago, Illinois to purchasers thereof located in the various states of the United States other than the State of Illinois. There is now, and has been for more than six months last past, a substantial course of trade by respondent in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his business as described in paragraph 2 hereof, respondent in soliciting the sale of, and in selling and distributing his merchandise, furnishes and has furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by respondent, and which is typical of the practices of respondent, is the following:

Respondent distributes, and has distributed, to operators and to members of the public certain literature and instructions, including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise and circulars explaining respondent's plan of selling and distributing his merchandise and of allotting it as premiums or prizes to the operators of said push cards, and as prizes to members of the purchasing public who purchase chances or pushes on said cards. One of respondent's said push cards bears 54 names with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the name selected. Said push card has 54 partially perforated discs. Each of said discs bears one of the names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the disc is pushed or separated from the card. The push card also has a larger master seal and concealed within the master seal is one of the names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a doll.

The push card bears the following legend or instructions:

LUCKY NAME UNDER LARGE SEAL RECEIVES THIS

New, Exciting, Glamorous
Million Dollar Doll
Miss T.V. Queen

(Illustrated
by picture
on push card)

SHE IS THE T.V. TOAST
FROM COAST TO COAST

See How beautifully and completely she is dressed with her attractive red rayon satin dress. Saran hair can be washed and set.

A NEW 20-INCH BEAUTY

- Rich, rayon satin dress
 - Newest, blonde hair-do
 - Soft, lifelike body
 - Smart, high fashion shoes
- (Illustrated by
picture on push card)

(Illustrated by

Picture on push card)
and her own 3 piece
Dresser Set (NOT A TOY)
Every little girl will love this beautiful dresser set . . . all her own . . . colorful and well made. Comb, brush and mirror in smart shape like big sisters.

She has her
own BRA,
PANTY and
NYLON HOSE

No. 1 pays 1¢
No. 9 pays 9¢
No. 19 pays 19¢
No. 21 pays 21¢
No. 24 pays 24¢
ALL others
pay only 29¢
NONE HIGHER

(Illustrated by
picture on
push card)
Nos. 50, 60, 70
EACH RECEIVE
BALL PEN

WRITE YOUR NAME ON
REVERSE SIDE OPPOSITE
NAME YOU SELECT

(Illustrated
by picture
on push card)
SIMULATED
PEARL
EARRINGS
BRACELET
NECKLACE
and RING

PAR. 4. Sales of respondent's merchandise by means of said push cards are made in accordance with the above described instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above described instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid and the amount to be paid for the merchandise or the chance to receive the merchandise are thus determined wholly by lot or chance.

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Order

PAR. 5. Respondent furnishes and has furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of his merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plan or method involved in the sale of said merchandise by means of said other push cards is the same as that hereinabove described, varying in detail only.

PAR. 6. The persons to whom respondent furnishes and has furnished said push cards use the same in selling and distributing respondent's merchandise in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plans or methods in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the government of the United States.

PAR. 7. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondent and the element of chance involved therein and thereby are induced to buy and sell respondent's merchandise.

CONCLUSION

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

ORDER

It is ordered, That Max H. Goldberg, individually and trading under the name of Novel Company, or under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others pull cards, push cards or other lottery devices, either with merchandise or sepa-

ately, which are designed or intended to be used in the sale or distribution of respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondent with selling and distributing merchandise by means of lottery schemes in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from that decision.

Two arguments are presented in the appeal. The first is that the Commission does not have jurisdiction to prohibit the mailing of push cards in interstate commerce and the second is that the furnishing of push cards to be used in selling merchandise by means of lottery schemes is not contrary to the established public policy of the United States. Both of these arguments have been previously considered and rejected by the Commission and the courts. *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (9th Cir. 1952); *Gay Games v. Federal Trade Commission*, 204 F. 2d 197 (10th Cir. 1953); *Surf Sales Company v. Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958); *Bernard Rosten v. Federal Trade Commission*, 263 F. 2d 620 (2nd Cir. 1959). As stated by the Court in *Surf Sales Company, supra*, "The law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we have here, is contrary to the established public policy of the United States and the sale and distribution, in interstate commerce of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act."

