

Complaint

IN THE MATTER OF
NORTH AMERICAN FOREIGN TRADING CORPORATION
ET AL.

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

Docket 7872. Complaint, Apr. 19, 1960—Decision, Sept. 21, 1960

Consent order requiring New York City distributors to cease selling watch bands imported from Japan, Hong Kong, and West Germany without adequate disclosure of their foreign origin—the alleged unfair practices consisting of packaging the bands between two pieces of cardboard with a clear cellophane window, which made it impossible to see the stamping of the foreign country on the inside of a link without opening and damaging the package.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North American Foreign Trading Corporation, a corporation, and Morris Lowinger, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent North American Foreign Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 220 5th Avenue, in the city of New York, State of New York.

Respondent Morris Lowinger is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the offering for sale, sale and distribution of watch bands to distributors and jobbers.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and

maintain and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents' watch bands are imported from Japan, Hong Kong and West Germany. Some of said bands are sold in bulk. The country of origin is stamped on a link on the inside of the band. In the case of some bands, this stamping is so small and indistinct that it does not constitute adequate notice to the public as to the country of origin. After receipt by respondents of said imported bands, some are packaged between two pieces of card board, the bands being exposed through a window covered by clear cellophane. A number of the individual cards are mounted on counter display cards.

The manner in which the bands are packaged makes it impossible for a prospective purchaser to see the stamping on the inside of the band except by opening and damaging the package. The country of origin of the bands is not shown on the individual cards or on the counter display cards.

PAR. 5. In the absence of an adequate disclosure that a product, including watch bands, is of foreign origin, the public understands and believes that it is of domestic origin and there are among the members of the purchasing public a substantial number who have a preference for domestic products over products of foreign origin, including watch bands originating in Hong Kong, Japan and West Germany. Many domestic watch bands sell for higher prices than imported bands, including those imported from Hong Kong, Japan and West Germany and members of the purchasing public are willing to pay these higher prices for domestic bands.

PAR. 6. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of watch bands of the same general kind and nature as that sold by respondents.

PAR. 7. The failure of respondents to adequately disclose the foreign origin of their watch bands has the tendency and capacity to lead the purchasing public into the erroneous and mistaken belief that such bands are of domestic origin and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public

and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., supporting the complaint.

Guggenheimer & Untermyer, and *Mr. George Herbert Goodrich* of New York, N. Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint issued in this proceeding on April 19, 1960, against the above-named respondents charges them with violating the Federal Trade Commission Act by failing to disclose adequately the foreign origins of merchandise, particularly watch bands, imported from Hong Kong, Japan and West Germany, and sold by respondents in interstate commerce in the United States. A true copy of said complaint was served upon respondents as required by law. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated July 15, 1960, which purports to dispose of all of this proceeding as to all parties without the necessity of conducting a hearing. The agreement has been signed by all of the respondents, their counsel, and by counsel supporting the complaint; and has been approved by the Director, Associate Director and the Assistant Director of the Commission's Bureau of Litigation. Said agreement contains the form of a consent cease and desist order which the parties have agreed is dispositive of the issues involved in this proceeding. On July 25, 1960, the said agreement was submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and

that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

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

1. Respondent North American Foreign Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 220 5th Avenue, in the city of New York, State of New York.

2. Respondent Maurice Lowinger, erroneously named Morris Lowinger in the complaint, is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent. His address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents North American Foreign Trading Corporation, a corporation, and its officers, and Maurice Lowinger, 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 or distribution of imported watch bands, or any other imported product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, or selling, any such product, unless the country of origin is clearly disclosed thereon, or in immediate connection therewith, and, if the product is packaged, such disclosure is clearly shown on the package.

637

Complaint

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 21st day of September 1960, 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
KOBACKER STORES, INC.

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

Docket 7893. Complaint, May 16, 1960—Decision, Sept. 21, 1960

Consent order requiring a furrier in Toledo, Ohio, to cease violating the Fur Products Labeling Act by failing to set forth the terms "Persian Lamb" and "Dyed Mouton processed Lamb" where required; by failing in advertising to disclose the names of animals producing certain furs or the country of origin of imported furs, to reveal when fur products contained artificially colored or cheap or waste fur, and by naming animals other than the producers of certain furs; and by failing in other respects to comply with labeling, invoicing, and advertising requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kobacker Stores, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Kobacker Stores, 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 408 Summit Street, Toledo, Ohio.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent through its Division known as Tiedtke's has been and is now engaged in the introduction into commerce and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth in the manner required, where an election was made to use that term instead of Lamb in violation of Rule 8 of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with nonrequired information, in violation of Rule 29(a) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(e) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(f) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(g) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(h) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

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

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) The term "Dyed Mouton processed Lamb" was not set forth in the manner required where an election was made to use that term instead of Lamb in violation of Rule 9 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly in the sale and offering for sale of said fur products.

PAR. 8. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondent which appeared in issues of the Toledo Blade, a newspaper published in the city of Toledo, State of Ohio, and having wide circulation in said State and various other States in the United States.

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

(a) Failed to disclose 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, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

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

(c) Failed to disclose that fur products were composed in whole or in substantial part of paws, tails, bellies or waste fur, when such was the fact, in violation of Section 5(a)(4) of the Fur Products Labeling Act.

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

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

(f) Failed to set forth the term "Persian Lamb" where an election is made to use that term instead of Lamb in violation of Rule 8 of said Rules and Regulations.

(g) Failed to set forth the term "Dyed Mouton Processed Lamb" where an election is made to use that term instead of Lamb in violation of Rule 9 of said Rules and Regulations.

(h) Contained information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder which was not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of said Rules and Regulations.

PAR. 9. The aforesaid acts and practices of respondent, 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.

Mr. Charles W. O'Connell supporting the complaint.

Marshall, Melhorn, Bloch & Belt by *Mr. Edward F. Weber*, of Toledo, Ohio, for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding alleges that Kobacker Stores, Inc., a corporation, hereinafter referred to as respondent, misbranded, falsely and deceptively invoiced and advertised fur products in violation 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, the above-named respondent, its attorney, and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Director, Associate Director and Assistant Director of the Bureau of Litigation. The agreement disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint 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 it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent Kobacker Stores, 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 408 Summit Street, Toledo, Ohio.

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

ORDER

It is ordered, That respondent Kobacker Stores, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, transportation or distribution, in commerce, of fur products; or in connection with the sale, advertising, offering for

Order

57 F.T.C.

sale, transportation, or distribution of fur products which are made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) 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.

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

2. Setting forth on labels affixed to fur products information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder:

(a) In abbreviated form;

(b) Mingled with non-required information;

(c) In handwriting.

3. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of lamb.

4. Failing to set forth all the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on one side of the label.

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

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

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish to purchasers of fur products an invoice showing all 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 the information required to be disclosed by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to set forth the term "Dyed Mouton Processed Lamb" in the manner required where an election is made to use that term instead of lamb.

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) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur when such is the fact.
 - (d) The name of the country of origin of any imported furs contained in a fur product.
2. 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.
3. Fails to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of lamb.
4. Fails to set forth the term "Dyed Mouton Processed Lamb" where an election is made to use that term instead of Lamb.
5. 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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall on the 21st day of September 1960, become the decision of the Commission; and, accordingly:

It is ordered That respondent Kobacker Stores, Inc., 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
RANK RECORDS OF AMERICA, INC.

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

Docket 7898. Complaint, May 20, 1960—Decision, Sept. 21, 1960

Consent order requiring a distributor of phonograph records in New York City to cease giving concealed payola to disc jockeys or other personnel of radio or television programs to induce playing of their records in order to increase sales.

Complaint

57 F.T.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Rank Records of America, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rank Records of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 24 West 57th Street, in the City of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution, of phonograph records to independent distributors and others throughout the United States.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said records, when sold, to be shipped from one State of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and at all times mentioned herein, respondent has been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola", among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of its business, in commerce, during the last several years, the respondent has engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondent alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondent by participating individually or in a joint effort with certain collaborating record distributors has aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondent to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distri-

bution of phonograph records, and to divert trade unfairly to the respondent from its competitors and substantial injury has thereby been done and may continue to be done to competition in commerce.

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

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.*, for the Commission.

Mr. Paul G. Marshall, of New York, N.Y., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of the Federal Trade Commission Act in the sale and distribution of phonograph records by negotiating for and disbursing "payola" (money and other valuable consideration) to disk jockeys broadcasting musical programs, and causing such fact to be withheld from the public. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

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

1. Respondent Rank Records of America, Inc., is a Delaware corporation with its office and principal place of business located at 24 West 57th Street, New York, N.Y.

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 Rank Records of America, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondent has a financial interest of any nature.

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondent has a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of September 1960, become the decision of the Commission; and, accordingly:

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

Complaint

57 F.T.C.

IN THE MATTER OF
BUDCO, INCORPORATED, ET AL.

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

Docket 7904. Complaint, May 20, 1960—Decision, Sept. 21, 1960

Consent order requiring three affiliated corporate manufacturers of television picture tubes, two in Pittsburgh, Pa., and one in Cleveland, Ohio, to cease selling television tubes with no notice on the tubes or the packaging cartons or invoices to show that they were reconditioned or rebuilt and contained previously used parts, or were defective when such was the case.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Budco, Incorporated, a corporation, and Hymen Kotovsky and Robert Kotovsky, individually and as officers and directors of said corporation; and Metropolitan Electronic Distributors, Inc., a corporation, and Hymen Kotovsky, Harry Kotovsky and Jack Rosenblum, individually and as officers of said corporation; and K. M. K. Corporation, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Budco, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 113 S. Beatty Street, Pittsburgh, Pa. Respondents Hymen Kotovsky and Robert Kotovsky are officers, directors and major stockholders of this corporate respondent. Their address is the same as this corporate respondent.

Respondent Metropolitan Electronic Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 113 S. Beatty Street, Pittsburgh, Pa. Respondents Hymen Kotovsky, Harry Kotovsky and Jack Rosenblum are officers, directors and major stockholders of said corporation. Their address is the same as that of this corporate respondent.

Respondent K.M.K. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 3323 Superior Avenue, Cleveland, Ohio.

The individual respondents formulate, control and direct the policies, acts and practices of the corporate respondent of which they are officers, directors and stockholders. All of the aforementioned corporate respondents and individuals cooperate and act together in carrying out the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, advertising, offering for sale, sale and distribution of television picture tubes, some of which are reconditioned and some of which are rebuilt, containing used parts, to wholesalers, distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the States of Pennsylvania and Ohio to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents do not disclose on the tubes or on the cartons in which they are packed or on invoices that said television picture tubes are reconditioned or are rebuilt and contain previously used parts.

PAR. 5. When television tubes are reconditioned or rebuilt containing previously used parts, in the absence of a disclosure to the contrary, such tubes are understood to be and are readily accepted by the public as new tubes.

PAR. 6. Certain of respondents' television picture tubes contain known defects. The fact that such tubes are defective is not disclosed on the tubes or on the cartons in which they are packed or on invoices. In the absence of said disclosure, such tubes are understood to be free from defects.

PAR. 7. By failing to disclose the facts, as set forth in paragraphs 4 and 6, respondents place in the hands of uninformed or unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature and condition of their said television picture tubes.

PAR. 8. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of television picture tubes.

PAR. 9. The failure of the respondents to disclose on their television picture tubes, on the cartons in which they are packed and on invoices that they are reconditioned or are rebuilt containing previously used parts and are defective has had, and now has, the ten-

dency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that their said picture tubes are new in their entirety and are free from defects and into the purchase of substantial quantities of respondents' said tubes, by reason of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

Mr. Michael J. Vitale for the Commission.

Wilner, Wilner and Kuhn, of Pittsburgh, Pa., by *Mr. Arnold D. Wilner*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

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

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

652

Order

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

1. Respondent Budco, Incorporated, is a Kentucky corporation, with its principal office and place of business located at 113 South Beatty Street, Pittsburgh, Pa. Individual respondents Hymen Kotovsky and Robert Kotovsky are officers, directors and major stockholders of said corporate respondent with their address the same as that of the corporate respondent.

Respondent Metropolitan Electronic Distributors, Inc., is a Pennsylvania corporation located at 113 South Beatty Street, Pittsburgh, Pa. Individual respondents Hymen Kotovsky, Harry Kotovsky and Jack Rosenblum are officers, directors and major stockholders of said corporate respondent with their address the same as that of the corporate respondent.

Respondent K.M.K. Corporation is an Ohio corporation located at 3323 Superior Avenue, Cleveland, Ohio.

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 Budco, Incorporated, a corporation, and its officers, and Hymen Kotovsky and Robert Kotovsky, individually and as officers and directors of said corporation; Metropolitan Electronic Distributors, Inc., a corporation, and its officers, and Hymen Kotovsky, Harry Kotovsky and Jack Rosenblum, individually and as officers and directors of said corporation; and K.M.K. Corporation, a corporation, and its officers, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of defective, reconditioned, and rebuilt television picture tubes containing used parts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly disclose on the tubes, on the cartons in which they are packed, on invoices and in advertising, that said tubes are reconditioned or are rebuilt containing used parts, as the case may be.

2. Failing to clearly disclose on the tubes, on the cartons in which they are packed, on invoices and in advertising that tubes are defective, when such is the fact.

3. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the nature and condition of their television picture tubes.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on August 2, 1960, having filed an initial decision in this proceeding, wherein he accepted an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint, and issued an order in conformity with the agreement; and

Pursuant to the provisions of § 3.21 of the Commission's Rules of Practice, said initial decision, on September 21, 1960, having become the decision of the Commission:

It is ordered, That the respondents, Budco, Incorporated, a corporation, and Hymen Kotovsky and Robert Kotovsky, individually and as officers and directors of said corporation; Metropolitan Electronic Distributors, Inc., a corporation, and Hymen Kotovsky, Harry Kotovsky and Jack Rosenblum, individually and as officers and directors of said corporation; and K.M.K. Corporation, a 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 contained in the aforesaid initial decision.

IN THE MATTER OF

THE JOS. M. ZAMOISKI CO., ET AL.

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

Docket 7921. Complaint, June 3, 1960—Decision, Sept. 21, 1960

Consent order requiring distributors of phonograph records in Baltimore, Md., to cease giving concealed payola to disc jockeys or other personnel of radio or television programs to induce playing of their records in order to increase sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Jos. M. Zamoiski Co., a corporation, and Calman J. Zamoiski, Sr., Calman J. Zamoiski, Jr., and H. Earl Kese, individually and as officers of said corporation, hereinafter referred to as respondents have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Jos. M. Zamoiski Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 1101 DeSoto Road, in the city of Baltimore, State of Md.

Respondents Calman J. Zamoiski, Sr., Calman J. Zamoiski, Jr., and H. Earl Kese are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to various retail outlets.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said records, when sold, to be shipped from Maryland to Virginia, West Virginia, and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to

their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury 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.

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.*, for the Commission.

Weinberg and Green, by *Mr. John J. Ghingher, Jr.*, of Baltimore, Md., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to various retail outlets, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola", i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent The Jos. M. Zamoiski Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 1101 DeSoto Road, in the city of Baltimore, State of Maryland; that respondents Calman J. Zamoiski, Sr., Calman J. Zamoiski, Jr., and H. Earl Keese (incorrectly named in the complaint as H. Earl Kесе) are officers of the corporate respondent, and formulate, direct and control the acts and practices of the corporate respondent; and that their address is the same as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the offi-

cial record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding 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 The Jos. M. Zamoiski Co., a corporation, and its officers, and Calman J. Zamoiski, Sr., Calman J. Zamoiski, Jr., and H. Earl Keese, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

656

Complaint

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of September 1960, become the decision of the Commission; and, accordingly:

It is ordered. That respondents The Jos. M. Zamoiski Co., a corporation, and Calman J. Zamoiski, Sr., Calman J. Zamoiski, Jr., and H. Earl Kese, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

 IN THE MATTER OF

MALVERNE DISTRIBUTORS, INC., ET AL.

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

Docket 7995. Complaint, June 24, 1960—Decision, Sept. 21, 1960

Consent order requiring distributors of phonograph records in New York City to cease giving concealed payola to disc jockeys or other personnel of radio or television programs to induce playing of their records in order to increase sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Malverne Distributors, Inc., a corporation, and Abraham Hirsch, William Shocket and Jack A. Shocket, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding

by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Malverne Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 424 West 49th Street, in the city of New York, State of New York.

Respondents Abraham Hirsch, William Shocket and Jack A. Shocket are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to various retail outlets and jukebox operators.

PAR. 3. In the course and conduct of their business, respondents now cause, and for sometime last past have caused, their said records, when sold, to be shipped from New York to New Jersey to purchasers thereof, and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury 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.

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.*, for the Commission.

Respondents, for themselves.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to various retail outlets and jukebox operators, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola", i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent Malverne Distributors, Inc. is a corporation 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 424 West 49th Street, New York, N.Y.; that respondents Abraham Hirsch, William Shocket and Jack A. Shocket are officers of the corporate respondent and formulate, direct and control the acts and practices of the corporate respondent; and that their address is the same as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the

Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

The hearing examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That respondents Malverne Distributors, Inc., a corporation, and its officers, and Abraham Hirsch, William Shocket and Jack A. Shocket, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is

played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of September 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

NATIONAL RETAIL BOARD OF TRADE, INC., ET AL.

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

Docket 7498. Complaint, May 18, 1959—Decision, Sept. 22, 1960

Order requiring two affiliated Los Angeles collection agencies to cease representing falsely by their trade names that they were an organization of retailers and were engaged in the liquidation business, respectively; representing falsely through their solicitors and by statements on forms, etc., that they had corresponding bonded attorneys, professional collectors, associated offices, were an organization for the protection of creditors, obtained investigations through banks and employers and issued credit reports; and requiring them to reveal clearly on their forms, questionnaires, etc., that the information requested was for skip-tracing purposes.

Mr. Edward F. Downs and *Mr. Michael J. Vitale* supporting the complaint.

Mr. Paul E. Iverson and *Mr. Victor R. Hansen* of Los Angeles, Calif., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

On May 18, 1959, the Federal Trade Commission issued a complaint alleging that National Retail Board of Trade, Inc., a corporation, National Liquidators, Incorporated, a corporation, Harold O. Jackson, Marion E. Jackson, individually and as officers of said corporations, and E. W. Pond, individually and as a director of said

corporations, hereinafter called respondents, violated the provisions of the Federal Trade Commission Act in the course of the operation of said corporations as collection agencies.

Respondents, through their counsel, answered the complaint, admitting some and denying other allegations. These will be discussed in subsequent paragraphs of this decision. Hearings have been held and proposed findings of fact, conclusions of law, and order have been submitted by respective counsel. These have been considered by the hearing examiner. All proposed findings of fact and conclusions of law not specifically found or concluded herein are rejected. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact and conclusions of law and issues the following order:

FINDINGS OF FACT

1. Respondent National Retail Board of Trade, Inc., is a corporation organized in 1927 under the laws of the State of Delaware. National Liquidators, Incorporated, is a corporation organized and doing business under the laws of the State of California. The office and principal place of business of each corporation is located at 7410 Beverly Boulevard, Los Angeles, Calif.