The evidence adduced in this matter establishes beyond question that respondent is engaged in a practice which the Commission and the courts have repeatedly and consistently held to be illegal. In view of the numerous decisions on this point, it is difficult to believe that a respondent can contend seriously that such a practice does not constitute a violation of the Federal Trade Commission Act.

It is noted that in the first paragraph of the initial decision the hearing examiner incorrectly refers to the complaint as charging respondent with the use of deceptive acts and practices in commerce. The initial decision will be modified, therefore, to correct this statement.

Respondent's appeal is denied, and the initial decision will be adopted, as modified, as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the initial decision of the hearing examiner and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the initial decision be modified by striking the words "and deceptive" from the fifth line of the first paragraph thereof.

It is further ordered, That the hearing examiner's initial decision as modified hereby be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

RADIO TELEVISION TRAINING ASSOCIATION, INC.,
ET AL.¹CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6616. Complaint, Aug. 21, 1956—Decision, Nov. 24, 1959

Consent order requiring a New York City corporation organized to sell at a profit correspondence courses in the practice and theory of radio and television, to cease misrepresenting its business as an association with members united in a common effort and for the particular purpose of advancing the science of television and radio training.

¹ The complaint was dismissed June 30, 1959 as to Frank Brown, individually.

Further charges of the complaint were disposed of in a consent order dated July 27, 1960, 57 F.T.C. —.

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

Mr. S. F. House for the Commission.

Glick & Wachtel, by *Mr. Harry H. Wachtel*, of New York, N.Y., for respondents.

INITIAL DECISION AS TO ONE ISSUE ONLY—USE OF WORD
“ASSOCIATION” IN RESPONDENT’S NAME AND OTHERWISE

The original complaint herein, charging respondents with violation of the Federal Trade Commission Act by reason of having made “grossly exaggerated, false and misleading” representations with respect to the correspondence school which they conduct, offering courses of instruction in the practice and theory of radio and television, was amended March 31, 1959, with respect to the respondents’ use of the word “Association.” The charges regarding the use of the word “Association,” as amended and set forth in revised paragraphs 9 and 10 of the complaint, are as follows:

“PAR. 9. In addition to the use of the corporate name in connection with their business, respondents also use the name Radio Television Training Association and the letters RTTA, meaning Radio Television Training Association, without reference to the full corporate name, Radio Television Training Association, Inc.; respondents also make use of such expressions as ‘become a member of this association’ and ‘Naturally as president of this Association * * *’

“By and through the use of said names, letters and expression, singly and in combination, respondents, directly and by implication, represent that respondents are organized into and comprise an association with members who are united in a common effort and for the particular purpose of advancing the science of training in television and radio.

“PAR. 10. Said representation was, and is, false, misleading and deceptive. In truth and in fact, the respondents are not organized into and do not constitute an association for any purposes whatsoever; but instead constitute a corporation organized for profit, which, under the direction of the individual respondents, is operated for the sole purpose of selling courses of instruction in television and radio, at a profit.”

Thereafter, respondents Radio Television Training Association, Inc., a corporation; Leonard C. Lane and Harvey C. Kaplan, individually and as officers of said corporation; their counsel, and

counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Acting Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Radio Television Training Association, Inc. was a New Jersey corporation and is now a New York corporation, with its office and principal place of business located at 52 East 19th Street, New York, New York, and that respondents Leonard C. Lane and Harvey C. Kaplan are officers of said corporation and formulate, direct, and control the policies, acts and practices thereof, their address being the same as that of said corporate respondent.

This agreement disposes of the issues presented by paragraphs 9 and 10 of the amended complaint herein, and is applicable to all parties herein except as to National Home Study School; Leonard C. Lane and Harvey C. Kaplan as officers thereof; and Frank Brown individually, the complaint having heretofore been dismissed as to these parties. The remaining issues as to the remaining parties will be otherwise disposed of.

This agreement provides, among other things, that respondents signatory thereto admit all the jurisdictional facts alleged in the amended complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that, as to that part of this proceeding disposed of by this agreement, the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the amended complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the amended complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents signatory thereto that they have violated the law as alleged in the amended complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

As to that part of this proceeding which is disposed of by this agreement, respondents signatory to said agreement waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of

the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of the issue as to the use of the word "Association" in the corporate respondent's name and otherwise, as set forth in paragraphs 9 and 10 of the amended complaint herein, and insofar as it relates to the respondents signatory to said agreement; and adequately prohibits the practices charged in said paragraphs 9 and 10 of the amended complaint as being in violation of the Federal Trade Commission Act. Accordingly, the hearing examiner finds the disposition of said issue at this time to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered. That respondents Radio Television Training Association, Inc., a corporation, and its officers, and Leonard C. Lane and Harvey C. Kaplan, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of courses of instruction in commerce as "commerce" as defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "association or any abbreviation or contraction thereof, as a part of the trade or corporate name under which the respondents conduct their business; or representing in any other manner or by any other means, directly or indirectly, that respondents' business is an association of any nature.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of November, 1959, become the decision of the Commission; and, accordingly:

It is ordered. That respondents Radio Television Training Association, Inc., a corporation, and Leonard C. Lane and Harvey C. Kaplan, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Decision

IN THE MATTER OF

ALEX J. HADID ET AL. DOING BUSINESS AS
HADID BROKERAGE COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c)
OF THE CLAYTON ACT*Docket 7518. Complaint, June 11, 1959—Decision, Nov. 24, 1959*

Order dismissing on joint motion of the parties complaint charging a Houston, Tex., brokerage partnership, no longer in business, with illegally accepting brokerage on purchases of citrus and other fresh fruit and vegetables for its own account.

Cecil G. Miles, Esq., for the Commission.

John E. Pledger, Jr., Esq., and *Billy B. Goldberg, Esq.*, of Houston, Tex., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of sub-section (c) of §2 of the Clayton Act, as amended (U.S.C., Title 15, §13). The complaint was filed June 11, 1959, and respondents were thereafter duly served therewith. On July 23, 1959, respondent Hyman Rudy filed his answer denying that he had ever been a partner with Alex J. Hadid in Hadid Brokerage Company but, in substance, admitted he had been employed by said company. On September 28, 1959, he filed his motion to dismiss the proceedings as to him, supporting the said motion by an affidavit denying the alleged partnership and stating that he never had anything to do with the policies of the Hadid Brokerage Company; that during the time he worked for it it was registered with the U.S. Department of Agriculture; that he was never registered as a partner in such business, and that his employment has been completely terminated therewith. On October 2, 1959, there was filed a letter dated August 11, 1959, from Attorney Pledger, counsel for respondent Hadid, stating the substance of certain facts pertaining to Hadid's said business and requesting a dismissal of the complaint as to him. There was also filed an affidavit of said Alex J. Hadid, sworn to September 3, 1959, positively stating that the Hadid Brokerage Company ceased to do business in January, 1959, that affiant has not conducted any business since such time, has left Houston, Texas, where such brokerage business was maintained by him, and is now living in California. Also on October 2, counsel supporting the complaint filed his answer to respondent Rudy's motion to dismiss

and also referred to the said affidavit of respondent Hadid and the letter of his counsel above referred to. This answer states he believes the facts contained in the said affidavits of respondents Rudy and Hadid to be true, and, being of the opinion that no useful purpose can be served by further proceedings in this matter, joins with respondents' motion that the complaint herein be dismissed as to all parties.

The hearing examiner, having carefully considered all matters in the record, including those above specifically referred to, and being convinced that there is no public interest in the further maintenance of this proceeding, that the further prosecution thereof would cause great and unnecessary expense to all parties to the litigation, and that it would serve no useful purpose to proceed further in this matter, therefore, sustains the said motions of respondents to dismiss, joined in by counsel supporting the complaint. Therefore,

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

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of November, 1959, become the decision of the Commission.

IN THE MATTER OF

MADISON'S, INC., ET AL.

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

Docket 7458. Complaint, Apr. 1, 1959—Decision, Nov. 25, 1959

Consent order requiring a Columbus, Ohio, furrier to cease violating the Fur Products Labeling Act by setting forth on labels on fur products the name of an animal other than that producing the fur; by failing to comply in other respects with labeling and invoicing requirements; and by advertising in newspapers which failed to disclose the names of animals producing certain furs or the country of origin of imported furs or the fact that some products contained artificially colored fur, and which contained comparative prices without giving a designated time of the compared price.