2. The respondents Harold O. Jackson and Marion E. Jackson are officers of said corporations. The respondent E. W. Pond is a director of said corporations. These individual respondents formulate, control and direct the policies, acts, and practices of the corporate respondents. Both the corporate and individual respondents cooperate and act together in carrying out the acts and practices hereinafter found. The address of the individual respondents is the same as that of the corporate respondents.

3. The respondents operate and have operated for more than one year immediately prior to the issuance of the complaint herein, collection agencies under the names National Retail Board of Trade, Inc., and National Liquidators, Incorporated. Business is obtained by respondents through advertisements soliciting delinquent accounts for collection and by personal solicitation of agents.

4. The respondents use assignment forms upon which each delinquent account is listed showing the name of debtor, address, date of indebtedness incurred and the amount due. These forms are sent to creditors located in various States of the United States. After receipt, the creditor executes the form, assigning the account so listed to respondents for collection on a commission basis and mails the completed form to respondents at Los Angeles or it is sent to respondents by their salesmen. The debtors concerned reside in States

other than California. The money collected by respondents from debtors is then transmitted, less their commission, to respective creditors, most of whom reside in States other than California. In some cases respondents receive checks from creditors representing their fees on accounts paid direct to the creditor by debtors.

5. In the conduct of said businesses as aforesaid, respondents have engaged, and are now engaged, in extensive commercial trade, in commerce among and between the various States of the United States including the receipt and transmission of assignments, contracts, letters, checks, money orders and other written instruments.

6. The complaint alleges, *inter alia*, that, through the use of the name of National Retail Board of Trade, Inc., the respondent and the individual respondents represented, and now represent, that said corporation is a nationwide organization of retailers. Said representations were, and are, false and misleading. The evidence shows that the National Retail Board of Trade, Inc., is not an organization of retailers and has no connection with any organization of retailers. Said corporation is operating solely as a collection agency. Therefore, it is found that the use of the name National Retail Board of Trade, Inc., is deceptive and misleading to the public.

7. The complaint further alleges that through the use of the name National Liquidators, Incorporated, respondent and the individual respondents represented, and now represent, that said corporation is a nationwide organization engaged in the liquidation business. The evidence shows and the respondents admit, that National Liquidators, Incorporated, is engaged in the business of collecting accounts. When the respondent National Liquidators, Incorporated, collects an account it thereby liquidates that account. To this extent, the respondent National Liquidators, Incorporated, is engaged in the liquidation business. Under the evidence in this record, it cannot be found that the use by respondent of the name National Liquidators, Incorporated, is deceptive and misleading.

8. The complaint further alleges that the respondent National Retail Board of Trade, Inc., and the individual respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing individuals, firms and corporations to execute assignment of accounts for collection, as well as in aiding collections, have represented, and now represent, directly or by implication, through written statements appearing on assignment forms, contracts, letters and other written instruments, and through oral statements made by their salesman solicitors, that said corporate respondent:

1. Has corresponding bonded attorneys and professional collectors in every county in the various states;
2. Has associate offices in all principal cities;

3. Is a national organization for the protection of creditors;
4. Makes investigations and obtains reports through banks, employers, organizations, and others;
5. Issues credit reports and banks and other business houses watch such reports.

9. With respect to the allegations contained in sub-paragraphs 1, 2, 3, 4 and 5 of paragraph 4 above, respondents admit that they do not have bonded attorneys and professional collectors in every county in the various states. However, they contend that they have discontinued use of this representation. Respondents also admit that they do not have associate offices in all principal cities and that said representation in subparagraph two above may be misleading to some people. It is found, therefore, that respondents maintain only the one office in Los Angeles, Calif. and do not have associate offices in all principal cities. The evidence and testimony received in this record demonstrate that the respondent National Retail Board of Trade, Inc., is not a national organization for the protection of creditors, as alleged in subparagraph 3 of paragraph 4 of the complaint. This, the respondents admit but claim that this representation has also been discontinued. Respondents also admit that their representation to the effect that the respondent National Board of Trade, Inc., makes investigations and obtains reports through banks, employers, organizations and others, as alleged in subparagraph 4 of paragraph 4 above, may be misleading and deceptive to some people. The respondents admit that they are not in the credit reporting business. It is found, therefore, that this allegation has been established. With respect to the representation set out in subparagraph 5 of paragraph 4 above to the effect that the respondent National Retail Board of Trade, Inc., issues credit reports and banks and other business houses watch such reports, respondents admit that they do not issue credit reports. Mr. Jackson testified that the respondent National Retail Board of Trade, Inc. is not in the credit reporting business. He further testified that the only instance in which respondents ever make a credit report concerning a debtor is when a delinquent debtor may have given respondent's name as a credit reference. This is infrequent. Accordingly, it is found that this allegation has been sustained.

10. The use by respondent National Retail Board of Trade, Inc., and the individual respondents of the foregoing false, deceptive and misleading representations and practices has had and now has the tendency and capacity to mislead a substantial number of creditors and debtors into the erroneous and mistaken belief that such representations were, and are, true, and into the assignment of accounts

Findings

57 F.T.C.

to National Retail Board of Trade, Inc., for collection because of such mistaken and erroneous belief.¹

11. The complaint in paragraph 7 alleges that in the course and conduct of collecting accounts, the corporate respondents frequently seek to ascertain the current address of debtors from whom they are attempting to locate and collect accounts. For this purpose respondents use, and have used letters and forms which contain requests for information to be filled in by the addressee and returned to respondents. Typical of the language used in said letters and forms are the following:

I am endeavoring to communicate with a person of your name, and I believe that you are the individual.

This is a matter of importance to the proper person. Please answer the following questions which will enable me to be certain whether or not you are the person to whom I shall communicate fully:

Full Name	Telephone
Present residence address	Present employer
Occupation	Address
Marital status <input type="checkbox"/> single <input type="checkbox"/> married <input type="checkbox"/> separated <input type="checkbox"/> divorced <input type="checkbox"/> widowed	
Mate's name	address
Children's names	addresses
Your parents' names	address
Other relatives	addresses
With whom do you bank	address

Your previous addresses and occupations

I hereby affirm that the above information is correct to the best of my knowledge.

Signed _____

(Do not print)

A business reply envelope is enclosed.

Very truly yours,

R. A. HOLMES.

Gentlemen:

We are desirous of verifying the position of the above-named individual, who, we are informed, is employed by your organization.

This information is desired for business purposes and we assure you that it will be treated with the strictest confidence.

In the event this individual is not on your current payroll, we would appreciate your giving us any available information as to his present whereabouts.

We enclose a business reply envelope for your convenience and we thank you for your cooperation in this matter.

Yours very truly,

/S/ M. E. JACKSON,
Auditor.

¹ The respondent National Retail Board of Trade, Inc. and the individual respondents contend that the use of these representations are not misleading to creditors because the representations are not made to creditors. This is no excuse. The representations were made and they are false and deceptive.

12. The first letter quoted above is plain and unambiguous. It appears to be directed to the purported debtor. The letter tells the addressee (purported debtor) that the writer is not positive the addressee is the person the writer wishes to communicate with and to please answer certain specified questions set out in the letter so the writer can determine if the addressee is the proper person with whom to communicate fully about a matter of importance. These questions relate to the full name, present and former residence and business addresses, telephone number and occupation of addressee, name of employer, marital status, name and address of wife and certain relatives, name of bank with whom addressee deals, and previous occupations of the addressee.

13. Counsel supporting the complaint contends that, through the use of the statements appearing in said letters and in particular the use in the first letter of the term "This is a matter of importance to the proper person," respondents have represented, directly or by implication, that the requested information is for business purposes and, if furnished, will be to the financial advantage of the person named. As authority for this contention, counsel cites *Retail Board of Trade, Inc.*, Docket 6214, and *American Credit Bureau, Inc.*, Docket 6364. Counsel asserts that the language in the letter in each of those cases is almost identical to that here involved. In the opinion of this hearing examiner, the wording of the two letters here in question are not identical with those involved in the *Retail Board of Trade* case, *supra*. With respect to the case of *American Credit Bureau, Inc.*, *supra*, the decision of the Commission in that case was based on a consent agreement. Under such circumstances it cannot be accepted as a reliable legal precedent for the interpretation here urged, even if it should be assumed that the wording of the letters are identical.

14. Counsel supporting the complaint asserts that the above representation or implication is not for business purposes and there is no advantage to the debtor in furnishing the information requested, but the use of said letters is an attempt to obtain information concerning debtors by subterfuge. In the first place, the information sought is most assuredly for business purposes because, as counsel supporting the complaint states, the information sought in the letters is for use in collecting accounts. Collecting an account is, in its very nature, a business activity. A "skip-tracer" letter is not illegal *per se*. To be unlawful under the purview of Section 5 of the Federal Trade Commission Act, the letter must contain language which is false, misleading, or deceptive. There is no statement in either of the letters involved in this proceeding that the information sought will be

to the debtor's financial advantage, nor is there any statement therein from which such an interpretation may be inferred. The letters do not contain any affirmative representation or statement from which deception may be inferred or implied. The type of "skip-tracer" letters which are frowned upon by the Commission are those where deceptive language is used to obtain information. An example is where the letter to the purported debtor uses language which leaves the impression that the debtor has inherited a sum of money which is held by the writer and will be delivered upon verification that the debtor is the proper person to receive the money or inheritance. A recent case is *National Research Company*, Docket No. 6236. In that case, the company gathered information under the pretext of conducting research on the subject of gasoline and cigarettes, gifting the replier with nominal amounts of cigarettes and gasoline, and using forms designed to resemble requests from the United States Government and postmarked Washington, D.C. The Commission held these statements and the means used to be deceptive. Here, we have no such deception nor misrepresentation. The statements made in the letter, together with the information requested, sufficiently informs the addressee as to the purpose of the information requested. If the addressee is in fact the delinquent debtor whom the writer of the letter is attempting to locate, the statements made in the letter indicate the purpose of the letter and requested information. No affirmative misrepresentation or deception is made in the letter nor is there any statement made from which a misrepresentation or deceptive statement may be inferred.

15. The second letter previously set out in paragraph eleven herein, is directed to the debtor's supposed employer, requesting verification of the debtor's position with said employer. Counsel supporting the complaint does not point out his specific objection to this letter, but asserts generally that this letter is also deceptive. This hearing examiner has examined this second letter and is not able to find any deceptive statement therein nor any language from which a deceptive statement may be inferred.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the person of each respondent;
2. This proceeding is in the interest of the public;
3. The acts and practices of the respondents, as hereinabove found, are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Opinion

ORDER

It is ordered, That respondents, National Board of Trade, Inc., a corporation, and its officers, and Harold O. Jackson and Marion E. Jackson, individually and as officers of said corporation, and E. W. Pond, individually and as a director of said corporation, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection, or the collection of, or attempts to collect accounts, or to obtain information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That they have corresponding bonded attorneys or professional collectors; or that they have any other persons or firms associated with them, unless such is the fact;

(b) That they have associate offices;

(c) That they are an organization for the protection of creditors;

(d) That they obtain investigations or reports through banks, employers or other organizations;

(e) That they issue credit reports.

2. Using the corporate name National Retail Board of Trade, Inc., or any other name of similar import; or representing, directly or by implication, that they are an organization of retailers or are connected in any manner with retailers or an organization of retailers.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the respondent National Liquidators, Incorporated, a corporation, and its officers.

OPINION OF THE COMMISSION

By SECRET, *Commissioner*:

This matter is before the Commission upon the cross-appeals of counsel supporting the complaint and respondents, excepting National Liquidators, Incorporated, from the hearing examiner's initial decision.

The complaint charges the respondents with misrepresentation in violation of the Federal Trade Commission Act in connection with their business of collecting delinquent accounts. The hearing examiner held that the evidence sustained some of the charges but not all and included with his initial decision an order against the respondents, except respondent National Liquidators, Incorporated, to cease and desist the practices found to be unlawful. The examiner dismissed the complaint as to respondent National Liquidators, Incorporated, and its officers.

The appeal of counsel in support of the complaint contests: (1) the dismissal of the complaint as to National Liquidators, Incorporated; (2) the finding that certain form letters set out in the complaint are not deceptive; and (3) the failure to include in the order a requirement for the disclosure on forms and materials the true purpose for which information is requested. Respondents appeal from the part of the order which prohibits them from using the corporate name National Retail Board of Trade, Inc.

We will first consider the appeal of respondents. They contend that there is no evidence that anyone has been deceived by the use of the name National Retail Board of Trade, Inc. They point to the testimony of Mr. Thomas D. Hodges, associated with the Better Business Bureau of Los Angeles, who stated that in the relevant period he had received no complaints relative to respondents' use of the name National Retail Board of Trade, Inc. As to this, the rule is that actual deception need not be shown. It is enough if the term has the capacity or tendency to deceive. *Federal Trade Commission v. Algoma Lumber Co., et al.*, 291 U.S. 67 (1934); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir., 1944); *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103, 105 (7th Cir., 1946). Through the use of the name National Retail Board of Trade, Inc., respondents have represented that this company is an organization of retailers when in fact it is not. Such a representation is false, and it has the capacity and tendency to mislead and deceive many persons into the erroneous and mistaken belief that this name indicates the true nature of respondents' business and to induce them because of such erroneous and mistaken belief to furnish information which they would not have otherwise provided. Cf. *Clifford E. Rice, et al., t/a Retail Board of Trade, et al.*, 53 F.T.C. 5 (1934). We believe, therefore, that the examiner correctly prohibited respondents from using this name.

The appeal of counsel supporting the complaint first raises an issue as to the finding by the examiner that the trade name National Liquidators, Incorporated, is not deceptive. The complaint alleges that the use of this name is false, misleading and deceptive because the company is not engaged in the liquidation business in any respect. The examiner found that this respondent is engaged in the business of collecting accounts and that when it collects an account it thereby liquidates the account and so is engaged in the liquidation business. Although the term "liquidator" is broad enough in meaning to include the collection business. *Liquidators v. Clifton*, 286 p. 152, 153 (1930), it also can mean a person appointed to carry out the winding up of the affairs of a company. It, therefore, may be used

in such a manner as to represent that it could be to the financial advantage of the person involved to reply to correspondence in which it appears. Cf. *Clifford E. Rice, et al., t/a Retail Board of Trade, et al., supra*. In this case, in every document in evidence which is used for mailing to debtors and on which the name National Liquidators, Incorporated, appears, it is clear that this respondent is a collection agency and that the purpose for sending the material is to collect a debt. However, in cases where this name is used on stationery sent to the debtor's employer (as distinguished from correspondence sent directly to the debtor) respondent is using the term National Liquidators, Inc. with such legend as "A National Institution," in such a manner as to cause the employer so receiving the correspondence to believe that it may be to the benefit of his employee to reply to the correspondence. For this reason we believe that the over-all impression created by this letter is deceptive and the order to be issued herein will require a disclosure so that the employer will be apprised of the true purpose of respondent's correspondence.

The next question raised in the appeal of counsel supporting the complaint relates to the examiner's failure to find deception in certain form letters covered by the allegations in Paragraph Seven of the complaint. The first of these, a letter which does not carry the letterhead of either the National Retail Board of Trade, Inc., or National Liquidators, Incorporated, reads in part as follows:

Liquidation No. [number inserted]

I am endeavoring to communicate with a person of your name, and I believe that you are the individual.

This is a matter of importance to the proper person. Please answer the following questions which will enable me to be certain whether or not you are the person to whom I shall communicate fully:

[Series of questions follow.]

This letter is sent to the debtor. It is so phrased as to mislead a recipient into the belief that there may be some financial advantage in furnishing the information. The expression, "This is a matter of importance to the proper person," combined with the term "Liquidation" clearly carries with it the suggestion of possible benefit. The fact is that the purpose of the letter is to locate a debtor and to collect a debt. Thus, it is false, misleading and deceptive. We note that respondents admit in their answer that some of their statements have the tendency and capacity to mislead some persons. Also, this letter is almost identical to a form letter held to be deceptive in *Clifford E. Rice, t/a Retail Board of Trade, supra*. We conclude that the examiner erred in finding that the allegations of the complaint were not sustained as to respondents' use of this form.

Opinion

57 F.T.C.

The other form letter set forth in Paragraph Seven of the complaint reads as follows:

Gentlemen:

We are desirous of verifying the position of the above-named individual, who, we are informed, is employed by your organization.

This information is desired for business purposes and we assure you that it will be treated with the strictest confidence.

In the event this individual is not on your current payroll, we would appreciate your giving us any available information as to his present whereabouts.

We enclose a business reply envelope for your convenience and we thank you for your cooperation in this matter.

Yours very truly,

/S/ M. E. JACKSON,
Auditor.

This form letter is used with the letterhead of both National Retail Board of Trade, Inc., and National Liquidators, Incorporated. It contains the company's emblem which is similar for both corporate respondents. The one contains the words, "National Retail Board of Trade—A National Institution"; the other, "National Liquidators, Incorporated—A National Institution." The form is signed in both instances by M. E. Jackson, Auditor.

While the body of this form letter, taken out of context, may not be false or deceptive, when taken in its entirety, with the aforementioned emblem and legend, and including the letterhead of the respective companies, it represents deceptively that it may be to the financial advantage of the party to reply to the correspondence. Actually the only purpose of the letter is to locate a debtor and collect a debt. The correspondence, therefore, is misleading and deceptive to the extent it may represent otherwise.

Counsel supporting the complaint have requested that the order include a provision which would prohibit the respondents from using or placing in the hands of others for use, any form, questionnaires or other materials, printed or written, which do not clearly reveal that the purpose for which information is requested is that of obtaining information concerning delinquent debtors. We find that the form letters herein found to be false and misleading fail to reveal their true purpose and deceive recipients to the extent that they do not know why the information is being requested. Accordingly, we believe that an appropriate disclosure provision in the order is necessary to prevent further deception. *Mitchell S. Mohr, t/a National Research Company, et al. v. Federal Trade Commission*, 272 F. 2d 401 (9th Cir., 1959). See also the order in *National Clearance Bureau, et al. v. Federal Trade Commission*, 255 F. 2d 102 (3d Cir., 1958).

The hearing examiner in his initial decision ordered that the com-

plaint be dismissed as to respondent National Liquidators, Incorporated, and its officers. He found, however, that both the corporate and individual respondents cooperate and act together in carrying out the acts and practices which he found to be unlawful. The corporate respondents occupy the same place of business at 7410 Beverly Boulevard, Los Angeles, California. Individual respondents Harold O. Jackson and Marion E. Jackson are officers of both corporations and E. W. Pond is director of both corporations. These individuals formulate, control and direct the policies, acts and practices of both corporate respondents. While it was not found that National Liquidators, Incorporated, directly engaged in all of the practices alleged to be unlawful, this corporation acted with the other respondents in carrying out such practices and shares the responsibility for the violations. Moreover, the finding that respondents used deceptive form letters relates to both corporate respondents. In the circumstances, we see no reason to distinguish between the corporate respondents so far as the remedy is concerned. If the order is to be effective in a case such as this where respondents have acted together and where they operate what is in effect a single business, it must encompass all the respondents. Accordingly, we hold that the examiner erred in dismissing the complaint as to National Liquidators, Incorporated, and its officers.

The respondents' appeal is denied and the appeal of counsel in support of the complaint is granted. It is directed that an appropriate order be entered.