Mr. John T. Walker supporting the complaint.

Mr. Troy A. Feibel, of Columbus, Ohio, for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On April 1, 1959, the Federal Trade Commission issued a complaint alleging that the above-named respondents in the course and conduct of their business had violated the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and the rules and regulations promulgated under the last named Act.

After issuance and service of the complaint, Madison's, Inc., a corporation, and James Jacobs, David Madison, and Walter Zeidner, individually and as officers of said corporation, and Jean Madison and Walter Anstendig, as officers of said corporation, hereinafter referred to as respondents, their counsel, and counsel supporting the complaint entered into an agreement for a consent order.

Under this agreement in accordance with the four affidavits, annexed and made a part thereof, the complaint is dismissed as to Jean Madison and Walter Anstendig as individuals, but not as officers, and the identity of respondents Jean Madison and David Madison is clarified.

The agreement has been approved by the Director and the Assistant Director of the Bureau of Litigation and disposes of the matters complained about.

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 Madison's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 72 North High Street, Columbus, Ohio.

2. Individual respondents Jean Madison, James Jacobs, David Madison, Walter Zeidner and Walter Anstendig are president, vice president, vice president, secretary and assistant treasurer, and treasurer, respectively, of the corporate respondent, and have the same address as that of the said corporate respondent.

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

ORDER

It is ordered. That the respondents, Madison's, Inc., a corporation, and its officers, and James Jacobs, David Madison, and Walter Zeidner, individually and as officers of said corporation, and Jean Madison and Walter Anstendig, as officers of said corporation, and respondents' representatives, agents or employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertisement, offering for sale, 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:

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing:

(1) In words and figures plainly legible all of the information required to be disclosed by each of the sub-sections of Section 4(2) of the Fur Products Labeling Act.

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

B. Setting forth on labels attached to fur products the name or names of any animal or animals other than the name or names of any animal or animals that produced the fur, in violation of Section 4(3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

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

D. 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 thereunder, mingled with non-required information;

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

E. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in the required sequence.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish to purchasers of fur products an invoice showing:

(1) All of the information required to be disclosed by each of the sub-sections of Section 5(b)(1) of the Fur Products Labeling Act.

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

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:

(1) The name or names of the animal or animals that produced the fur 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 bleached, dyed or otherwise artificially colored fur, when such is the fact;

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

B. Sets forth the name or names of any animal or animals other than the name or names specified in Section 5(a)(1) of the Fur Products Labeling Act.

C. Makes use of comparative prices or percentage savings claims unless such compared prices or claims are based upon the current market value of the fur product or upon a bona fide compared price at a designated time.

It is further ordered, That the complaint be, and hereby is, dismissed as to Jean Madison and Walter Anstendig individually, but not as officers of said corporate respondent.

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 25th day

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

It is ordered. That respondents Madison's, Inc., a corporation, and its officers, and James Jacobs, David Madison, and Walter Zeidner, individually and as officers of said corporation, and Jean Madison and Walter Anstendig, as officers of said corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
CHARLES BREGER

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

Docket 7558. Complaint, Aug. 5, 1959—Decision, Nov. 25, 1959

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to label and invoice fur products with information required by the Act.

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

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on August 5, 1959 charging him 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 of certain fur products.

An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all the jurisdictional facts alleged 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 the agreement; that the making 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 this proceeding without further notice to the respondent and when entered shall have the same force and effect as if entered after a full hearing, respondent specifically waiving all the

rights he may have to challenge or contest the validity of the order; that the order may be altered, modified, or set aside in the manner provided for other orders; that the complaint may be used in construing the terms of the order; that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint; and that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

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 Charles Breger is an individual doing business under his own name with his office and principal place of business located at 215 West 28th Street, New York, New York.

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

ORDER

It is ordered. That Charles Breger, an individual doing business under his own name or any other name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, manufacture for introduction, 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, manufacture for 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 in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish to purchasers of fur products an invoice showing all of the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth on any invoice required information in abbreviated form.

C. Failing to disclose that fur products contain or are composed of "secondhand used furs" when such is the fact.

D. Failing to set forth on each invoice the item number or mark assigned to a fur product.

E. Falsely or deceptively invoicing 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.

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 25th day of November, 1959, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

WILLIAM M. HOOKS TRADING AS EMPIRE FUR CO.

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

Docket 7310. Complaint, Nov. 19, 1958—Decision, Nov. 26, 1959

Consent order requiring a furrier in San Diego, Calif., to cease violating the Fur Products Labeling Act by failing to comply with labeling requirements; by setting forth fictitious sales prices on invoices; by advertising in newspapers and letters to prospective purchasers with credit checks enclosed which failed to disclose the names of animals producing certain furs, the country of origin of imported furs, and the fact that some fur products were artificially colored and to give other required information, and represented falsely that said credit checks would reduce the price of furs; and by failing to maintain records on which pricing claims were based.

Mr. Thomas A. Ziebarth, Counsel Supporting the Complaint.
Respondent, *pro se*.

INITIAL DECISION BY JOHN B. POINDENTER, HEARING EXAMINER

On November 19, 1958, the Federal Trade Commission issued a complaint charging William M. Hooks, an individual, trading as Empire Fur Co., with misbranding, falsely and deceptively invoicing

and advertising certain of his fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

Thereafter, with respondent's consent, the complaint was amended so as to include violations of the above-named Acts alleged to have been committed by respondent while also doing business under the name of Dependable Fur Company.

After issuance and service of the complaint and the amendment thereto, the respondent and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Assistant Director and the Acting Director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts: the complaint, as amended, 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, as amended, and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint, as amended.

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 is an individual who has traded at various times as Empire Fur Co., with office and principal place of business located at 432 West Main Street, Oklahoma City, Oklahoma, and Dependable Fur Company, with office and principal place of business located at 4633 South 24th Street, Omaha, Nebraska. His present address is 2838 Chatsworth Boulevard, San Diego, California.

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

Order

56 F.T.C.

ORDER

It is ordered, That respondent William M. Hooks, individually and trading as Empire Fur Co., Dependable Fur Company, or under any other trade name, and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, 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:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and figures plainly legible:

(a) All of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act;

(b) The item number or mark assigned to a fur product;

(c) The complete term "Mouton-processed Lamb;" when an election is made to use that description instead of merely the animal name "Lamb."

2. Setting forth on labels attached 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 Products Labeling Act and the Rules and Regulations thereunder mingled with non-required information.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish to purchasers of fur products invoices showing all of the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act;

2. Setting forth on invoices furnished to purchasers of fur products fictitious sales prices;

3. Failing to set forth on each invoice the item number or mark assigned to a fur product;

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 disclose:

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

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

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

2. Fails to set forth the complete term "Mouton-processed Lamb," when an election is made to use that description instead of merely the animal name "Lamb."

3. 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.

4. 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 the respondent has usually and customarily sold such products in the recent regular course of his business.

5. Misrepresents in any manner the amount of savings available to purchasers of its fur products, or the amount by which the prices of its fur products are reduced from the prices at which said products are usually and regularly sold by it in the recent regular course of its business.

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

D. Making pricing claims or representations in advertisements respecting reduced prices of furs or fur products, 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 26th day of November, 1959, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF
BELBER TRUNK & BAG COMPANY ET AL.

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

Docket 7577. Complaint, Sept. 2, 1959—Decision, Nov. 28, 1959

Consent order requiring Philadelphia manufacturers to cease attaching to luggage before shipment to retailers for resale, price tags bearing fictitious and excessive prices represented thereby as the usual retail prices.

Mr. Frederick McManus for the Commission.

Mr. Charles H. Greenberg of *Robinson, Greenberg and Lipman*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on September 2, 1959 charging them with having violated the Federal Trade Commission Act in the preticketing of luggage 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 the jurisdictional facts alleged 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 the agreement; that the making 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 this proceeding without further notice to the respondents and when entered shall have the same force and effect as if entered after a full hearing, respondents specifically waiving all the rights they may have to challenge or contest the validity of the order; that the order may be altered, modified, or set aside in the manner provided for other orders; that the complaint may be used in construing the terms of the order; 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 agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

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 Belber Trunk & Bag Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1317 Filbert Street, in the City of Philadelphia, State of Pennsylvania.