FINAL ORDER

Respondents, except National Liquidators, Incorporated, and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision, and the matter having come on to be heard by the Commission upon the whole record, including briefs in support of and in opposition to the appeals, and the Commission having rendered its decision denying respondents' appeal and granting the appeal of counsel in support of the complaint and directing that an appropriate order be entered:

It is ordered, That the first sentence in numbered paragraph 6 of the findings contained in the initial decision be, and it hereby is, modified to read as follows:

Through the use of the name of National Retail Board of Trade, Inc., in the course and conduct of the aforesaid business, this respondent and the individual respondents represented, and now represent, that the corporation so named is a nationwide organization of retailers.

It is further ordered, That the paragraph numbered 7 of the findings contained in the initial decision be, and it hereby is, modified to read as follows:

7. Through the use of the name National Liquidators, Incorporated, in the course and conduct of the aforesaid business, this respondent and the individual respondents represented, and now represent, that the corporation so named is engaged in the liquidation business. The firm of National Liquidators, Incorporated, is engaged solely in the business of collecting accounts, and while it is true that the term "liquidation" is broad enough in meaning to include a collection business, it also can mean a person appointed to carry out the winding up of the affairs of a company. It, therefore, may be used in such a manner as to represent that it could be to the financial advantage of the person involved to reply to correspondence in which it appears. In evidence in this record is a letter containing the letterhead "National Liquidators, Incorporated". This letter also includes the company's emblem on which appears the following words: "National Liquidators, Incorporated—A National Institution". The form letter is signed by M. E. Jackson, auditor. When used in this context, the name National Liquidators, Incorporated, represents that it would be to the financial advantage of the party for which the information is requested, if the recipient will reply. In fact, the only purpose of the letter is to locate a debtor and collect a debt. The representation, therefore, is false, misleading and deceptive. The name National Liquidators, Incorporated, when so used, has the capacity and tendency to mislead recipients into the erroneous and mistaken belief that such representation is true and may induce them because of such erroneous and mistaken belief to furnish information which they would not have otherwise provided.

It is further ordered, That the paragraph numbered 8 of the findings contained in the initial decision be, and it hereby is, modified by deleting the words "The complaint further alleges that" and by capitalizing the word "the" immediately following the deleted words.

It is further ordered, That paragraph numbered 9 of the findings contained in the initial decision be, and it hereby is, modified by inserting at the end thereof the following sentence:

It is, therefore, found that each of the representations set forth in subparagraphs 1 through 5 in paragraph 8 above, is false, misleading and deceptive.

It is further ordered, That the paragraph numbered 10 of the findings contained in the initial decision be, and it hereby is, modified by inserting the words "by creditors" immediately following the word "accounts".

666

Order

It is further ordered, That the footnote to the paragraph numbered 10 of the findings contained in the initial decision be, and it hereby is, modified to read as follows:

¹The respondents contend that the use of these representations are not misleading to creditors because the representations are not made to creditors. This contention is rejected. At least one of the representations appears on forms presented to creditors. Reference is made to Commission Exhibit 3, a contract used for assigning accounts. Some of the representations involved appear on forms intended to be sent to debtors, but even these forms could come to the attention of creditors. Moreover, the contention fails to establish a defense since some or all of the false representations have the tendency and capacity to deceive debtors into an erroneous and mistaken belief as to the true nature of respondents' business and induce them because of such erroneous and mistaken belief to furnish information which they would not have otherwise provided.

It is further ordered, That the first sentence of the paragraph numbered 11 of the findings contained in the initial decision be modified to read as follows:

In the course and conduct of their aforesaid business by collecting accounts, respondents frequently seek, and have sought, to ascertain the current address of persons from which they are attempting to collect accounts.

It is further ordered, That the initial decision be, and it hereby is, modified by substituting for the paragraphs numbered 12, 13 and 14 of the findings contained in the initial decision, the following paragraphs:

12. The first letter quoted above is sent to debtors. It is so phrased as to cause a debtor to believe that there may be some financial advantage in furnishing the information. The statement therein that "This is a matter of importance to the proper person", combined with the term "Liquidation" signifies or suggests possible benefit. The truth is that the sole purpose of the letter is to locate a debtor and collect a debt. Therefore, the representations as to financial advantage in this first form letter are found to be false, misleading and deceptive. The use by the respondents of this form letter has the capacity and tendency to mislead a substantial number of debtors into the erroneous and mistaken belief that such representations are true and may induce them because of such erroneous and mistaken belief to furnish information which they would not have otherwise provided.

13. The second form letter quoted above is sent to the debtor's employer. While there is nothing in the body of this form letter

which is false or deceptive, nevertheless, taken in its entirety it is misleading in its overall effect. The letter contains the letterhead of the National Retail Board of Trade, Inc., or National Liquidators, Incorporated, and the emblem of the respective companies, one of which contains the words "National Retail Board of Trade—A National Institution" and the other "National Liquidators, Incorporated—A National Institution". The letter is signed by M. E. Jackson, Auditor. The representation in the letter, considering it as a whole, is that it would be to the financial advantage of the employee if the recipient employer will reply. In fact, the only purpose of the letter is to locate a debtor and collect a debt. The representation, therefore, is false, misleading and deceptive. This form letter has the capacity and tendency to mislead recipients into the erroneous and mistaken belief that such representation is true and may induce them because of such erroneous and mistaken belief to furnish information which they would not have otherwise provided.

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

It is ordered, That respondents, National Retail Board of Trade, Inc., a corporation, and National Liquidators, Incorporated, and their officers, and Harold O. Jackson and Marion E. Jackson, individually and as officers of said corporations, and E. W. Pond, individually and as a director of said corporations, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection, or the collection of, or attempts to collect accounts, or to obtain information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

- (a) That they have corresponding bonded attorneys or professional collectors; or that they have any other persons or firms associated with them, unless such is the fact;
- (b) That they have associate offices;
- (c) That they are an organization for the protection of creditors;
- (d) That they obtain investigations or reports through banks, employers or other organizations;
- (e) That they issue credit reports;
- (f) That they are a national institution by using the emblem containing the words "National Retail Board of Trade—A National Institution" or "National Liquidators, Incorporated—A National Institution" or by any other means.

666

Decision

2. Using the name National Retail Board of Trade Inc., or any other name of similar import; or representing, directly or by implication, that they are an organization of retailers or are connected in any manner with retailers or an organization of retailers.

3. Representing, through use of deceptive trade names or in any other manner, that their business is other than that of a private collection agency engaged in collecting past due accounts.

4. Using, or placing in the hands of others for use, any forms, questionnaires or other materials, printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.

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

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

IN THE MATTER OF

BARNARD HOSIERY CO., INC., ET AL.

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

Docket 7544. Complaint, July 15, 1959—Decision, Sept. 22, 1960

Order requiring manufacturers to cease violating the Wool Products Labeling Act by labeling as "Wool 35%, Cotton 65%, 100% wool cushion sole", men's hosiery which contained no wool except for the soles and in which the percentage by weight of wool was substantially less than 35%; and by labeling other men's hosiery as "100% Wool Sole Cushioning—Top, body all cotton", when the wool content of the soles was substantially less than 100%.

Mr. Thomas A. Ziebarth and Mr. Charles W. O'Connell supporting the complaint.

Respondents, *Pro Se*.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

THE COMPLAINT

The complaint charges that respondents violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder by misbranding mens hosiery and it is also charged

that the respondents violated Section 5 of the Federal Trade Commission Act through the use of false and misleading statements on sales invoices and shipping memoranda which misrepresented the fiber content of hosiery.

THE ANSWER

The corporate respondent and the individual respondent Nathan Natelson filed an answer which admitted the alleged corporate status of the corporate respondent and the control by the individual respondents. The individual respondent Robert Sharp did not file an answer and did not appear at the hearing but he did enter into a stipulation which is a part of the record in which he conceded that he cooperated in formulating, directing and controlling the acts and practices of the corporate respondent which was engaged in interstate commerce. The answer further admitted respondents were engaged in "commerce" as alleged and that they were in competition in commerce with others engaged in the manufacture and sale of hosiery containing wool. The other allegations were denied and the answer asserted as an affirmative defense that the markings on its hosiery were in full compliance with Rule 23 of the Rules and Regulations promulgated by the Commission under the authority of the Wool Products Labeling Act of 1939 and that such markings were not deceptive.

A hearing was held at which evidence was received in support of, and in opposition to, the allegations of the complaint. Thereafter, proposed findings as to the facts and a proposed order were submitted by counsel supporting the complaint and by the corporate respondent. These proposals have been considered and to a considerable extent those submitted by counsel supporting the complaint have been accepted and are embodied herein. To the extent that they are not embodied herein, the proposals submitted are hereby rejected.

After considering the entire record, the hearing examiner now finds the following facts.

FINDINGS OF FACTS

1. Respondent Barnard Hosiery Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Nathan Natelson and Robert Sharp are president-treasurer and secretary of the corporate respondent, respectively. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent, including the acts and prac-

tices herein referred to. All respondents have their office and principal place of business at 29 West 34th Street, New York, N.Y.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1955, respondents have caused the manufacture for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

3. Respondents in the course and conduct of their business as aforesaid were and are in competition in commerce with other corporations, firms and individuals likewise engaged in the manufacture and sale of hosiery containing wool.

4. The record shows that respondents are engaged in the business of marketing hosiery. The product which is the subject matter of the complaint is referred to as a "cushion sole sock". This product consists of a cotton sock to which wool has been added in certain places for its cushioning effect.

5. Wool has been added to the inside of the sole and high heel of the cotton sock by attaching the wool to the cotton portion by a process known as terry stitching and these are the only parts of the sock that contain any wool. The high heel is not to be confused with the heel. The heel is cushioned with cotton and an area above the heel is cushioned with wool and is referred to as the high heel. The toe like the heel is cushioned with cotton. The weights of wool and cotton in the parts of the sock that have the wool cushioning are approximately equal.

6. A test of one of the respondents' socks shows the wool content of the entire sock to be 19.3% and a test of another of respondents' socks shows that one to be 17.6% wool.

7. Respondents used two different transfers on the sock in question to designate the fiber content therein. These transfers read as follows:

- (1) Wool 35%; cotton 65%; 100% wool cushion sole (CX 1).
- (2) 100% Wool sole cushioning; top, body all cotton. (CX 3)

Respondents did not label their hosiery as required by Sections 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act of 1939 in that the labels did not show the correct percentage of wool in their socks and did not show the actual percentage of wool in the sole section of the socks. In its proposed order the corporate respondent concedes that the transfer quoted first in finding 7 constitutes misbranding but contends that the transfer last quoted in finding 7 was not shown to be deceptive. Respondents contend that Rule 23 of the Rules promulgated under the Wool Act per-

Conclusion

57 F.T.C.

mits the use of the labeling last quoted in finding 7 because they contend that the sole is the inside of the sock and the foot is the outside. Literally, the term foot includes the toe, heel and sole and the term sole includes both the inner and outer layers if, in fact, there are inner and outer layers as is the case here. It may be that a cushion inner sole, as distinguished from a complete sole, could be considered a recognizably distinct section of a sock although the trade generally, as evidenced by the Trade Practice Rules for the Hosiery Industry, does not consider this to be true but it is not necessary to decide this because the respondents did not distinguish between inner sole and outer sole and it seems obvious that respondents' hose had both an inner sole of wool and an outer sole of cotton and thus the complete sole was misbranded. It could be considered that respondents' cushion sole is padding and that its fiber content should be set forth separately as required by Rule 24 but in any event this Rule has not been complied with and more particularly Rule 23 was not complied with as respondents contend.

The permissive portion of Rule 23 was not adhered to, but more importantly and as a part of the same issue, the mandatory portion of the Rule was violated because a failure to designate the part of the sole which was wool and the part which was cotton does not avoid deception as the rule requires. There is no evidence to show whether the cushion sole or inner sole is a recognizably distinct section except what may be observed from an examination of the product. It cannot be found that it is not a recognizably distinct section but if there is such section, Rule 23 requires that each such section be separately identified in the same label and the Rule would require that the fiber content of the inner sole, the outer sole, and each other recognizably distinct section be similarly identified with the fiber content shown. This, the respondents have not done. Thus, their contention that they have complied with the permissive section of the Rule must be rejected. It also appears that the use of larger print in the "100% wool" portion of the label and smaller print for the portion "top, body all cotton" aids in the deception.

CONCLUSION

Respondents have misbranded hosiery containing wool within the intent and meaning of Section 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act of 1939 and of Rule 23 of the Rules and Regulations promulgated thereunder. It is also concluded that the evidence does not show a violation of Section 5 of the Federal Trade Commission Act which was alleged in Paragraph Ten of the Complaint because it does not appear that the shipping memoranda to

the producing mill, which are in evidence, had the capacity to deceive.

ORDER

It is ordered, That respondents Barnard Hosiery Co., Inc., a corporation, and its officers and Nathan Natelson and Robert Sharp, 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 the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of hosiery composed in whole or in part of wool 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.
3. Falsely or deceptively designating the character or amount of the fibers contained in any section of a wool product composed of two or more sections which are recognizably distinct in violation of Rule 23 of the Rules and Regulations promulgated pursuant to the Wool Products Labeling Act of 1939.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

In the initial decision filed by the hearing examiner, the examiner found that the respondents had misbranded their hosiery products in violation of the Wool Products Labeling Act and that such violations included failure to comply with the requirements of Rule 23 of the Rules and Regulations promulgated under the Act. These findings and the order based thereon the respondents are here contesting.

The complaint's charges of misbranding and the evidence received related to two forms of imprinted labeling statements used by respondents for designating the fiber content of socks marketed by them, which statements or transfers read as follows:

- (1) Wool 35%; cotton 65%; 100% wool cushion sole.
- (2) 100% Wool sole cushioning; top, body all cotton.

Respondents, in their appeal, do not challenge the finding of law violations attending use of the first aforementioned label. The appeal thus presents the sole question of whether the hearing examiner erred in finding that the second label fails to comply with the requirements of the rule previously referred to which provides for disclosure of the fiber composition of wool products on a sectional basis under circumstances and in the manner there prescribed.

Respondents' hosiery is referred to as a cushion sole sock. It is essentially a cotton sock with tufted or looped stitching affording a cushioning effect and applied by a process known as "terry stitching." The cushioning for the toe and heel is composed of cotton; that for the area in between them, that is, the sole, is wool; and that for the high heel, namely, the reinforcing area joining the heel and extending up toward the body or leg, also is wool. The cushioning is limited to these particular portions of the sock and is plainly visible on their inner surfaces and, where the wool yarn is knitted with the cotton yarn, they form the fabric. The weights of the cotton and wool in the parts where wool is used are approximately equal.

Rule 23¹ permits and authorizes sellers of wool products which are composed of two or more recognizably distinct sections of differing fiber compositions to show the fiber composition of each section separately, provided that such designations include the respective percentages applicable to each section specifically designated and provided that the disclosure made is adequate to fully inform purchasers; and under the rule, sectional disclosure of fiber composition in the manner above prescribed is mandatory when necessary to avoid deception of purchasers or purchaser-consumers. The exhibits received in evidence include a copy of certain specifications relating to wool "cushion-sole" men's socks which have been approved by the procurement divisions of the armed services. These specifications prescribe, in effect, a seamless sock with top and leg composed of designated yarns and having terry or tuft stitches "throughout the high heel, heel, sole, toe, toe and ring toe."

Respondents contend that the hearing examiner erred in failing to find that the term "sole" as a designation for cushion sole hose

¹ Rule 23—*Sectional Disclosure of Content.*

(a) *Permissive.* Where the wool product is composed of two or more sections which are recognizably distinct and such several sections are of different fiber composition, the required fiber content to be stated upon the stamp, tag, label, or other mark of identification may be separated in the same label or mark in such manner as to show the fiber composition of each section, provided the section to which the respective percentages and fiber designations apply is specifically designated and such disclosure by sections is adequate fully to inform purchasers of the required information.

(b) *Mandatory.* The disclosure by sections as above provided shall be made in all instances where such form of marking is necessary to avoid deception of purchasers and purchaser-consumers. [16 C.F.R. § 300.23]

connotes the inner portion where two fabrics are combined to form its foot portion and that the inner cushioning material in the foot area thus constitutes a distinct section for purposes of fiber disclosure. Were the area constituting the inner cushioning in the foot section deemed an appropriate distinct section for purposes of fiber disclosure, as contended, the respondents' labels identifying the sole cushioning of their hosiery as "100% wool" and referring to the top and body as all cotton still would not supply the information prescribed by the rule and would be deceptive. This is evident because the heel and toe are likewise components of the foot portion and not of the top and body of hosiery, and the label is silent as to the fact that these components in the respondents' products are in fact all cotton. Furthermore, not all the yarn used by the respondents for the cushioning effect is wool yarn. As previously noted, the cushioning for the toe and heel of their socks is composed of cotton.

In 1941, the Commission promulgated Trade Practice Rules for the Hosiery Industry. Rule 9(n)² thereof recognizes as appropriate sections of hosiery for purposes of making sectional disclosures of fiber content, (1) the "body" or "leg"; (2) the "top" or "welt"; and, (3) the "foot" or "heel, toe and sole." Although the record suggests that production of socks having this type of cushioning material began later, in 1943, the record also includes evidence as to current practices and customs in the hosiery trade respecting the nomenclature of sections and disclosure of their fiber contents. An affidavit executed by an official of a trade association, whose membership manufactures approximately 75% of the hosiery produced in this country, states that members (and non-members with few exceptions) recognize and use the sections designated in the above trade practice rules. Furthermore, according to that affidavit, the member producers and most nonmembers who make hosiery wish cushion soles composed of cotton and wool yarn also set forth the fiber contents of such soles separately together with the respective percentages of each fiber. It is clear therefore that there is no general understanding among the members of the industry that the inner segment of a cushion sole is an appropriate distinct section for purposes of fiber disclosure. It is evident, on the other hand, that a cushion sole consisting of an inner and outer segment is the portion which is duly recognized as an appropriate distinct section for purposes of fiber disclosure.

The Wool Products Labeling Act contemplates that products containing the woolen fibers there designated bear labels or other

² 6 Fed. Reg. 2428 (May 15, 1941); 16 C.F.R. § 152.9 (1960).

means of identification showing the respective percentages of total weight of those and the other fiber constituents. Under Section 6(a) of the Act, the Commission is empowered, among other things, to make rules requiring the segregation of such prescribed information as relates to different portions of a wool product in the interest of preventing deception or confusion. Rule 23 was promulgated by the Commission pursuant to that authority. The statute makes it mandatory, and the rules and regulations contemplate, that products subject to the Act and containing a uniform blend of fibers throughout be identified as to their fiber content in the manner prescribed by Section 4(a)(2)(A) of the Act. The rule is directed to wool products composed of two or more recognizably distinct sections of differing composition; and subparagraph (a) imposes a duty on sellers electing to avail themselves of its permissive provisions to specifically designate each component section and disclose the respective fiber compositions of each. The record in this proceeding supports informed determinations that respondents have failed to comply with Rule 23(a) because their labeling statements or transfers have failed to designate the recognizably distinct sections of their hosiery and to show the respective percentages of wool and cotton contained in the fabric composing each such section. Such products accordingly were misbranded within the meaning of the Act.

Rule 23 additionally makes sectional disclosure mandatory in any situation where that form of marking is necessary to prevent deception. Tests of two representative samples of respondents' socks reveal that the wool present in one constituted 19.3% of its entire weight and in the other 17.6%. As previously noted, however, only the high heel and the sole area of the foot between the heel and toe of respondents' hosiery have contained wool fiber. That a statement designating the percentage which the wool fiber in those particular areas bears to the entire sock would represent and imply, contrary to the facts, that the wool fiber was uniformly present in that percentage throughout the entire sock is obvious, and requires no further comment. It follows that respondents' cushion sole hosiery are subject to the mandatory requirements of Rule 23(b).

Where Rule 23 is governing, it is not necessary that the label additionally show the percentages in which the constituent fibers of the distinct sections are present in the overall product. At the option of the seller, however, a statement in that regard may be set forth on the label as non-required information in conformity with Rule 10(b).

681

Order

To the extent that the findings and conclusions in the initial decision depart from those expressed above, the initial decision shall be deemed modified. We further note that the order to cease and desist contained in the initial decision does not expressly require that future labels reveal the statutorily prescribed fiber information on a sectional basis. The order is being appropriately modified to remedy this deficiency and also for the purpose of clarifying the fact that overall disclosure of fiber content is not required in labeling situations where Rule 23 governs. The respondents' appeal is denied and the initial decision, modified as noted above, is being adopted as the decision of the Commission.

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

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 denied the appeal for reasons stated in the accompanying opinion and having further determined that the order to cease and desist contained in the initial decision should be modified:

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

It is ordered, That respondents, Barnard Hosiery Co., Inc., a corporation, and its officers, and Nathan Natelson and Robert Sharp, 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 the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of hosiery composed in whole or in part of wool 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; provided, however, that the

overall content of the wool products need not be given if such products are labeled in accordance with Rule 23 of the Rules and Regulations promulgated under said Act.

3. Misbranding wool products by failing to set forth on stamps, tags, labels or other means of identification attached to such products the information required under Section 4(a)(2)(A) of the Wool Products Labeling Act with respect to each specifically designated section of a wool product composed of two or more sections where such sections are of a different fiber composition and are recognizably distinct.

4. Falsely or deceptively designating the character or amount of the fibers contained in any section of a wool product composed of two or more sections which are recognizably distinct in violation of Rule 23 of the Rules and Regulations promulgated pursuant to the Wool Products Labeling Act of 1939.

It is further ordered, That the charges contained in paragraph ten of the complaint be, and the same hereby are, dismissed.

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.

Commissioner Tait not participating.

IN THE MATTER OF
HOVING CORPORATION

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

Docket 7195. Complaint, July 18, 1958¹—Decision, Sept. 23, 1960

Order requiring a corporation trading as "Bonwit Teller", with retail stores in New York City, Chicago, Cleveland, and other cities, to cease violating the Fur Products Labeling Act by labeling which deceptively identified the animals producing certain furs or named an additional animal; by advertising in newspapers and otherwise which failed to disclose the names of animals producing certain furs or the country of origin of imported furs, failed to disclose when fur products contained artificially colored or cheap or waste

¹ Amended and Supplemental Complaint dated Mar. 9, 1959.

fur, and contained the name of another animal than that producing certain fur; and by failing in other respects to comply with labeling and invoicing requirements.

Mr. Thomas A. Ziebarth for the Commission.

Dunnington, Bartholow & Miller, by *Mr. Charles G. Pillon*, of New York, N. Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondent has violated the Fur Products Labeling Act and the Rules and Regulations thereunder. After hearings and submission of proposed findings, conclusions and order, and upon the basis of the entire record, the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Hoving Corporation is a Delaware corporation having its principal place of business at 721 Fifth Avenue, New York City. It is engaged, in interstate commerce, in the business of selling women's wearing apparel and accessories, including articles comprised, in whole or in part, of fur. It trades under the name "Bonwit Teller" and maintains retail stores at 721 Fifth Avenue, New York City, and in Cleveland, Chicago, and other cities. Its sales volume during the fiscal year 1957 in all of its seven stores was in excess of \$33,000,000, involving the sale of approximately 2,000,000 items; and it has more than 250,000 charge account customers throughout the United States. Fur products represent approximately 1½% to 2% of respondent's total business. As an incident to its business it causes numerous advertisements to be printed in various newspapers, magazines and other periodicals.

2. The original complaint, issued July 18, 1958, was superseded by an amended and supplemental complaint dated March 9, 1959, mailed March 18, 1959. This proceeding is to be determined upon the charges in the amended complaint, which fall into three general categories—false labeling, false invoicing and false advertising.

A. Labeling Charges; Paragraphs 3 through 6:

3. Under this general classification there are several charges more or less specifically set forth, as follows:

(a) Certain fur products were falsely and deceptively identified with respect to the name or names of the animal or animals which produced the fur—a violation of § 4(1) of the Act;

(b) Certain fur products were not labeled as required by § 4(2) of the Act and the Rules and Regulations thereunder;

(c) Certain fur products were misbranded in that the labels contained the name of an animal in addition to the name of the animal

that produced the fur—violating § 4(3) of the Act and the Rules and Regulations thereunder;

(d) Certain fur products were not labeled as required by the Act and in accordance with the Rules and Regulations in the following respects:

- (1) Required information was abbreviated—a violation of Rule 4;
- (2) Required information was mingled with non-required information—a violation of Rule 29(a);
- (3) Required information was set forth in handwriting—a violation of Rule 29(b);
- (4) Item numbers or marks were not set forth on labels—a violation of Rule 40.

4. To support the labeling charges there was introduced into evidence a white mink muff which was procured from respondent's New York store on December 5, 1958, by an investigator from the Commission's New York office, accompanied by Mr. Mac Shuler, who conducts in New York a resident fur-buying business for out-of-town stores. The label on the muff contained the following information:

Bleached white mink plate; fur origin: USA; item #5; style 1407; RN 3971.

The muff was fabricated from what is known in the trade as a "plate", which consists of small pieces of fur from the bellies or flanks of minks, sewn together to form a larger rectangular piece approximately 8" x 12" in size. The pieces were small sections which had "fallen off the furrier's table during the operation of making a mink garment." Counsel have "joined in recommending" that such pieces may be referred to as "waste fur". The fur had been bleached to achieve a white color. Its selling price, exclusive of tax, was \$39.50. If it had been fabricated from average quality whole white mink skins, the price would have been "in the neighborhood of \$350 last December, figuring on a basis of 6 skins at \$240, plus labor, plus markup". The value of the mink plate actually used, in the same market, was estimated roughly by the Commission's expert witness at 5¢ per square inch. The muff was manufactured by Miss Alice, Inc., and the cost of the fur contained, exclusive of cost of incorporating it into the muff, was stated to be less than \$5.00.

No labels or tags relating to any other fur product are in evidence.

5. Counsel for the respondent contend that since the manufacturer's cost of the fur contained in the mink muff did not exceed \$5.00, the product, under Rule 39, is exempt from the requirements of the Act. The applicable part of Rule 39 reads as follows:

(a) Where the cost of any manufactured fur or furs contained in a fur product, exclusive of any costs incident to its incorporation therein, does not exceed five dollars (\$5.00), or where a manufacturer's selling price of a fur product does

not exceed five dollars (\$5.00), and no express or implied representation is made concerning the fur contained in such product * * *, the fur product shall be exempt from the requirements of the Act and Regulations; * * *.

By labeling the muff, respondent made certain representations concerning the fur contained therein, and therefore the fur product is not exempt from the requirements of the Act and the Regulations.

6. Assessing the label on the basis of the charges, it must be concluded that the label clearly (a) discloses the name of the animal which produced the fur; (b) contains no name of an animal other than that which produced the fur; (c) contains no abbreviation except USA, which has repeatedly been disregarded in the Commission's decisions as a violation of Rule 4; (d) does not mingle required information with nonrequired information; (e) does not set forth the required information in handwriting; (f) discloses the item number of the product.

There is a provision in § 4(2)(D) of the Act that the label must disclose "that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact." Rule 20(a), which further elucidates § 4(2)(D) of the Act, provides:

Where fur products, or fur mats and plates, are composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur, such fact shall be disclosed a a part of the required information in labeling, invoicing and advertising. Where a fur product is made of the backs of skins such fact may be set out in labels, invoices and advertising.

"Rule 20," respondent says, "is, in effect, a tautology, in reality, saying that a 'plate' is a 'plate', and the information which it requires is unnecessary and unreasonable." What the respondent contends is that by use of the word "plate" the label clearly discloses that the muff is made of pieces of bellies, or waste fur. To the fur industry that may be the case, but the Act and the Rules were adopted for the protection of the public and not for members of the industry. Respondent's label, by failing to disclose that the muff was made of scrap pieces of bellies or flanks, or waste fur, does not comply with the relevant requirements of the Act and the Rules.

7. In concluding this section, it is found that respondent, through labeling this mink muff as it did, has violated the provisions of the Act and the Rules as to labeling by not conforming to the requirements of § 4(2)(D) thereof and the Rules relevant thereto.

B. Invoicing Charges—Paragraphs 7 and 8 of Complaint:

8. There are two invoicing charges:

- (a) a general charge that certain fur products were not invoiced as required by § 5(b)(1) of the Act and the Rules thereunder, and
- (b) that required information was set forth in abbreviated form, violating § 5(b)(1) of the Act and Rule 4 thereunder.

9. There are three invoices in evidence.

(a) One is a sales slip issued by Bonwit Teller to the purchaser of the white mink muff above referred to. Under heading "Items & Style" the description is as follows:

Whi mink muff 37—1407.

The sales slip shows date, price, Federal tax, sales tax, department number and other information customarily found on department-store sales slips, but no other information pertaining to the mink muff. It does not show that the fur product was dyed or bleached, or made of bellies, flanks or waste fur, as required by § 5 (b) (1) of the Act.

(b) Another sales slip was issued by Bonwit Teller to Max Azen, in which the fur product is described as a

White Mink Set.

With reference to this product the purchaser, a fur expert, stated by affidavit that "the set was composed of assembled or pieced mink and not solid mink and furthermore that the pieces from which said set was assembled averaged one-half by one inch in size". Because of the small size of the pieces it must be concluded that the fur product covered by this invoice was made of scrap pieces or waste fur. Being white mink, the fur must have been dyed or bleached. By not disclosing these facts this invoice was faulty and did not comply with the requirement of § 5(b) (1) of the Act and the Rules thereunder. This fur set was purchased by Azen on the basis of an advertisement in the New York Times of November 24, 1957.

(c) The third sales slip shows that it was issued by Bonwit Teller for a "Beige Otter Coat". It was stipulated that otter fur in its natural state is dark brown in color, and if it is beige in a fur garment, the fur would of necessity be dyed, bleached or otherwise artificially colored. This information is not disclosed on the sales slip, which is therefore faulty.

10. In concluding this section, it is found that in its invoicing respondent has violated § 5(b) (1) of the Act and Rule 4 of the Rules and Regulations as charged.

C. Advertising Charges—Paragraphs 9 and 10:

11. The complaint charges that in its advertising respondent has violated § 5(a) (1), (3), (4), (5) and (6) of the Fur Act and Rule 20.

(a) by failing to disclose the name or names of the animal or animals that produced certain furs;

(b) by setting forth the name of an animal in addition to the name of the animal that produced certain furs;

(c) by failing to disclose the name of the country of origin of certain imported furs;

Decision

(d) by failing to disclose that certain furs were bleached, dyed or otherwise artificially colored; and

(e) by failing to disclose that certain furs were composed in whole or in part of paws, tails, bellies, or waste fur.

12. To support the foregoing charges, the following advertisements were presented:

(1) In the New York Herald Tribune of December 3, 1958 (CX 4), respondent advertised "mink, chinchilla, fox" furs, but did not disclose the type of fox as specified in the Name Guide, and so did not comply with §5 (a) of the Act and the Rules thereunder.

(2) Two identical advertisements, one in the Cleveland Press of December 7, 1956 (CX 2A), and the other in the Cleveland Plain Dealer of December 14, 1956 (CX 1A), described a "barrel muff" as being "Black Fox" and "Black-dyed fox from Finland". The muff advertised was constructed of the fur of the Red Fox imported from Finland and dyed black. The designation in the advertisement does not disclose properly the name of the animal that produced the fur.

(3) In advertisements appearing in the Plain Dealer of November 10, 1957 (CX 1C) and December 1, 1957 (CX 1E) and in the Press of December 13, 1957 (CX 2B), respondent advertised a "black fox barrel muff" as "black dyed red fox from Finland". Black Fox and Red Fox are accepted in the Name Guide as proper animal designations, but both cannot be properly used as animal designations for the same fur.

(4) An advertisement in the Plain Dealer of August 18, 1957 (CX 1B) is of a "hip line tweed, collared in black lapin" suit. Black lapin is an improper description, not recognized by the Name Guide.

(5) The Plain Dealer of November 23, 1958 (CX 1H), the Cleveland Press of December 5, 1958 (CX 2C), and the New York Times of November 23, 1958 (CX 3D) advertise fox boa-ties "of beautiful fox * * * in natural platina, natural silver or natural blue bleached white. All labeled country of origin". The kind of fox is not specified, as required by the Act and Rules.

(6) In the New York Times of September 29, 1957 (CX 3A) is a respondent's advertisement of a black and white tweed coat with "dyed black Alaskan seal collar". "Alaskan" is not one of the types of seal listed in the Name Guide. "Seal" in itself is not a complete name.

(7) A Plain Dealer advertisement of November 14, 1958 (CX 1G) is of an "African leopard" beret and muff to match. The fault is that "African" refers to a continent rather than a country. The name of the "country of origin" is required.

(8) The New York Times of November 24, 1957 (CX 3B) carried respondent's advertisement of hat-and-muff sets "Natural ranch,

Order

57 F.T.C.

dyed white or dyed black mink" * * * "All furs labeled country of origin". Commission's witness Azen ordered one of the white mink hat-and-muff sets and found, as stated hereinabove, that "the set was composed of assembled or pieced mink and not solid mink, and furthermore that the pieces from which said set was assembled averaged one-half by one inch in size". The advertisement did not disclose that the fur was dyed or that the product was made of "waste fur", as previously found to be the case hereinabove in paragraph 9(b) where this same fur product was discussed.

(9) In the New York Times of November 23, 1958 (CX 3C), there was an advertisement of mink fur sets "in white, black or ranch mink. All furs labeled country of origin". The mink muff (CX 13) previously referred to in paragraphs 4, 5 and 6, above, was from one of the sets thus advertised. There was no statement in the advertisement that the muff was fabricated from scraps or "waste fur."

(10) In Harpers Bazaar for October, 1957 (CX 6), respondent advertised a "belted jacket of American broadtail". "American broadtail" is not a name listed in the Name Guide nor a term recognized by Rule 8. It is therefore an improper designation of the name of the animal that produced the fur of which the jacket was composed. Counsel supporting the complaint urges that there were other faults in this particular advertisement, but his conclusions are based on the testimony of an expert who undertook, without further information, to identify specifically the fur contained in the jacket pictured in the Bazaar. It is doubtful that a positive, specific identification can be so made. Furthermore, accepting the contentions of counsel supporting the complaint as correct, no violations would be found in addition to those which have been pointed out and established by other advertisements of record.

CONCLUSIONS

This proceeding is in the public interest.

The Federal Trade Commission has jurisdiction herein.

The acts and practices hereinabove found to be in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder, constituted and now constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act. Therefore,

It is ordered, That the respondent, Hoving Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in com-

merce, 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: 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 § 4(2) of the Fur Products Labeling Act;

B. Falsely or deceptively invoicing fur products by: 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 § 5(b)(1) of the Fur Products Labeling Act;

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 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 said Rules and Regulations;

2. Fails to disclose that the fur product or fur is bleached, dyed or otherwise artificially colored, when such is the fact;

3. Fails to disclose that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

4. Contains the name of an animal in addition to the name of the animal that produced the fur;

5. Fails to disclose the name of the country of origin of imported furs contained in fur products.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

Respondent is charged with misbranding, false invoicing and false advertising of fur products in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder. The hearing examiner held in his initial decision that the allegations were sustained in part and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from this decision.

The complaint was originally issued on July 18, 1958. Prior to any hearings for the reception of testimony, counsel supporting the

complaint filed a motion with the hearing examiner to amend the complaint so as to include two additional advertising charges. This motion was denied by the hearing examiner on the ground that he did not have authority under § 3.9 of the Rules of Practice to allow the amendment. On February 10, 1959, counsel supporting the complaint filed a motion for amended and supplemental complaint, which was essentially the same as the previous motion, together with a motion to the hearing examiner to certify the proceeding to the Commission for its determination. Thereafter, the proceeding was certified to the Commission, the motion was granted, and an amended and supplemental complaint was issued by the Commission on March 9, 1959.

Respondent's first contention is that the Commission's order of March 9, 1959, was null and void since the motion for certification was filed subsequent to the ten-day period provided in § 3.20 of the Rules of Practice for the filing of interlocutory appeals. It appears, however, that the motion for certification was not an appeal from the hearing examiner's action. The hearing examiner's ruling was not based on the merits of the motion and it is obvious from the motion to certify that the counsel supporting the complaint was in accord with the hearing examiner's decision that the requested action exceeded his authority. The medium of certification was not a means to thwart the provisions of § 3.20 as urged by respondent, but was a proper method of presenting the matter to the Commission which itself has administrative responsibility to issue a complaint or to amend and supplement an existing complaint whenever it has "reason to believe" that a provision of the laws it administers is, or has been, violated. Respondent was not prejudiced by the Commission's action and its appeal on this point is denied.

Respondent next argues that the hearing examiner erred in admitting evidence of violations which occurred after issuance of the original complaint. The original complaint was superseded by the amended and supplemental complaint which was, in effect, the commencement of a new action by the Commission. Since the evidence sought to be excluded was offered in proof of violations which occurred prior to the new action, respondent's argument must be rejected.

Respondent contends that the hearing examiner erred in finding violations of subsection D of Section 4(2) and subsection D of section 5(b)(1) of the Act since violations of those subsections were not specifically charged. In so contending, respondent misconceives the scope and purpose of Sections 4(2) and 5(b)(1). Paragraph Four of the complaint charges that certain of respondent's fur products were misbranded in that they were not labeled as required under

the provisions of Section 4(2), and Paragraph Seven charges that certain of its fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1). As stated in the Commission's opinion in the matter of *Mandel Brothers, Inc.*, Docket No. 6434, July 12, 1957 (order as rephrased affirmed 359 U.S. 385, May 4, 1959):

The Fur Products Labeling Act expresses a national policy against misbranding and false invoicing of fur products. Under the Act, a fur product is misbranded and the introduction, or manufacture of it for introduction, into commerce, or the transportation or distribution of it in commerce, or the sale, advertising, or offering of it for sale in commerce is unlawful, unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4(2), and is falsely invoiced unless there is issued, in connection with its sale, an invoice which incorporates each of the statements of the nature contemplated by Section 5(b)(1). The violations with which the subsections are concerned consist of the failure to attach to a fur garment an adequate label as there prescribed or to deliver to the customer in connection with the sale an invoice that imparts all required information. The subsections do not deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees. Under the plain language of the statute, the offense of misbranding or false invoicing occurs either by reason of failure to attach to a fur product a label or to issue in connection with its sale an invoice, or failure to include on a label which is attached or to show on an invoice which is issued each of the items of information which the statute requires.