Respondent Jack Brier is an officer of said corporate respondent. He formulates, directs, and controls the policies, acts and practices of said corporate respondent. His address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents Belber Trunk & Bag Company, a corporation, and its officers, and Jack Brier, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of luggage or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing by preticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.

2. Putting any plan into operation whereby retailers or others may misrepresent the regular and usual retail prices of merchandise.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 28th day of November, 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
MILTON B. ENGEL ET AL. DOING BUSINESS AS
NATIONAL SCHOOL OF CHEMISTRY

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

Docket 7376. Complaint, Jan. 23, 1959—Decision, Dec. 2, 1959

Consent order requiring Redwood City, Calif., sellers of an elementary correspondence course in high school chemistry, to cease representing falsely in newspaper advertisements that persons completing the course should be trained, qualified, recognized, and employed as chemists, could analyze any known substance, and would be able to earn the same income as various professional men and skilled workers.

Mr. Terral A. Jordan supporting the complaint.

Respondents, *pro se*.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On January 23, 1959, the Federal Trade Commission issued its complaint charging that the above-named respondents had violated the provision of the Federal Trade Commission Act. The complaint alleged that respondents, for the purpose of enrolling prospective students and thereby promoting the sale of said courses of instruction for home study in various subjects, including chemistry, and the supplies and equipment in connection therewith, had made false, misleading and deceptive statements.

After issuance and service of the complaint, Milton B. Engel and Alice Engel, as individuals and as co-partners trading and doing business as National School of Chemistry, or under any other trade name, hereinafter referred to as respondents, and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Acting Director of the Bureau of Litigation. The agreement disposes of the matters complained about.

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. Respondents Milton B. Engel and Alice Engel are individuals trading and doing business as a co-partnership under the name of National School of Chemistry. Their office and principal place of business is located at 3046 Bayshore Highway, Redwood City, California.

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

ORDER

It is ordered, That respondents Milton B. Engel and Alice Engel, as individuals or as co-partners trading and doing business as National School of Chemistry, or under and other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of respondents' courses of study and instruction, including a course of instruction in chemistry, or the supplies and equipment used in connection therewith, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That persons completing respondents' said chemistry course will be trained, qualified, recognized or employed as a chemist; or that persons completing any of respondents' said courses of study and instruction will be trained, qualified, recognized or employed in any profession or vocation other than as actually so afforded or provided by said courses of study and instruction.

2. That persons completing said chemistry course will acquire a complete, thorough or basic knowledge of chemistry; or that any

of respondents' said courses of study and instruction afford or provide an amount or degree of training or instruction greater than is in fact provided.

3. That persons completing said chemistry course can analyze or duplicate any known substances; or that persons completing any of respondents' said courses of study and instruction will be trained, instructed or otherwise made able to do or perform any methods, procedures, skills or techniques in any occupation or profession to a degree of proficiency greater than is the fact.

4. That persons completing said chemistry course will be enabled thereby to earn an income equivalent to that earned by doctors, dentists, chemists or other professional persons or by printers, electricians or other skilled workers; or that the income of persons completing said courses of study and instruction will be any amount greater than that generally received by persons with the same background and training as that afforded by said courses of study and instruction and employed in the profession or occupation in which instruction and training is afforded by said courses of study and instruction.

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 2nd day of December, 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

TOM VINT DOING BUSINESS AS NATIONAL BUSINESS
SERVICE

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

Docket 7545. Complaint, July 15, 1959—Decision, Dec. 2, 1959

Consent order requiring an individual in Sioux City, Iowa, to cease using deception to sell real estate advertising, including such false claims as that he had available prospective buyers for properties listed or advertised by

him; that he would finance the sale of the listed property; that the property was underpriced and the asking price should be increased; that his services would result in sale of the properties he listed or advertised; and that the advance fee would be refunded if the property was not sold.