Thus, the charges that certain of respondent's fur products were misbranded and falsely invoiced because they were not labeled and invoiced as required by Section 4(2) and 5(b)(1), respectively, were clearly sufficient to inform respondent of the practices alleged to be in violation of the law. The fact that the complaint did not go further and specify the information alleged to have been omitted from the labels and invoices, namely, that the fur products were composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such was the fact, is immaterial. "Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies." *A. E. Staley Mfg. Co. v. Federal Trade Commission*, 135 F. 2d 453, 454 (7th Cir. 1943).

The label introduced into evidence to support the misbranding charge was attached to a mink muff and bears the wording "Bleached White Mink Plate." The record shows that in the fur industry the term "plate" as used with reference to this article, means that the product is composed of "pieces of small sections of the mink that have fallen off the furrier's table during his operation of making a

mink garment and are sewn together into an oblong sheet." As stated by the hearing examiner, however, the Act was adopted for the protection of the public and not for members of the fur industry. The statutory requirement with respect to the labeling of a fur product such as here involved is expressly stated. Since the muff was shown to have been made of waste fur, the label should have shown in words and figures plainly legible (and we think with unmistakable clarity) that such was the fact. In the absence of such a showing on the label, the product was clearly misbranded.

Respondent has raised several objections to the hearing examiner's refusal to rule that certain of its fur products were exempt from the requirements of the Act and the Rules and Regulations by the provisions of Rule 39(a). The part of the rule relied on by respondent reads as follows:

(a) Where the cost of any manufactured fur or furs contained in a fur product, exclusive of any costs incident to its incorporation therein, does not exceed five dollars (\$5.00), or where a manufacturer's selling price of a fur product does not exceed five dollars (\$5.00), and no express or implied representations is made concerning the fur contained in such product * * *, the fur product shall be exempt from the requirements of the Act and Regulations;

The record discloses that the cost of the fur in the muff introduced into evidence in this case did not exceed \$5.00. The only labels or tags in evidence are those which were attached to that muff. As we have previously stated, the label bears the wording "Bleached White Mink Plate." The hearing examiner found that by labeling the muff, respondent made certain representations concerning the fur contained in the product, and that therefore the product was not exempt.

Respondent contends that since the hearing examiner did not specify the representations which were made, his findings were deficient. It appears, however, that the representations used on the label were set out verbatim in the initial decision, and since this is the only label in evidence, the statement thereon obviously must have been the one on which the finding was based. We find that the words "Bleached White Mink Plate" constitute representations concerning the fur within the intent and meaning of Rule 39(a).

Respondent next argues that Rule 39, insofar as it purports to withdraw the exemption from an otherwise exempt item in the event an express or implied representation is made concerning the fur contained therein, was beyond the authority of the Commission to make. The Commission's general authority to prescribe rules and regulations under the Fur Act is granted by Section 8(b). Under this section, the Commission is authorized and directed to prescribe not only rules and regulations governing the disclosure of required

information but also such further rules and regulations as may be necessary and proper for purposes of administration and enforcement of the Act. One of the provisions of the Act which the Commission has to administer and enforce is Section 2(d). Under this section a "fur product" is defined as "any article of wearing apparel made in whole or in part of fur or used fur; except that such term shall not include such articles as the Commission shall exempt by reason of the relatively small quantity or value of the fur or used fur contained therein." Thus the Commission was specifically charged with the duty of determining which, if any, fur products should be exempt from the statutory requirements by reason of the relatively small quantity or value of the fur contained therein, and of prescribing appropriate regulations thereon. In the exercise of this duty, the Commission, after appropriate proceedings, promulgated Rule 39. Under this rule, and subject to the other provisions thereof, a fur product is exempt if, but only if, the cost of the fur contained in the product does not exceed five dollars, or the manufacturer's selling price of the product does not exceed five dollars, and, in either case, if no express or implied representation is made concerning the fur. Obviously, this does not withdraw from the requirements of the statute an exemption otherwise allowed, but establishes a condition which must exist before the exemption applies. In our view, this condition is fully consistent with the stated purpose of the Act to protect consumers and with the general authorization in Section 8(b).

Respondent's contention that the rule was illegally promulgated for the reason that it does not contain a concise general statement of its basis and purpose as required by Section 4(b) of the Administrative Procedure Act, 5 U.S.C.A. Section 1003(b), is rejected upon the authority of *Courtaulds, Inc. v. Federal Trade Commission, et al.*, D.C. Cir., March 4, 1960, and the case cited therein. Also, contrary to the contention of respondent, that portion of Rule 39 relating to representations concerning the fur in a fur product was discussed at the public hearings on the proposed rules and regulations held on June 3, 1952. (See transcript of hearings, Docket 204-4, pages 104, 105.)

Respondent contends that the hearing examiner erred in finding that an invoice describing a fur product as a "Beige Otter Coat" violates Section 5(b)(1) of the Act. Respondent concedes that the fur in this coat was bleached, but argues that there is no proof that the use of the term "beige" was not sufficient to show this fact. This argument is rejected. We agree with the hearing examiner's finding that the word "beige" does not meet the statutory directive of Sec-

tion 5(b)(1), which as implemented by Rule 19 requires that where a fur product is composed of bleached fur, such fact shall be disclosed as a part of the required information. The term "bleached" should have been included on respondent's invoice.

The evidence sustains those charges in the complaint which are covered by the hearing examiner's order. However, respondent argues that on the basis of the allegations and findings in this case, it is incumbent on counsel supporting the complaint to show why the public interest requires the issuance of a formal order. It is well settled that the Commission has broad discretion in determining whether a proceeding would be to the interest of the public. *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929). It is likewise settled that it is in the public interest to prevent the sale of commodities by deceptive methods. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933). Where the Commission has determined that a proceeding is warranted in the public interest and has issued its complaint and found a violation of its statutes, there is no requirement for a specific finding that the issuance of an order to cease and desist is in the public interest. *Northern Feather Works, Inc. v. Federal Trade Commission*, 234 F. 2d 335 (3rd Cir. 1956). In the case of a statute such as the one here involved, any clear and actual violation, even though shown to have been engaged in only once, constitutes ground for issuance of an appropriate order. *The Fair v. Federal Trade Commission*, 272 F. 2d 609 (7th Cir., 1959).

The hearing examiner's order requires respondent to properly set forth on its labels and invoices all of the information required to be disclosed by each of the six subsections of Section 4(2) and Section 5(b)(1) of the Act, respectively. Respondent contends that this order is improper since the hearing examiner found a violation of only one of the subsections of Section 4(2) and two of the subsections of Section 5(b)(1). This same argument was considered by the Commission in the matter of *Mandel Brothers, Inc.*, *supra*, in which case the Supreme Court approved an order of like scope under similar circumstances (359 U.S. 385). For the reasons set forth in the Commission's opinion in that case, the respondent's objections to the order here are denied.

Respondent also argues that the hearing examiner was in error in holding that certain of its advertisements violated the Act. One such advertisement, published in the December 3, 1958, issue of the New York Herald Tribune, contained the representation "mink, chinchilla, fox" furs. The hearing examiner ruled that the failure to disclose the type of fox as specified in the Name Guide constituted a violation of Section 5(a). Respondent contends that the advertisement was of an institutional type and that, as such, it was

exempt from the requirements of the Act under the provisions of Rule 38(c). It is not necessary to determine whether or not the advertisement was of an institutional type. Rule 38(c) contains an express provision that "when animal names are used in such advertising, such names shall be those set forth in the Fur Products Name Guide." Thus, regardless of whether the advertisement was of the institutional type, respondent's failure to disclose the type of fox producing the furs referred to therein constituted a violation of the Act.

The hearing examiner also found that the kind of fox was not specified in an advertisement offering fox boa-ties "of beautiful fox * * *. In natural platina, natural silver or natural blue bleached white." Respondent's argument is that the words "platina", "silver" and "blue" are proper designations in the Name Guide as required by Section 5(a)(1). Rule 5(b) provides that where the name of the animal appearing in the Name Guide consists of two separate words, the second word shall precede the first in designating the name of the animal in the required information. In the list of names of the various kinds of fox in the Name Guide, the words "Platinum", "Silver" and "Blue" are the second words. The hearing examiner's finding is correct.

Respondent has taken exception to the hearing examiner's rulings on certain other of its advertisements. From a careful review of the record, we are convinced that the evidence fully supports the hearing examiner's findings and we are in accord with his conclusions and his order based thereon. Respondent's arguments on these points are rejected.

Although no appeal has been taken on this point, the hearing examiner found that in its invoicing respondent has violated Rule 4 of the Rules and Regulations. This rule provides that required information shall not be abbreviated but shall be spelled out fully. The finding is based on an abbreviation of the word "White" in the designation "Whi Mink Muff" appearing on the invoice referred to in paragraph 9(a) of the initial decision. As the word "White" is not information required to be disclosed under the Act and the Rules, there is no factual basis for the hearing examiner's finding. Accordingly, the initial decision will be modified by striking from paragraph 10 the words "and Rule 4 of the Rules and Regulations."

In view of the foregoing, respondent's appeal is denied. As modified in accordance with this opinion, the initial decision will be adopted as the decision of the Committee.

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

Decision

57 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforementioned appeal and having modified the initial decision to the extent necessary to conform to the views expressed in said opinion:

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

It is further ordered, That the respondent, Hoving Corporation, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Tait not participating.

 IN THE MATTER OF

 THE LAFAYETTE BRASS MANUFACTURING
 COMPANY, INC., ET AL.

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

Docket 6671. Complaint, Oct. 31, 1956—Decision, Sept. 27, 1960

Order requiring two associated corporations and their common officer-owners to cease using the word "Manufacturing" as part of their corporate or trade names unless it is clearly disclosed in immediate connection and conjunction with each such name that such corporation is primarily a distributor and assembler of the products it sells.

Charges of failure to reveal foreign origin of products, representing them to be of domestic origin, and misrepresenting the extent to which their lawn sprinklers could withstand water pressure were settled by consent order dated July 23, 1957, 54 F.T.C. 117.

Mr. Berryman Davis for the Commission.

Mr. Charles Korn, of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

All of the issues originally involved in this proceeding except those raised by paragraph 9 and 10 of the complaint have been adjudicated as to all parties by an Initial Decision *pro tanto* issued by the hearing examiner June 10, 1957, and adopted by the Commission July 23, 1957.

Remaining to be determined is a charge in the complaint of improper and misleading use of the word "manufacturing" in the corporate names of respondents, The Lafayette Brass Manufacturing Company, Inc., and The Durst Manufacturing Company, Inc. This charge was denied by respondents, and on the issues thus joined the matter proceeded to trial, during the course of which certain testimony was had and exhibits received in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

On October 23, 1958, counsel for respondents filed suggestion of death of respondent, David Durst, as to whom the complaint will be dismissed.

After the conclusion of the taking of all the testimony and the reception of all the evidence in this proceeding, respondents moved the dismissal of the ninth and tenth paragraphs of the complaint, in which this charge was set forth, on the ground that there had been a failure of proof with respect to the allegations thereof. This motion was supported by memorandum and was opposed by counsel supporting the complaint in an answering memorandum. Said motion is hereby denied for the reasons and findings herein appearing.

All parties were accorded an opportunity, of which they availed, of filing with the hearing examiner their respective Proposed Findings of Fact and Conclusions of Law, those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

FINDINGS AS TO THE FACTS

1. Respondents The Lafayette Brass Manufacturing Company, Inc., The Durst Manufacturing Company, Inc., and Marshall Metal Products, Inc. are corporations organized and existing under and by virtue of the laws of the State of New York, and share the same offices located at 409 Lafayette Street, New York, N.Y. Respondents Pauline D. Kohn and Norman Redlich are individuals and are secretary and president, respectively, and formulate, direct and control the policies, acts and practices of each of said corporate respondents. Respondent The Durst Manufacturing Company, Inc., owns all of the stock of respondent The Lafayette Brass Manufacturing Company, Inc., and over 80% of the stock of respondent Marshall Metal Products, Inc.; the individual respondents own a majority of the stock of The Durst Manufacturing Company, Inc.

2. The Durst Manufacturing Company, Inc. (hereinafter referred to as "Durst") started doing business in New York City about 1905,

was incorporated in 1911 and has used its present corporate name uninterruptedly for almost fifty years. The word "Manufacturing" has been part of the company's name from the date of its inception in 1905. Its controlling officers are grandson and daughter, respectively, of the founder. Durst is one of the largest firms in the plumbing specialty business, and handles an extremely large number of items for repairs and replacements in the plumbing field, and also specialized in related tools, supplies and accessories. It sells these products in commerce to wholesalers, distributors, chain outlets and certain retail accounts, all of such sales being made "to the trade" in contradistinction to the general public or ultimate consumer, to whom it does not sell. Some of the merchandise sold by Durst is manufactured by it, but the vast majority of all merchandise, dollarwise and as to volume, is made by other manufacturers or producers, and as to this Durst acts as a buyer in the open market or under contract and resells for its own account and profit. Many of its customers received a Durst catalogue, exemplified by Commission's Exhibit No. 7.

3. The Lafayette Brass Manufacturing Company, Inc. (hereinafter referred to as "Lafayette") was organized in 1949 in New York City as a company dealing in brass products and was known as The Lafayette Brass Company, Inc. Its name was changed to "The Lafayette Brass Manufacturing Co., Inc." in 1955 for alleged competitive reasons. It has dealt in interstate commerce primarily in lawn sprinklers, hose nozzles and hose connections. The actual manufacture or production of these articles is performed in very limited part by Lafayette, whose chief function is that of an assembler of diverse parts manufactured or produced by others. Also it contracts abroad, specifically with manufacturers in Japan, for the production of various items which it imports and sells under its own name, thus implying and representing itself to be the manufacturer of such products.

4. Respondents, in the course and conduct of their business, are in substantial competition in commerce with other corporations, firms and individuals in the sale and distribution of lawn sprinklers, hose nozzles, hose connections, faucet aerators, electrical supplies, locks, hardware, plumbing and heating supplies and sundry other articles of merchandise.

Many of Lafayette's customers received a "Lafayette" catalogue, exemplified by Commission's Exhibit No. 6 and Respondents' Exhibits Nos. 1, 2 and 3. All of the sales of merchandise by Lafayette are effected by direct solicitation in "the trade", and sales are not made to the general public or ultimate consumer.

5. Through the use of the word "Manufacturing" in the names of corporate respondents The Lafayette Brass Manufacturing Co., Inc., and The Durst Manufacturing Company, Inc., respondents represent that they manufacture the products sold by them as aforesaid. In truth and in fact, respondents do not manufacture many of such products, but purchase from others either the completed products or the parts thereof which the respondents merely assemble. There is a preference on the part of dealers and the purchasing public for dealing with the manufacturer of products direct, such preference being due to a belief on the part of such dealers and the purchasing public that thereby lower prices and other advantages may be obtained.

6. At the outset of these proceedings, as the record will disclose, pretrial hearings and preliminary discussions were entered into, as a result of which, as in the opening paragraph hereof recited, certain issues raised by the complaint were embodied in an order to cease and desist which was formally approved by this Honorable Commission, leaving to be litigated only the charge of misrepresentation in the use of the word "manufacturing" in the corporate names of the respondents, The Lafayette Brass Manufacturing Co., Inc., and The Durst Manufacturing Company, Inc. The evidence developed without question that these names appeared prominently on the various products merchandised by the respective respondents, on the cartons containing such merchandise which was ultimately sold to the public, and many of the individual articles sold by Durst bore the imprint or trademark "DUMACO" in the center of a diamond outline, which is the trademark of The Durst Manufacturing Company. It was likewise brought out in evidence that the invoices, letterheads, and, particularly, the catalogues issued by both companies hereinabove referred to specifically, all bore the corporate names of respondents, which are found to be misleading in fact in that neither The Durst Manufacturing Company, Inc., or The Lafayette Brass Manufacturing Co., Inc., are in truth and fact manufacturers of the vast majority of the merchandise which they respectively sell.

At this point, and on this subject which is the gravamen of the issue between the parties, and the examiner being of opinion that this initial decision must perforce,¹ by reason of the many decisions on the subject and the position and rulings of the Federal Trade Commission in similar matters, result in the passage of an order against the respondents, however reluctantly he feels it incumbent to do so, especially in the matter of The Durst Manufacturing Company, which has been in business for over sixty years, enjoying an

¹ *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103.

excellent reputation. Further, there is an absolute and total lack of any direct proof of injury to competition or that anyone has been misled to their detriment by the use of the corporate names. It must be recognized that it is not necessary to prove actual injury but that it is sufficient that the possibility of injury or deception be inherent in the act charged. Furthermore, neither respondent corporation sells directly to the ultimate purchaser or to the consuming public but solely to the trade, and we must bear in mind the contention of the respondents, which has not been overcome, that the members of the trade are not deceived by use of the word "manufacturing", especially so in those instances where the respective catalogues of the two corporations clearly disclose, by halftone cuts, that the articles vended by them are the products of others and not of respondents' own manufacture. This is especially true in the matter of the 200-page catalogue of Durst, where the trademarks and names of other manufacturers clearly stand out in the depiction of the various articles of merchandise. However, it must be noted in passing that in the Durst catalogue the name "The Durst Manufacturing Company, Inc." and the Durst trademark appear with great prominence at the top and bottom of each page of the catalogue. Such is likewise true of the catalogues issued by Lafayette.

7. During the pretrial conference and negotiations hereinabove adverted to, the matter of a substitute name, or the deletion of the word "manufacturing" from each corporate name, was explored without success, each of the respondents claiming that their respective names constituted a valuable business asset and good will which had been built up over the years, the validity of which position is recognized by this hearing examiner and forms the basis for the reluctance which he has heretofore expressed in the passage of an order which would be harsh in nature and would deprive the respondents of a valuable asset. Especially is this true in view of the language of the Supreme Court in the *Jacob Siegel Company* matter (327 U.S. 608-614), to the effect that such action should not be taken if the Commission, in the exercise of its administrative discretion and determination, could find a lesser solution, pursuant to which the Federal Trade Commission did in fact alter its original order proscribing use of the name "Alpacuna", and permitted the use of same with additions which obviated the misleading character of the tradename. However, in the instant matter, involving as it does the corporate names, no explanation or modification is possible to overcome the inherent difficulties presented, thus making excision of the word "manufacturing" imperative if the enunciated policy of the Federal Trade Commission is to be followed. With the fore-

going observations, and in order that the position of the respondents on the matter be made known, it is felt only fair to present a short resumé thereof.

THE DEFENSE

1. The Durst Company was incorporated in the year 1912 and is one of the oldest firms dealing in plumbing specialties. At its inception it manufactured substantially all of the comparatively small line of products which it sold, such sales being limited to jobbers, wholesalers, and plumbing supply houses. It did not, and has never, sold directly to the public, nor has it ever solicited mail orders or any other orders directly from the consuming public. In its early history, in common with many of its competitors, it found that there was an increasing need and demand for a single source where repair parts for plumbing fixtures could be purchased, as also the fixtures themselves and specialized tools and accessories. As kitchen and bath plumbing furnishings increased in variety and complexity, specialized tools and accessories were included in the manufacturer's line. Many of these specialized fittings, parts, tools and accessories were not and are not made by Durst, but, on the contrary, are produced in the plants of specialized manufacturers and thereafter purchased by Durst in quantities for resale. The core of the business, however, is still, according to Durst's position, the plumbing specialties made by Durst either on its own premises or with facilities owned and operated by others but made to Durst's order and to Durst's specifications, in many instances bearing Durst's name and backed by Durst's guarantee.

As the field continued to grow, with corresponding expansion of the number of plumbing specialty "manufacturers", such as Durst, it became incumbent on Durst to include in its line certain standard items of other manufacturers. which growth gave rise to a large number of *jobbers* who do absolutely no manufacturing. This activity of Durst in incorporating in its line various items of the lines of other manufacturers, is indulged in by many of Durst's competitors and who,² as in the case of Durst, because of their primary function as manufacturers, have deemed it vital to their continued operation to maintain the distinction in the trade between themselves and the *jobbers* who were not, and never were, manufacturers in any sense of the word.

Thus, at the present time Durst both manufactures some of its own products and distributes certain standard products of others as hereinabove delineated. The variety of products handled is vast in

² See Respondents' Exhibits Nos. 48 and 49.

number and description and composed of various suitable materials, including rubber, brass, steel, plastics of numerous kinds, wood, wire, porcelain, glass or fiber, and some of which may be molded, machined, cast, stamped, drawn, etc. Respondent Durst therefore contends that it is obvious from a perusal of the multitude of items contained in the catalogue and their descriptions, that any reasonable person would instantly recognize that no producing concern could be integrated to the extent that it had the capability of producing all of the various items. When this is coupled with the fact, proven of record, that the catalogue is distributed only to those who are familiar with the trade and not to consumers or the general public, and that the catalogue in each instance, where such is the fact, seeks to identify the maker of the product and clearly gives the maker's name or his trademark, no misrepresentation is possible or intended. Durst's position is, therefore, that if it is denied the use of the word "manufacturing" in its corporate name, its position in the trade as to those products which it actually manufactures would not and could not be made known, and it would revert to the position of a *jobber* as to *all* of the products by it handled, whether such to be manufactured by itself or by others, with consequent loss in good will and perhaps disaster to the company.

2. Continuing with the respondent's position concerning Lafayette Brass Manufacturing Co., Inc., the operations of the latter are entirely different from those of Durst, although the management is identical, the ownership of the two corporations is very close and, in some instances, the marketing outlets of both concerns are similar. Lafayette is not in any sense of the word a plumbing specialty manufacturer, but confines its activities to the "manufacture" and sale of lawn sprinkling and watering devices, hose nozzles, connections, sprayers and related accessories.

Originally, Lafayette actually made its lawn sprinklers and a few other items in their entirety on its own premises with its own facilities and personnel. It designed the castings for the sprinkler bases and had them cast in foundries. The moving portions of the sprinkler tops were fabricated from raw material furnished by various mills. The component parts were then assembled and packaged by Lafayette on its own premises. It was found later, as this field became more competitive, that lower manufacturing costs were imperative so that products could be offered at lower prices, which could be accomplished if the essential parts were made abroad, that is to say, in countries other than America. With this in mind Lafayette caused certain of its hose nozzles to be made in Italy and

most of its lawn sprinklers to be made under contract with Japanese fabricators. This state of affairs continues to exist as of the present time.

The product desired to be fabricated is initiated by causing industrial designers in this country to prepare drawings, a sample of the product is made up by hand for the purpose of pretesting performance, suitability of design, etc., and at such time as all of these items are satisfactory, jigs and dies are made up and negotiations entered into, either directly or through an intermediary, with owners of foreign plants who competitively bid for the privilege of making the items or some portions thereof, or merely for assembling parts and packaging same. Inspection of the foreign plants used is then caused to be made by Lafayette to ascertain if the available equipment is sufficient for the work in hand. When contracts for production are entered into, jigs and dies, as well as specialized tools, are sent by Lafayette to the plant or plants involved. An irrevocable letter of credit is then drawn and delivered to the successful bidder, against which he draws for the purpose of purchasing the required material and then proceeds to fabricate the parts or items contracted for. It is the contention of the respondent Lafayette that the fabrication of the parts or items is under the supervision of personnel who are in the employ of Lafayette and who personally supervise and coordinate the various stages and operations involved in the production. In no case does any single plant produce a complete product. Lafayette's contention, in view of the foregoing, is that it is the "manufacturer" of the part or item and the resultant product sold in commerce is the responsibility of Lafayette rather than any firm engaged in the making of a subpart or sub-assembly. In other words, the foreign facilities are being employed by Lafayette as though they were agents, remaining under the control, and subject to the direction of Lafayette at all times.

Because of the highly competitive conditions in this field and the constant emergence of new inventions and innovations, a manufacturer must be highly responsive to price fluctuations and product changes, for which reason new products are constantly being developed by Lafayette and old products are abandoned or curtailed from season to season. If the slightest cost advantage may be obtained by the use of foreign facilities, Lafayette will employ them and, on the other hand, if there are cost or other advantages to be derived in connection with any particular product by the use of Lafayette's own labor and facilities in the United States, it will immediately make the necessary shift in its production process.

Order

57 F.T.C.

CONCLUSIONS

1. This Initial Decision is concerned only with paragraphs 9 and 10 of the complaint, which specifically charges respondents The Lafayette Brass Manufacturing Co., Inc. and The Durst Manufacturing Company, Inc. with misrepresenting their status as "manufacturers" of the products by them sold because of the use of the word "manufacturing" as an integral part of their respective corporate names. Therefore, the respondent Marshall Metal Products, Inc., not being charged under paragraphs 9 and 10 of the complaint, and having heretofore entered into a consent settlement of the other charges of the complaint as to it, will not be included in the order hereinafter issued.

2. Note is made of the suggestion of death of the named respondent, David Durst, as to whom the order will provide for dismissal of the complaint.

3. The individually named respondents, Pauline D. Kohn and Norman Redlich, are officers and directors of both The Lafayette Brass Manufacturing Co., Inc., and The Durst Manufacturing Company, Inc., and as such are responsible for and direct the business policies and acts of both corporate respondents, wherefore they will be individually included in the order.

4. The acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, wherefore the following order is issued:

ORDER

It is ordered, That respondents The Lafayette Brass Manufacturing Co., Inc., and The Durst Manufacturing Company, Inc., both corporations, and their officers, and respondents Pauline D. Kohn and Norman Redlich, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "manufacturing" or any other word of the same or similar import or meaning as a part of their corporate or trade name or names in connection with products not manufactured by them; or representing in any manner or by any means that they

manufacture any article or product that is not manufactured in a factory owned, operated or controlled by them.

It is further ordered, That, because of the death of respondent David Durst, during the pendency of this proceeding, the complaint, as to him, be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By **SECRET**, *Commissioner*:

The complaint in this matter charges respondents, inter alia, with violating Section 5 of the Federal Trade Commission Act by falsely representing through use of the word "Manufacturing" in the names of two of the corporate respondents that they manufacture the products sold by them.

Respondents, acting under § 3.25 of the Commission's Rules of Practice, executed agreements containing consent orders relating to certain other practices charged in the complaint to be misleading. An initial decision disposing of these charges was issued by the hearing examiner on June 10, 1957, and became the decision of the Commission on July 23, 1957. The remaining charge was contested by respondents and after trial of the issues raised thereby, the hearing examiner, in a separate initial decision held that the charge was sustained by the evidence and ordered respondents (except for an individual respondent against whom the complaint was dismissed and corporate respondent, Marshall Metal Products, Inc.) to cease and desist the practice found to be unlawful. Respondents have appealed from this decision.

The basic issue raised by the contested charge is whether the use of the word "Manufacturing" in the corporate name of The Durst Manufacturing Company, Inc., hereinafter referred to as Durst, and in the corporate name of The Lafayette Brass Manufacturing Company, Inc., hereinafter referred to as Lafayette, has the capacity and tendency to mislead purchasers and prospective purchasers as to the true business status of these firms. Respondents contend on appeal that there is no record support for the finding in the initial decision that Durst and Lafayette do not manufacture the vast majority of the products which they sell and that the record does not provide any basis for distinguishing between a "manufacturing" operation and an "assembling" operation. We think that respondents' arguments on both points must be rejected.

Durst is engaged in the plumbing specialty business, selling a large number of repair and replacement parts for plumbing installation and repair, such as shower heads, tank valves, faucets, filters

and gauges, as well as tools, hardware and electrical products. The products sold by Lafayette are lawn sprinklers, hose nozzles, connections and related items. Both firms sell to wholesalers, distributors and retail accounts.

The record discloses that the manufacturing process used in the production of the products sold by the two firms necessarily involves the fabrication of component parts from raw materials. There is also sufficient evidence in the record to support the finding that dealers that purchase such products consider the firms that perform this basic operation to be manufacturers. The testimony of these dealers also shows that they are aware of the difference between a firm that makes the component parts of the products and a firm that merely assembles or distributes products made in whole or in part by others, and that they prefer to deal with the former.

The record also discloses that products made by various manufacturers and sold under the manufacturer's trademark or name has accounted for about 20% of Durst's total sales. Approximately 30% of this firm's business has consisted of the sale of merchandise made to its specifications by contract suppliers located in Italy and Japan. These products have been received by Durst in completed form and have been sold under the Durst name. Of the remaining products sold and distributed by Durst, some have been made completely in this country by other firms and have been packaged by Durst in its own boxes. The other products, with a few exceptions such as washers and gaskets, which Durst produces by stamping them out of sheets of such material as fiberboard, have been assembled by Durst from parts made by other firms. The evidence also shows that the products sold by Lafayette have been assembled by Lafayette from parts made by foreign and domestic manufacturers. None of the plants that have manufactured the completed products purchased by Durst and Lafayette or the plants which have manufactured the parts for the products assembled by these two corporations has been owned, operated or directly controlled by respondents.

The principal argument advanced by respondents in opposition to the hearing examiner's findings is that the assembling of parts into products is itself a process of manufacture. Although no authority is cited in support of this position, we think there can be no doubt that an assembling operation may be an essential step in the manufacture of certain products and may, therefore, be considered to be part of the manufacturing process. In this connection we have held that the blending by an American firm of perfume concentrates or compounds which had been made in France was a process of manufacture. *Fioret Sales Co., Inc. v. Federal Trade Commission*, 100 F.

2d 358 (1938). Further support for this proposition can be found in the following statement by the Supreme Court in *Tide Water Oil Company v. United States*, 171 U.S. 210 (1898):

The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name.

The material of which each manufacture is formed . . . is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank. . . .

The Court in this case also distinguished between an assembling operation and the complete manufacture of a product by observing that:

. . . If, for instance, the wheels, chain, springs, dial, hands and case of a watch were all imported from abroad, and merely put together in this country, we do not think it could be said that the watch was wholly manufactured within the United States. . . .

It is our opinion, therefore, that, as to certain products assembled by Durst and Lafayette from parts made by others, the operations performed by these firms may be considered to be a process of manufacture. Examples of such operations are the assembling of a "hook" washing machine hose by Durst which involves the cutting of the hose, the cutting and bending of aluminum tubing and the coupling of the tubing to the hose; and the assembling of certain sprinklers by Lafayette which involves such operations as grinding off aluminum flash, drilling holes, punching out gaskets and punch pressing retainer and base plates, together with the assembling of the various parts.

It is not necessary for the purpose of this decision to determine how many of the assembling operations performed by Durst and Lafayette were manufacturing operations. On the other hand, even if it be conceded that each assembling operation was a process of manufacture, it does not necessarily follow that the representation

that these firms are manufacturers would not be deceptive. Where, as here, it is shown that buyers understand the word "manufacturing" to mean the making of component parts as distinguished from the assembling of such parts, the use of the word "Manufacturing" in the corporate name of firms engaged almost exclusively in the distribution and assembling of products made in whole or in part by others, might well have the capacity to mislead and deceive such buyers as to the business status of those firms.

As found by the hearing examiner, there is no evidence of actual deception resulting from the use of the word "Manufacturing" in the names of the two corporations. Neither Durst nor Lafayette sell to the public and there is no showing that members of the trade actually have been deceived. Contrary to respondents' contention, however, such a showing is not necessary to justify an order to cease and desist. It is sufficient if the alleged acts or practices have the capacity or tendency to mislead or deceive purchasers or prospective purchasers.

The hearing examiner has also held that nothing short of excision of the word "Manufacturing" from the names of the corporate respondents "Durst" and "Lafayette" would suffice to cure the deceptive capacity of those names. We do not think the record supports this conclusion, however, nor do we agree with the hearing examiner's ruling that excision is required because corporate names are involved. As hereinbefore stated, Durst and Lafayette do perform certain manufacturing operations. In view of this fact we believe that excision of part of the corporate names would not be warranted if there is some other means by which the deceptive implications of the word "Manufacturing" can be removed. In our opinion the likelihood of deception resulting from the use of this word would be eliminated if persons dealing with Durst and Lafayette are adequately informed of the true nature of the business operations of these firms. This may be accomplished through the use of a concise, though clear statement on stationery, in catalogs and advertising and wherever the corporate names are used, to the effect that respondents are primarily distributors and assemblers of the products they sell.

Respondents' appeal is denied and the initial decision, in those respects in which it is contrary to the views expressed herein, is modified to conform with such views. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon

briefs in support thereof and in opposition thereto; and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal, and having modified the initial decision to the extent it is contrary to the views expressed in said opinion:

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

It is ordered, That respondents, The Lafayette Brass Manufacturing Company, Inc., and The Durst Manufacturing Company, Inc., both corporations, and their officers, and respondents, Pauline D. Kohn and Norman Redlich, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "Manufacturing" as part of the corporate or trade names of corporate respondents unless in immediate connection and conjunction with each such name a clear and conspicuous disclosure is made that such corporation is primarily a distributor and assembler of the products it sells.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent David Durst.

It is further ordered, That respondents, The Lafayette Brass Manufacturing Company, Inc., The Durst Manufacturing Company, Inc., Pauline D. Kohn and Norman Redlich, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

MYTINGER & CASSELBERRY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 6962. Complaint, Nov. 26, 1957—Decision, Sept. 28, 1960

Order requiring the nation's largest direct seller of vitamin and mineral food supplements, with main office in Long Beach, Calif., to discontinue making and enforcing unlawful exclusive-dealing agreements with distributors of its "Nutralite Food Supplement"; canceling contracts of distributors who did not rigidly adhere thereto; and enforcing requirements that distributors, for a two-year period following termination of contracts, not sell their customers any other vitamin-mineral product; and to cease representing falsely, directly and through its distributors, that a consent decree issued by a U.S.

Decision

57 F.T.C.

District Court permanently enjoining it from making false claims concerning said "Nutralite", amounted to endorsement and approval of the product by the U.S. Government, the U.S. District Court, and the Food and Drug Administration; that the allowable claims listed in said decree could be applied only to its product, etc.

Mr. Fredric T. Suss for the Commission.

Rhyne, Mullin, Connor & Rhyne, by *Mr. Charles S. Rhyne*, *Mr. Eugene F. Mullin, Jr.*, and *Mr. W. Dean Wagner*, of Washington, D.C., and *Mr. J. E. Simpson*, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The complaint in this proceeding alleges that the respondents are and have been, for many years, engaged in the purchase, sale and distribution of a vitamin-and-mineral preparation known as Nutralite Food Supplement. This food supplement is described as an encapsulated concentrate of alfalfa, watercress and parsley, to which synthetic vitamins are added and which is combined a package with mineral tablets. This product is sold by respondents to approximately 20,000 distributors throughout the United States, who in turn sell it directly to consumers by house-to-house canvassing. In 1956, respondents' total sales approximated \$26,000,000, and exceeded in volume the sales of any of respondents' competitors likewise selling vitamin-and-mineral food supplements, by the method of house-to-house canvassing. The specific charges against the respondents are separated in the complaint into three counts.

Count I of the complaint charges that the respondents' sales to their distributors are made on the condition, agreement or understanding that the purchaser thereof shall not sell or otherwise distribute any other vitamin or mineral product of a competitor. As a result of this restrictive agreement, the complaint alleges, the competitors of respondents have been and are now unable to make sales of similar products to respondents' customers, which otherwise could have been made. The complaint further alleges that the customers of respondents have been prevented by respondents' restrictions from purchasing similar vitamin and mineral products at lower prices or upon more favorable terms than those granted by respondents. *Count I* of the complaint concludes that the effect of such conditions, agreements or understandings " * * * may be to substantially lessen competition in the line of commerce in which respondents are engaged, and in the line of commerce in which the customers and purchasers of respondents are engaged, and may be to tend

to create a monopoly in respondents in the line of commerce in which respondents have been and are now, engaged.", in violation of the provisions of § 3 of the Clayton Act.

Count II of the complaint alleges that the respondents have employed and are now employing threats of cancellation of their contracts with their distributors, and are cancelling such contracts, unless their distributors rigidly adhere to their exclusive-dealing contracts with respondents. *Count II* further alleges that respondents have threatened and are threatening to enforce, and are actually enforcing, the provisions of their contracts with their distributors, which provide that they shall not, for a period of two years following the termination of such contracts with respondents, solicit the sale of or attempt to sell to their former customers any vitamin or mineral products other than respondents'. *Count II* of the complaint concludes that the effect of such threats and actual enforcements of the above-described agreements.

(1) has a tendency to make respondents' distributors subservient to respondents' wishes and will as to the conduct of their business, lest said distributors be subjected to the onerous and oppressive provisions of said contracts, to the prejudice of competitors of respondents' customers and purchasers of respondents' products and of the public;

(2) has a tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin and mineral products in commerce; and

(3) constitutes unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Count III of the complaint alleges that respondents have, directly and by implication, falsely represented, and have caused and are now causing their distributors to make false representations, as follows:

(1) that a consent decree of injunction issued by the United States District Court for the Southern District of California amounted to an endorsement and approval of Nutrilite Food Supplement by the United States Government, the United States District Court, and the Food and Drug Administration;

(2) that the allowable claims contained in the above-described injunction applied only to Nutrilite Food Supplement and to no other vitamin or mineral supplement product; and

(3) that no other seller of vitamin or mineral food supplement products has a right to submit its promotional literature to the Food and Drug Administration for inspection and comment.

Count III concludes that the use by the respondents of the aforementioned false representations has had and now has a capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true and into the purchase of a substantial number of respondents' products because of such erroneous and mistaken belief, with the result that trade in commerce has been unfairly diverted to the respondents from their competitors, and injury has thereby been done to competition in commerce. Count III concludes, further, that respondents' acts and practices, just described, have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin and mineral products in commerce, and have a tendency to obstruct, and have obstructed and restrained such commerce, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of § 5 of the Federal Trade Commission Act.

THE ANSWER

On February 6, 1958, respondents submitted their answer, in which, in addition to other statements, they denied that they have in any manner violated the Clayton Act, the Federal Trade Commission Act, or any other law of the United States. Respondents further deny that the Commission has reason to believe that they have violated any of the above-mentioned statutes, and specifically deny that the Commission has sufficient information in its files to justify the issuance of the complaint herein.

THE HEARINGS

Subsequent to the submission of respondents' answer, hearings were held, at which evidence was presented in support of the complaint, in Los Angeles, California; Chicago, Illinois; Detroit, Michigan; and Washington, D.C. Thereafter hearings were also held on behalf of respondents, in Los Angeles, California, and in Washington, D.C.