Mr. John W. Brookfield, Jr., and *Mr. John J. Mathias*, supporting the complaint.

Mr. Don H. Jackson of Council Bluffs, Ia., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 15, 1959, issued and subsequently served its complaint in this proceeding against the above-named respondent charging him with misrepresentations in the solicitation of listings of real estate and other property.

On October 6, 1959, there was submitted to the undersigned hearing examiner an agreement between respondent, his counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that he has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Tom Vint is an individual trading and doing business as National Business Service, with his principal office and place of business located at 703 Badgerow Building, 4th and Jackson Street, Sioux City, Iowa.

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 Tom Vint, an individual trading and doing business as National Business Service, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, or sale of advertising in newspapers or other advertising media, or of other services or facilities in connection with the offering or listing for sale, selling, buying or exchanging of business or any other kind of property, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Respondent has available prospective buyers who are interested in the purchase of, and are financially able to purchase, the properties sought to be listed or advertised by him.

2. Respondent is able to and will finance the sale of said properties.

3. The property is underpriced by the owner or that the asking price should be increased.

4. Respondent has been successful in effecting the sale of the property of others, except in rare instances, or that his services, except in rare instances, will result in the sale of the properties which he lists or advertises.

5. Respondent will refund all or part of the service fee if the property is not sold, unless such is the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall on the 2nd day of December, 1959, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

C. J. SPURGIN ET AL. DOING BUSINESS AS
MIDWEST COMMUNICATIONS SCHOOLCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 7549. Complaint, July 23, 1959—Decision, Dec. 2, 1959.*

Consent order requiring a Des Moines, Iowa, correspondence school to cease using false employment offers and exaggerated earnings claims to sell its training course for positions as railroad station agents and telegraphers, including such claims as that job openings existed in numerous areas, and that it was a railroad company or affiliated with railroad companies; that an eighth grade education met its educational requirements; and that employment at starting salaries of from \$365 to \$475 monthly was guaranteed those accepted for training.

Mr. Berryman Davis supporting the complaint.

Holliday, Miller & Stewart, of Des Moines, Ia., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 23, 1959, issued and subsequently served its complaint in this proceeding against the above-named respondents charging them with misrepresentations in the sale of a course of study.

On October 13, 1959, there was submitted to the undersigned hearing examiner an agreement between respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

Order

56 F.T.C.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondents C. J. Spurgin and W. G. Spurgin are individuals and copartners trading as Midwest Communications School, with their office and principal place of business located at 832 Hull Avenue, Des Moines, Iowa.

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 C. J. Spurgin and W. G. Spurgin, individually and doing business under the name of Midwest Communications School, or under any other name, and their respective representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of courses of study, training and instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(1) Employment is being offered when, in fact, the purpose is to obtain purchasers of such courses of study, training and instruction;

(2) Positions of employment as railroad station agents or telegraphers are open to those who complete such courses;

(3) Respondents are a railroad company or are affiliated with a railroad company;

(4) Respondents' said courses qualify purchasers thereof to become railroad station agents or telegraphers on completion of said courses;

(5) An eighth grade education meets the educational requirement of railroad companies accepting applications from persons seeking employment as railroad station agents and telegraph operators, or otherwise misrepresenting educational requirements;

(6) Respondents guarantee employment to persons completing the said course;

(7) There is a great demand for graduates of respondents' school to fill positions of railroad station agent or telegrapher or otherwise misrepresenting the demand for such graduates;

(8) Respondents have a placement service or have placed graduates of their school in positions of employment;

(9) Graduates of respondents' school are qualified for positions of employment with starting salaries which are in excess of the starting salaries of positions for which such graduates are qualified, or otherwise misrepresenting the starting salaries of positions for which graduates of respondents' school are qualified.

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 2nd day of December, 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

D. L. PIAZZA CO.

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

Docket 7519. Complaint, June 11, 1959—Decision, Dec. 8, 1959

Consent order requiring a Minneapolis broker of food products to cease violating Sec. 2(c) of the Clayton Act by receiving and accepting brokerage from various packer principals, including Minute Maid Corporation, on purchases of citrus food products for its own account for resale.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent D. L. Piazza Co., hereinafter sometimes referred to as Piazza, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 100 North Seventh Street, Minneapolis, Minnesota.