RULING ON PROPOSED FINDINGS

Proposed findings as to the facts and proposed conclusions, and replies thereto, were thereafter submitted by both counsel supporting the complaint and counsel for the respondents. Each of such proposals has been separately considered by the hearing examiner, and those accepted have been adopted and embodied in substance herein. All other proposed findings as to the facts and all other proposed conclusions are hereby rejected.

The hearing examiner, having considered the entire record herein, now finds the relevant facts and conclusions warranted thereby to be as hereinafter set forth.

FINDINGS AS TO THE FACTS

Identity of Respondents:

Mytinger & Casselberry, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located in the city of Long Beach, Calif. Respondent William S. Casselberry is president of the corporate respondent, and Respondent Lee S. Mytinger is secretary-treasurer thereof. Both of these individuals have at all times controlled and directed the policies and practices of the corporate respondent.

Respondents' Product and Method of Distribution:

Respondents are now and for many years have been engaged in the purchase, sale and distribution in commerce, among and between the several States of the United States, of a product known as Nutrilite Food Supplement.

Nutrilite is a multiple-vitamin mineral dietary food supplement composed of an encapsulated concentrate of alfalfa, watercress and parsley, to which synthetic vitamins have been added, and which is combined in a package with mineral tablets. Since 1945 the respondent corporation has purchased the entire production of Nutrilite from the producer thereof, Nutrilite Products, Inc., of California. Respondents sell Nutrilite to distributors only. Such distributors are located throughout the United States, and they, in turn, sell to other distributors and to the consuming public. The distributors of Nutrilite sell this product exclusively by house-to-house canvassing, as distinguished from retail sales through drugstores and other over-the-counter sales.

Respondents designate their distributors of Nutrilite Food Supplement as "sponsors", "agents", "key agents" and "group heads". All distributors are under contract to the corporate respondent. Direct sales are made, however, by the corporate respondent to certain favored distributors, who are designated as "key agents" or "group heads". As of December 31, 1958, there were 1,420 individual distributors who were thus privileged to purchase directly from the corporate respondent. During the same period the total number of individual distributors was 80,700. Respondents' product is distributed to their key agents and group heads from their warehouses in Long Beach, Calif., and Joliet, Ill.

Respondents' Restrictions Upon Their Distributors:

Although, as we have stated, the corporate respondent sells Nutrilite directly to a relatively small group of its leading distributors, all distributors, regardless of how they may be classified by the respondents, are required by the respondents to submit to them an application for distributorship and secure respondents' expressed approval thereof before they are permitted to buy Nutrilite from any source. Each application describes the relationship to be established between the applicant and the corporate respondent in part as follows:

I understand and agree that I am not an employee, servant, agent, or legal representative of Mytinger & Casselberry, Inc., and that the relationship between us is not that of joint venture or similar arrangement, but that as a Nutrilite Distributor I am in business on my own account as an independent contractor who purchases and sells Nutrilite Food Supplement.

I agree that during the time I am distributing Nutrilite Food Supplement: (1) I will not sell, give away, or otherwise distribute any other vitamin and/or mineral products, (2) I will not disclose to any person, firm or corporation other than authorized distributors and/or personnel of Mytinger & Casselberry, Inc. the names and/or addresses of Nutrilite customers unless Mytinger & Casselberry, Inc. gives me written permission to do so.

I agree that for a period of two years following the termination of my relationship with Mytinger & Casselberry, Inc., I will not use or disclose to any person whomsoever any information I obtained while I was a Nutrilite Distributor concerning the names and/or addresses of Nutrilite customers, or any other trade secrets, nor will I, on my own behalf, or on behalf of any other person solicit or in any manner attempt to induce Nutrilite customers to purchase any other vitamin and/or mineral product or to cease using Nutrilite Food Supplement.

I have read and understand that I must meet and uphold the requirements set forth *on the back of this application* if I wish to maintain my status as a Nutrilite Distributor, and that if I do not meet and uphold said requirements my authorization as a Distributor of Nutrilite Food Supplement is subject to cancellation upon written notice from Mytinger & Casselberry, Inc.

On the back of the application there appears a list of items designated A to H, which is headed "DISTRIBUTOR REQUIREMENTS". The first two of such requirements are as follows:

A. While waiting for authorization from Mytinger & Casselberry, Inc., the prospective Distributor will secure a Sales Kit from his Sponsor and proceed with a study of the material therein. He will not be allowed to purchase any Nutrilite Food Supplement at the Distributor's discount, nor make any effort to sell Nutrilite Food Supplement until his formal approval as a Distributor has been received.

B. When authorized as a Distributor, Nutrilite for sale to the consumer and Nutrilite for the Distributor's personal consumption may be purchased at the Distributor's basic discount.

Findings

When the applicant for a distributorship is accepted by the corporate respondent, a letter is written to the successful applicant by the corporate respondent, which reads in part as follows:

YOU ARE NOW A NUTRILITE DISTRIBUTOR . . . and we welcome you as the newest member of the Nutrilite family. We know this is the beginning of a long, pleasant and profitable business association between us.

This authorization is our acceptance of your application and evidences that a contract exists between you and Mytinger & Casselberry in accordance with this letter and the provisions of your Distributor Application.

In a general letter addressed to key agents and qualified sponsors, respondents describe the contractual relationship so established as follows:

The Nutrilite Distributor's contract with M&C is legal and binding. It is a common and usual form of contract. In it M&C agrees to honor certain promises to the Distributor, and the Distributor agrees to honor certain promises to M&C. This is the basis of all contracts. A competitor is not afraid to urge a Nutrilite Distributor to violate this contract because the responsibility is principally the Distributor's—not his would-be recruiters'. His name is on the contract—not theirs. What kind of business would ask him to break a legal contract? The Distributor should remember this: HOW SECURE WOULD HIS CONTRACTUAL ARRANGEMENT BE WITH A BUSINESS THAT ALREADY HAS SHOWN ITS CONTEMPT FOR SUCH CONTRACTS?

Effects and Extent of Control

By means of the quoted agreements, the respondents restrict all of their distributors to sales of Nutrilite Food Supplement exclusive of any other vitamin-and-mineral preparation. Thus respondents deprive their distributors, from the inception of their contractual relationship, of the freedom of choosing any other vitamin or mineral products for resale. Not only do respondents forbid their distributors to sell any vitamin-and-mineral preparation other than Nutrilite during the life of their distributorship, but they exact from their distributors a promise to refrain, for a period of two years after the termination of their distributorship, from endeavoring in any way to sell any vitamin-and-mineral product to those customers to whom the distributor, under his contract with respondents, formerly sold Nutrilite. In other words, if a distributor wishes to withdraw from his relationship with the corporate respondent and continue in the business of selling vitamin-and-mineral preparations, he must forthwith abandon the customers to whom he formerly sold Nutrilite, sacrifice the good-will which he has built up with them, and seek and establish good-will among a new group of customers. It is probable that in many of the smaller sales areas, such reestab-

ishment of good-will would be difficult, if not impossible. It would appear that the prospect of such a consequence renders respondents' distributors afraid to terminate their contracts with respondents, thereby rendering such contracts or agreements a strong instrument for respondents' control of their distributors.

Respondents have enforced these exclusive-dealing agreements with their distributors at various times by cancelling, or threatening to cancel, distributorships; by refusing to supply their distributors with Nutrilite Food Supplement; and occasionally by actual litigation for breach of contract. They have also enforced the two-year restrictive clause in such agreements. Counsel for respondents have freely admitted on the record that respondents have enforced their exclusive-dealing agreements, and have declared that respondents intend to continue doing so in the future. In fact, one of respondents' attorneys, who also appeared as a witness for the respondents in this proceeding, testified that he advised the respondents to adopt their present exclusive-dealing contracts, following the issuance of the consent decree which is the subject matter of Count III of the complaint herein, in order to insure obedience by the distributors to that decree. It seems to us, however, that although an exclusive-dealing arrangement might aid in keeping the advertising claims of competitors out of the possession of respondents' distributors, the primary purpose of such exclusive-dealing contracts was not and is not to promote compliance with that decree, but rather to insure obedience by the distributors to respondents' wishes for the economic and financial benefit of the latter. Respondents' extension of such control for two years after the distributor's relationship with the corporate respondent has terminated indicates, we think, that the true purpose of the restrictions is to advance the sale of Nutrilite, to the prejudice of respondents' competitors and former distributors. By December 31, 1958, respondents had established, through their exclusive-dealing contracts and policies, 100% control over the purchase and resale of vitamin-and-mineral preparations by 1,420 direct purchasers and 80,700 indirect purchasers or distributors of Nutrilite, who sold Nutrilite at retail during that year for a grand total of over nineteen million dollars.

"Line of Commerce" Defined:

As we have previously observed, Count I of the complaint alleges that the effect of the conditions and agreements above described may be "to substantially lessen" competition in the "line of commerce" in which respondents are engaged, and in the line of commerce in which the purchasers of respondents' products are engaged, and may tend to create a monopoly in the respondents, in violation of the

provisions of § 3 of the Clayton Act, the pertinent parts of which are as follows:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, * * * or other commodities, * * * or fix a price charged therefor, * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, * * * or other commodities of a competitor * * * of the lessor or seller, where the effect of such * * * sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Since the facts hereinabove found clearly show that respondents have made and enforced restrictive contracts with their distributors of the type described in the above-quoted Act, we must now determine whether the result of such contracts * * * may be substantially lessen competition or tend to create a monopoly in any line of commerce". Clearly the mere existence of the restrictive contracts executed between the corporate respondent and respondents' distributors, or even the enforcement thereof, cannot of themselves constitute a violation of the Clayton Act unless the effect thereof falls within the prohibitions of the Act. Our problem, therefore, is to determine the effect of such restrictive contracts upon competition within any line of commerce. Accordingly, we must first inquire into the intent and meaning of the phrase "a line of commerce" as used in the Act, and second, delimit the line or lines of commerce in which respondents are here engaged and the competition therein.

The Supreme Court of the United States, in the case of *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), gives us an authoritative explanation of the meaning of the term "line of commerce." The Court was there concerned with determining whether certain paints and fabrics designed especially for use in finishing and decorating automobiles constituted a separate line of commerce distinct and different from other paints and fabrics which might also be used in the painting and finishing of automobiles, but which were not specifically designed or used for that purpose and would not have the peculiar characteristics of the paints and fabrics in question. The Court stated that

The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute such products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Cf. *Van Camp & Sons Company v. American Can Company*, 278 U.S. 245. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automobile finishes and fabrics.

We conclude that a "line of commerce", as defined in the Clayton Act, consists of a commodity or class of commodities possessing "sufficient peculiar characteristics and uses" to render such commodities substantially more suitable for a specific purpose or purposes than commodities lacking such characteristics. All commodities, then, which possess the same "sufficient peculiar characteristics and uses" are, by force of competitive reality, in the same line of commerce and compete with each other. A line of commerce, therefore, is not determined by the method of distribution or sale of a product, but by the inherent "sufficient peculiar characteristics and uses" of the product itself.

National Sales Compared:

The record shows that respondents make no sales at retail, nor do they sell to retail establishments such as drugstores or similar over-the-counter retail outlets. Respondents even forbid their own distributors to maintain " * * * an office for retail sales of Nutrilite * * * ." The only channel through which Nutrilite flows to the consuming public is by the so-called "direct-selling" method; that is, house-to-house canvassing. During the past eight years respondents have not only maintained leadership in such sales, but have far surpassed their direct-selling (house-to-house canvassing) competitors, as shown by the tabulation which follows:

Year	Total sales by direct-selling competitors	Total sales of Nutrilite	Respondents' share of direct sales
			<i>Percent</i>
1951.....	\$10,250,000	\$9,891,000	96.40
1952.....	13,440,000	11,501,000	85.57
1953.....	18,540,000	15,480,000	83.40
1954.....	23,000,000	20,507,000	89.16
1955.....	30,800,000	25,401,000	82.47
1956.....	35,350,000	26,514,000	75.00
1957.....	32,590,000	21,522,000	66.04
1958.....	31,120,000	19,145,000	61.52

Respondents regard themselves, and are regarded by their competitors, as "one of the largest direct-sales organizations in America", and as the leader in the direct-selling of vitamin-and-mineral food supplements. From 1951 to 1957 the annual value of sales of Nutrilite ranged from \$10,900,000 to \$26,900,000, and the net value of sales from \$4,000,000 to \$10,000,000.

A survey conducted by Drug Topics, the national newspaper for retail druggists, which was placed in evidence by respondents as their Exhibit 19, shows that even when the total national market for multiple-vitamin concentrates sold in combination with minerals is considered, the respondents, although their share of the national

717

Findings

market has been declining, have nevertheless retained a very large share thereof, as demonstrated by the tabulation which follows:

Year	Total national sales of vitamin-mineral combinations	Total Nutrilite sales	Respondents' market share
			<i>Percent</i>
1955.....	\$44,320,000	\$25,401,000	57.3
1956.....	48,310,000	26,514,000	54.9
1957.....	52,990,000	21,522,000	40.6
1958.....	55,290,000	19,145,000	34.6

Contentions of Counsel as to the Line of Commerce:

Upon the basis of the above facts, counsel supporting the complaint would have us conclude that " * * * house-to-house selling or field selling * * * " of vitamin-and-mineral food supplements constitutes a separate line of commerce, distinct from other vitamin-and-mineral preparations sold at drugstores and other over-the-counter retail outlets. On the other hand, counsel for respondents, on the basis of the national sales of all vitamin food supplements as shown in their Exhibit No. 19, would have us conclude that all multiple-vitamin food preparations designed as food supplements, regardless of whether they are packaged in combination with minerals or separate therefrom, and regardless of whether they are sold over the counter or from house to house, fall within the same line of commerce, and are sold in competition with each other.

Obviously, if a combination of vitamins and minerals sold by the so-called direct-selling method (house-to-house canvassing) is a separate line of commerce from the same food supplement sold over the counter, respondents' share of sales in that separate line of commerce would far exceed their nearest competitor, and the tendency toward monopoly inherent in respondents' restrictive contracts would likewise be increased. On the other hand, if the line of commerce includes, as counsel for the respondents would have us find, all multiple-vitamin products regardless of how sold or whether combined with minerals, then respondents' share of the market, in proportion to the total sales in that line of commerce, would be substantially less, and the tendency toward monopoly of respondents' contractual restrictions would be greatly minimized. Neither contention falls wholly within the "line of commerce" as herein defined, and both must therefore be rejected.

Line of Commerce Here Involved:

The authentic definition, as here interpreted, does not permit the determination of a line of commerce by the method of sale, nor by including therein products possessing some but not all of the re-

quired "peculiar characteristics." To constitute a line of commerce, products must possess, in common, sufficient peculiar characteristics and uses. The commodity here involved consists of a combination of multiple vitamins with minerals. Therefore no multiple-vitamin preparation without minerals, and no mineral preparation without vitamins, can properly be considered to be in the same line of commerce as such a combined product as Nutrilite. Accordingly, we must conclude that vitamin-and-mineral-combination food supplements, such as Nutrilite, are sufficiently different from vitamin food supplements and mineral food supplements, separately, to constitute, of necessity, an independent line of commerce.

Respondents' Relative Importance in Line of Commerce:

As one of the tabulations heretofore presented shows, respondents have maintained, within the line of commerce here involved, total yearly sales ranging from \$25,401,000 in 1955 to \$19,145,000 in 1958. Those yearly sales have given the respondents a share of the national market ranging from 57.3% in 1955 to 34.6% in 1958. During the same period, it will be remembered, respondents have maintained through their exclusive-dealing contracts a 100% control over the purchase and resale of Nutrilite. By December 31, 1958, such control extended to 1,420 direct purchasers and 80,700 indirect purchasers and distributors. These figures clearly show that the respondents, if not in a dominant position in the line of commerce here involved, are at least leaders therein, with a substantial share of the market.

Proof Under § 3 of the Clayton Act:

The question follows: Do the above facts constitute sufficient proof of a violation of § 3 of the Clayton Act? The United States Court of Appeals for the Second Circuit has answered this question with clarity in the case of *Dictograph Products, Inc., Petitioner, v. Federal Trade Commission*, Respondent, 217 F. 2d 821, Cert. denied 349 U.S. 940. The court stated:

* * * Where the alleged violator dominated or was a leader in the industry, proof of such fact, was, at an early stage, determined to be a sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative of Section 3 and other factors appear to have been largely ignored. * * * More recently the Supreme Court extended the rule to business organizations enjoying a powerful, though clearly not dominant, position in the trade and doing a substantial share of the industry's business by means of these contractual provisions and tacitly approved the trial court's refusal to consider other economic effects or merits of the system employed. * * *

Accordingly, we conclude that the effect of the exclusive-dealing agreements, as alleged in Count I of the complaint and as herein

found, may be substantially to lessen competition in the line of commerce in which respondents are engaged and in the line of commerce in which their distributors are engaged, and may tend to create a monopoly in respondents, in violation of the provisions of § 3 of the Clayton Act.

Proof Under § 5 of the Federal Trade Commission Act:

Furthermore, we must inquire if the above facts, which show that the threats and enforcement of the restrictive contracts were and are to the prejudice of competitors and purchasers of respondents' product and to the public interest, constitute sufficient proof of a violation of § 5 of the Federal Trade Commission Act. *In the Matter of Dictograph Products, Inc.*, Docket 5655, the Commission held:

* * * that respondent's practices of entering into contracts containing exclusive-dealing provisions with its distributors and of intimidating and coercing them into complying with those provisions were unfair methods of competition and unfair acts and practices in commerce in violation of § 5 of the Federal Trade Commission Act.

We conclude, therefore, that the effect of the threats and actual enforcement of respondents' restrictive agreements and exclusive-dealing contracts, as alleged in Count II of the complaint herein, have a tendency to render respondents' distributors subservient to respondents, to the prejudice of the competitors of respondents' dealers and of the public; have a tendency toward and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin-and-mineral-combination food supplements in commerce; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Count III of the Complaint

Introduction:

As previously stated, the respondents are charged in Count III of the complaint herein with a violation of § 5 of the Federal Trade Commission Act, by making and causing to be made three specific misrepresentations about the consent decree of injunction issued against the corporate respondent by the United States District Court for the Southern District of California in 1951. Each of those specific misrepresentations will be considered in detail.

The Consent Decree of Injunction:

A brief statement of the background of that consent decree is essential to an understanding of the issues concerning it. Prior to its issuance the Food and Drug Administration had instituted multiple seizures of Nutrilite in various widely-scattered areas of the

United States. Those actions were based upon allegations that Nutrilite was misbranded by the use of certain allegedly misleading literature in connection with its sale. In addition, a criminal action against the respondent corporation had also been instituted. While these various actions were pending, the corporate respondent instituted an injunction proceeding in the United States District Court for the District of Columbia, against the Federal Security Administrator and certain officials of the Food and Drug Administration. That injunction proceeding was based upon the theory that the various seizure actions against the corporate respondent were arbitrary and illegal. The District Court of the District of Columbia held that Nutrilite had not been misbranded and that the government officials named in that proceeding had acted arbitrarily and illegally. On an appeal from that trial court's decision to the Supreme Court, the decision of the trial court was reversed on the ground that the court was without jurisdiction. Therefore the decision of the District Court of the District of Columbia in that case is a legal nullity, and, accordingly, it is not in any sense an authority by which to resolve any of the factual controversies involved in this proceeding.