PAR. 2. Respondent is now, and for the past several years has been, engaged primarily in the brokerage business. It is a licensed food broker and deals in fresh fruits and vegetables, all of which are hereinafter sometimes referred to as food products. In the fresh fruit field respondent deals primarily in citrus fruit, such as oranges, grapefruit, and tangerines. Respondent represents a number of principals located in various states throughout the country, two of which are Minute Maid Corporation and its wholly owned subsidiary Minute Maid Groves Corporation, with offices, packing plants and warehouses located in the State of Florida and elsewhere. In representing Minute Maid Corporation and Minute Maid Groves Corporation, both of which are hereinafter sometimes referred to as Minute Maid, in the sale of their citrus fruits, respondent receives for its services in connection therewith, a commission, or brokerage fee at the rate of 10 cents per $1\frac{3}{5}$ bushel Bruce box, and 5 cents per $\frac{4}{5}$ bushel Bruce box, or $\frac{1}{2}$ box.

PAR. 3. In the course and conduct of its business in selling and distributing the products of its various principals, as well as its own purchases, respondent has directly or indirectly caused such food products, when purchased or sold, to be transported from the packing plants or warehouses of its principals to buyers thereof located in another state or states of the United States, other than the state of origin of said food products. Thus respondent has been for the past several years, and is now, engaged in a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended.

PAR. 4. In the course and conduct of its business as aforesaid during the past several years, but more particularly during and from 1956 up to the present time, respondent has made and is now making numerous and substantial purchases of food products for its own account for resale from its various packer principals, including Minute Maid Corporation and Minute Maid Groves Corporation, on which purchases it has received and accepted and is now receiving and accepting, directly or indirectly, something of value as a commission, brokerage, or other compensation or an allowance or discount in lieu thereof, from such sellers, including Minute Maid Corporation and Minute Maid Groves Corporation.

PAR. 5. The acts and practices of respondent as above alleged and described are in violation of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

Mr. Cecil G. Miles for the Commission.

No appearances for the respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on June 11, 1959, issued its complaint herein, charging the above-named respondent with having violated the provisions of subsection (c) of §2 of the Clayton Act, as amended (U.S.C., Title 15, §13), and the respondent was duly served with process.

On August 17, 1959, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval and "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent and counsel supporting the complaint, under date of August 14, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent D. L. Piazza Co. is a corporation, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 100 North Seventh Street, Minneapolis, Minnesota.

2. 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.

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

4. Respondent waives:

- a. Any further procedural steps before the hearing examiner and the Commission;

- b. The making of findings of fact or conclusions of law; and

- c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

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

7. This 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act as amended (U.S.C., Title 15, §13) against the respondent both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto: and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That D. L. Piazza Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of citrus fruit or other food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of citrus fruit or other food products for its own account, or where respondent is the agent, representative, or other intermediary acting for in behalf of, or is subject to the direct or indirect control of, any such buyer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day

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

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

IN THE MATTER OF
EGAN, FICKETT & CO., INC.

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

Docket 7520. Complaint, June 11, 1959—Decision, Dec. 8, 1959

Consent order requiring a New York City wholesale distributor of fresh fruits and vegetables to cease receiving and accepting commissions, etc., or lower net prices reflecting brokerage, on substantial purchases of food products from various suppliers, including Minute Maid Corporation, for its own account for resale.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has been and is now, violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Egan, Fickett & Co., Inc., hereinafter sometimes referred to as Egan or as respondent, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 266 West Street, New York, New York.

PAR. 2. Respondent is now and for the past several years has been engaged primarily in business as a wholesale distributor of fresh fruits and vegetables and other grocery products, all of which are hereinafter sometimes referred to as food products. Respondent purchases these food products from a large number of canners and packers, hereinafter sometimes referred to as suppliers, located in many states other than the State of New York. In the fresh fruit field, respondent deals primarily in citrus fruits, such as oranges, grapefruit and tangerines. Two of respondent's suppliers of citrus fruits are Minute Maid Corporation and its wholly owned