Following the Supreme Court's decision, and while the criminal and seizure proceedings were still pending, a complaint for injunction was filed in the District Court for the Southern District of California, charging that Nutrilite was misbranded within the meaning of § 502(a) and § 502(f)(1) of the Food, Drug and Cosmetic Act. That complaint for injunction repeated the charges of the earlier seizure cases and the criminal action to the effect that the then current edition of the book, "How To Get Well And Stay Well", used by the respondents in connection with the sale of Nutrilite, represented that Nutrilite would be an effective and adequate treatment for many diseases and ailments of mankind. The complaint also alleged that various other promotional material misrepresented the curative effects of Nutrilite.

The complaint just referred to sought to restrain the defendants from distributing Nutrilite Food Supplement which was allegedly misbranded by the use of false and misleading written, printed or graphic material, or misbranded by failure to bear adequate directions for use for the conditions for which the preparation was intended. In addition, the complaint prayed that the defendants be required to make restitution to purchasers of Nutrilite Food Supplement who had purchased that product because of the false and misleading representations alleged to have been made by respondents.

By negotiation by and between the parties, the pending complaint for an injunction against the respondents was disposed of by the

consent decree issued by the District Court for the Southern District of California on April 6, 1951. The decree was based upon the agreement and consent of the respondents on the one hand, and Food and Drug Administration officials on the other hand. Accordingly, the decree was one of consent, and was entered without any findings by the Court on issues of fact or of law. Although the decree was based upon consent, the corporate respondent was placed under an injunction by the Court, the consent of the parties, under Court practice, rendering the making of factual findings unnecessary, the consent taking the place of and standing in lieu of findings as to the facts, and the corporate respondent was "Ordered, adjudged and decreed" to refrain from certain acts and practices, as follows:

1. Distributing Nutrilite Food Supplement accompanied by certain designated, written Nutrilite articles, books, pamphlets, and a motion picture;
2. Distributing Nutrilite Food Supplement accompanied by articles, pamphlets or graphic matter which implied that Nutrilite would be an effective cure for approximately 54 specific diseases or conditions;
3. Making certain other specific misrepresentations in writing, printing, or graphic matter, to promote the sale of Nutrilite.

The decree set forth certain specified allowable claims which might be made as to the need for or usefulness of Nutrilite Food Supplement XX, Nutrilite Food Supplement X, and Nutrilite Food Supplement Junior.

It also specified that the respondents would have the option of submitting to the Food and Drug Administration for inspection and comment all written, printed and graphic matter to be used in the future merchandising of their product, Nutrilite.

The indictment against the partnership and against Lee S. Mytinger, William S. Casselberry and Carl F. Rehnberg was dismissed, and the consolidated libel proceedings terminated by a stipulation between the parties. The injunction action was dismissed as to the individual defendants Mytinger, Casselberry and Rehnberg.

It should here be observed that we are not sitting in judgment on any of the factual issues involved in either the injunction proceeding in the United States District Court for the District of Columbia or the litigation which resulted in the issuance of the consent decree by the United States District Court for the Southern District of California. Regardless of whether the respondents had made the false representations with which they were charged in the injunction proceeding, they consented to the court's order to refrain from making specified representations in the future. Our problem here is, therefore, to determine whether the three specific allegations made

in the Commission's complaint relative to misrepresenting the significance of the injunction are sustained by substantial evidence. In other words, we are not here concerned with the truth or falsity of any acts and practices of the respondents other than the three specific misrepresentations alleged. Accordingly, a number of findings as to the facts concerning other misrepresentations, proposed by counsel supporting the complaint, have been rejected.

Specific Charges Relative to the Consent Decree:

The three specific charges of Count III of the complaint herein allege that the respondents have misrepresented the consent decree, as follows:

1. That the consent decree amounted to an endorsement and approval of Nutrilite Food Supplement by the United States government, the United States District Court, and the Food and Drug Administration;

2. That the allowable claims contained in the consent decree applied only to Nutrilite Food Supplement and to no other vitamin-mineral supplement product;

3. That no other seller of vitamin or mineral food supplement products has a right to submit its promotional literature to the Food and Drug Administration for inspection and comment.

The attitude of respondents and of their counsel concerning the significance of the decree in question is revealed at pages 509 and 510 of the transcript herein. Counsel for respondents made an objection as follows:

We object to that as an improper characterization of the consent decree. We object specifically to the words "ordered," and "enjoined," as an improper characterization of this document.

To this objection counsel supporting the complaint replied:

Your Honor, the document is in evidence in this case and in a great many paragraphs it states very clearly that the defendants are ordered and enjoined.

Although the document in question bears the title "Final Consent Decree", it is clearly an injunction, for in six separate places therein the Court uses mandatory language, as follows:

* * * ORDERED, ADJUDGED, and DECREED that the defendants, and each of them, and their officers, agents, distributors, representatives, servants, employees, attorneys * * * be and hereby are perpetually enjoined from * * *.

In a statement released by the corporate respondent, dated January 1, 1952, entitled "The Nutrilite Consent Decree: How It Came About", respondents make the statement:

* * * Mytinger & Casselberry agreed not to use certain literature—including reprints of magazine articles which they had long before discontinued using—and not to make certain statements, most of which they had not made anyway,

and not to claim that Nutrilite would cure diseases—a claim which they had never made. The decision of the three judges in Washington proved *that*. In exchange, Mytinger & Casselberry secured a list of more than 60 definite claims they could make for Nutrilite, the right to use testimonials and the right, at M & C's option, to submit literature to FDA for its advance comment, or to the Court for its approval. These are rights which FDA had never granted to anyone before in all its forty-year history. For obvious reasons, Mytinger & Casselberry considered the trade a good one.

In a general memorandum to its Nutrilite distributors, the respondents stated:

You can be proud and confident as you present the "facts" about vitamins and minerals as set forth in the Consent Decree. "Proud" because none of your competitors has such a document, and "confident" because it bears the approval of a Judge of the United States District Court. * * * The Decree is a valuable selling tool.

In a pamphlet entitled "Know Where You Are Going"; which contained a preface to a reproduction of the consent decree, respondents state in semiscrypt type, such as is usual in diplomas and certificates of merit, the following:

* * * On that day an important document called the "Final Consent Decree" was signed by representatives of both corporations and the United States Government * * * (No dispute was ever involved over the merits of the product, which the government conceded is wholesome and beneficial.)

* * * * *

This Decree is a tribute, indeed, and we are sincerely grateful for the right to say that for the first time we really "know where we are going"!

In similar promotional literature disseminated to their distributors, respondents stated:

The Truth—The Consent Decree is one of the strongest sales tools a Nutrilite Distributor can use. It is an official document, bearing the signatures of officials of the Federal Government. The prospective customer is immediately convinced that the Nutrilite Distributor is speaking the truth—making only honest claims for his product. WHAT OTHER FOOD SUPPLEMENT DISTRIBUTOR CAN SAY:

"HERE IS A LEGAL DOCUMENT SIGNED BY A UNITED STATES DISTRICT JUDGE AND UNITED STATES ATTORNEYS THAT BACKS UP THE CLAIMS I MAKE FOR MY PRODUCT?"

In a letter to respondents from the Deputy Commissioner of the Food and Drug Administration, respondents were advised as follows:

I have examined some carbon copies of recent letters that have been signed by various members of the Food and Drug Administration in answer to letters of inquiry about Nutrilite and, in particular, about answers to inquiries about the meanings and significance of the pamphlet "The Nutrilite Consent Decree". It appears that the efforts of the distributors of Nutrilite to create the impression that the Court Decree is some form of meritorious award have been confusing to some of the prospects contacted by Nutrilite salesmen.

Findings

57 F.T.C.

Actually, I am sure you will recognize that the pamphlet "The Nutrilite Consent Decree" is a very cleverly worded piece of advertising and capable of creating an entirely unwarranted impression about the Consent Decree. My observation is that letters signed by officers of the Food and Drug Administration have represented a forthright attempt to responsively state facts in answer to questions raised by the public.

In Commission's Exhibit 14B, the respondents reported in a letter under their letterhead the following comments of one of their agents:

* * * The Consent Decree itself is a good selling tool because it is a *document*. His group uses it effectively by telling the prospect that they are presenting the facts about vitamins and minerals and, "Here is a document written over the signature of Judge Harrison and the FDA officials giving the facts which I know you'd like to have." Bill stated that a good increase in volume has resulted in his group from the extensive use of the Consent Decree in canvassing.

In Commission's Exhibit 27A, respondents instruct their Distributors in a method of using the consent decree to sell Nutrilite. The distributor is told:

In Nutrilite, we have the most powerful sales tool of any corporation in America—the Know Where You're Going booklet. Here is the M&C-approved way to use this sales tool to present the possible need to your prospects.

I would like to show you a legal document. This document, as you will see on page one, was filed in the United States District Court for Southern California in April of 1951. Back here on page sixteen are the names of the United States District Judge and the United States Attorneys who signed this document. You'll agree with me, Mrs. Prospect, that such a legal document would contain only factual information.

The distributor is then instructed to go on and point out to the prospect various allowable claims contained in the consent decree and to refer to it continually as "this legal document", but nowhere in the presentation does he advise the prospect that the document was issued to restrain the distributor and the company, including the respondents, from misrepresenting the product as a treatment or cure for many conditions and diseases. In fact, by conveying to the public only half of the story contained in the allowable-claims section and by pointing out that the document was filed in court and signed by a Judge and United States attorneys, the respondents are actively concealing from the public the true nature of the consent decree.

In a speech given by R. L. Mytinger at a distributor meeting in 1952, he stated:

And so we find that our Consent Decree gives us: Federal Court-approved facts about vitamins and minerals; approved list of claims; right to submit literature to FDA *before* release. No other vitamin-mineral food supplement has these court-approved rights.

A typical example of respondents' use of a true statement to produce a misimpression in the representation that the allowable claims listed in the consent decree apply only to Nutrilite appears in Commission's Exhibit 20:

No other vitamin-mineral food supplement has such an approved list of claims.

In Commission's Exhibit 17A, respondents made the representation that:

We are also happy because now we can get our literature passed on *before* we publish it and as far as we know, we are the only company with this privilege.

and in Commission's Exhibit 20,

No other vitamin-mineral food supplement company has the court-approved right to submit its literature.

The effect of such representations is shown in part by the statement of Deputy Commissioner Harvey of the Food and Drug Administration, who testified that the Food and Drug Administration had received possibly over a thousand letters of inquiry as to the Government's approval of Nutrilite, and practically none as to such approval of any other similar product.

It is readily apparent from the above statements, and others in the record herein, that the respondents have disseminated to their distributors and to the public representations which are capable of creating the inference that the consent decree constitutes a vindication of respondents' past acts and practices; a tribute to the merits of respondents' product Nutrilite; approval of that product by the Federal District Court and by the officials of the Food and Drug Administration; a document to be proud of; approval of a number of definite claims for the product Nutrilite; a prize sales tool; one of respondents' biggest achievements; something in the nature of an award for merit which none of respondents' competitors has the right to claim; and that said consent decree confers upon respondents the exclusive privilege of submitting their advertising material to the Food and Drug Administration for its comment in advance of publication.

In truth and in fact, the consent decree is an injunction, albeit one based upon consent of the parties rather than upon evidence. The order contained therein is just as authoritative and restrictive upon respondents as if the injunction had resulted from a lengthy trial and factual findings by the court. The orders contained therein restrain the corporate respondent from making various representations in connection with the sale of Nutrilite, which representations were alleged in the complaint in that proceeding to be false and

deceptive. Obviously, therefore, the consent decree is not in the nature of an award or something to be proud of, nor is it a vindication of or tribute to respondents' past performances. It is instead a corrective measure taken by the court to abate alleged wrongdoing by the respondents, and to prevent the repetition thereof in the future. Clearly the consent decree is not an endorsement and approval of Nutrilite Food Supplement by the United States Government, the United States District Court, or the Food and Drug Administration.

A number of the statements quoted above have a tendency to give the impression that the claims allowed in the consent decree to be made for Nutrilite apply only to that product. The evidence shows, however, that the claims listed as allowable in the consent decree consist of statements of facts relating to vitamins and minerals which have been scientifically recognized and are so generally known that they may be applied with equal relevance to any products which contain the vitamins and minerals contained in Nutrilite. Clearly the officials of the Food and Drug Administration and the Federal Court never intended to grant, nor did they grant to respondents any exclusive right to make the claims allowed. Accordingly, we must conclude that respondents' representations that the allowable claims contained in the consent decree may be applied only to Nutrilite Food Supplement and to no other vitamin or mineral supplement product were false and misleading, in that no such exclusive right was ever granted.

Respondents have also created the false impression that they alone, and no other seller of vitamin and mineral products, have the right, as the result of the consent decree, to submit their advertising and promotional literature to the Food and Drug Administration for comment in advance of publication. Actually, any advertiser of any food, drug or cosmetic has the right so to submit advertising to the officials of that agency, and the mere fact that this right is mentioned in the consent decree does not render it exclusive to the respondents. Nor was the consent decree necessary to grant such right to respondents; they had that privilege before the issuance of the decree, in common with all other advertisers who wished to avail themselves thereof. Emphasis upon that privilege in the manner used by respondents, therefore is unwarranted by fact and misleading in effect.

In 1956, when respondents submitted to the Food and Drug Administration their pamphlet prepared for the use of their distributors, entitled "How To Use The Consent Decree", for comment and opinion, the respondents' attorney was warned that

"Deception may result from the use of statements not technically false or which may be literally true." *U.S. v. 90 Barrels etc.*, 265 U.S. 438.

The Food and Drug Administration might have added a further quotation from the Supreme Court's opinion in the same case, to the effect that "It is not difficult to choose statements, designs and devices which will not deceive."

These erroneous impressions and fallacious inferences have been created by telling half-truths, by making true statements but placing them in unwarranted juxtaposition, and by failure to reveal certain facts which are essential to a true understanding of the consent decree. We must, therefore, conclude that the three allegations of Count III of the complaint herein have been sustained by substantial, reliable and probative evidence.

CONCLUSIONS

1. The Commission has jurisdiction over the respondents herein, and over their acts and practices as herein found.
2. This proceeding is in the public interest.
3. The effect of respondents' restrictive contracts, as herein found, may be substantially to lessen competition in the lines of commerce in which respondents and their customers and purchasers are engaged, and may be to tend to create a monopoly in respondents in the line of commerce in which they have been and now are engaged, in violation of § 3 of the Clayton Act.
4. The acts and practices of respondents, as herein found, are all to the injury and prejudice of respondents' competitors, customers, and purchasers, and of the public; have a tendency and effect of obstructing, hindering, and preventing competition in the sale and distribution of vitamin and mineral products in commerce; have a tendency to and have obstructed and restrained such commerce in such merchandise; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of § 5 of the Federal Trade Commission Act.
5. The use by respondents of the aforementioned misleading and deceptive representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true, and into the purchase of a substantial amount of respondents' product because of such erroneous and mistaken belief; as a result of which, trade has been unfairly diverted to the respondents from their said competitors, and injury has thereby been done to competition in commerce.

6. The acts and practices of respondents, as herein found, are all to the injury and prejudice of respondents' competitors, customers, and purchasers, and of the public; have a tendency and effect of obstructing, hindering, and preventing competition in the sale and distribution of vitamin and mineral products in commerce, within the intent and meaning of the Federal Trade Commission Act; have a tendency to and have obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition and unfair acts and practices in commerce, within the intent and meaning and in violation of § 5 of the Federal Trade Commission Act. Therefore,

It is ordered, That Respondents Mytinger & Casselberry, Inc., a corporation; William S. Casselberry and Lee S. Mytinger, individually and as officers of said corporation; and their officers, agents, representatives, employees and attorneys, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Nutrilite Food Supplement, or any product possessing similar characteristics, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondents;

2. Enforcing, or continuing in operation or effect, any condition, agreement or understanding in, or in connection with, any existing contract of sale, which is to the effect that the purchaser of such products shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondents.

It is further ordered, That said respondents, their officers, agents, representatives, employees and attorneys, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Nutrilite Food Supplement, or any other product possessing similar characteristics, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Canceling, or directly or by implication threatening to cancel, any contract or franchise or selling agreement with respondents' distributors, or with any other seller, for the sale of respondents' product, because of the failure of such purchasers to purchase exclusively or deal exclusively in the product sold and distributed by respondents;

2. Instituting litigation, or directly or by implication threatening to institute litigation, against any of respondents' dealers, distribu-

tors, or other customers or sellers of respondents' product, because of their failure or refusal to purchase exclusively or deal exclusively in products sold and distributed by respondents;

3. Entering into, continuing, maintaining, threatening to enforce, or enforcing, in any manner, any agreement or understanding with any customer or seller, or former customer or seller, of respondents' products, to refrain from dealing in products of a competitor or competitors of respondents, when such actions are taken by respondents for the purpose or with the effect of coercing or intimidating such customers or sellers into dealing exclusively in respondents' products, or of retaliating against such customers or sellers for their failure or refusal to purchase or deal in, exclusively, products sold and distributed by respondents;

4. Enjoining, attempting to enjoin, or threatening to enjoin, any of respondents' distributors, dealers or customers from selling or distributing any product of a competitor or competitors, like, similar or related to respondents' product, to persons to whom they formerly sold respondents' product, or revealing the names of such persons to any competitor of respondents' for a period of two years or any other specific period of time;

5. Coercing or intimidating any customer or seller of respondents' product in any manner, for the purpose or with the effect of causing said customer to deal exclusively in respondents' said product;

6. Disseminating, causing to be disseminated, or otherwise making available to distributors or their customers, any pamphlet, booklet, leaflet, printed or recorded talk, or in any other manner or through the use of any other printed, written or graphic material, representing, or causing to be represented, directly, indirectly, or by implication,

(a) That the Final Consent Decree issued on April 6, 1951, by the United States District Court for the Southern District of California in Civil Action No. 10344-BH, *United States of America, Plaintiff, v. Mytinger & Casselberry, Inc., et al., Defendants*, was or is anything other than an injunction prohibiting, restraining and limiting respondents' advertising practices;

(b) That the allowable claims for respondents' product Nutrilite, listed in said Final Consent Decree, may be applied only to respondents' product Nutrilite;

(c) That the right to submit advertising and promotional material to the Food and Drug Administration for its inspection and comment, prior to publication, has been granted exclusively to the corporate respondent, or that such right is other than a privilege available without special permission to any advertiser of foods, drugs or cosmetics desirous thereof:

(d) That Nutrilite Food Supplement, or any other of respondents' products, or the claims made therefor, are approved by any Court, or by any agency or officials of the United States Government.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The corporate respondent engages in the nationwide sale of Nutrilite Food Supplement composed of various vitamins and minerals. It is sold house to house by independent distributors or dealers buying direct from respondents at wholesale or purchasing indirectly through other distributors. In the initial decision, the hearing examiner found that an exclusive dealing provision contained in respondents' agreements with the distributors was violative of Section 3 of the Clayton Act. He further found that respondents' practices in enforcing and threatening to enforce that requirement and another contract provision restricting sales of competing products by terminated distributors were in violation of Section 5 of the Federal Trade Commission Act, and that the complaint's charges of product misrepresentation by respondents also were sustained. Respondents have appealed from those findings and conclusions in the initial decision and its order to cease and desist.

It is undisputed that all of the respondents' distributors are required to covenant and agree not to sell any other vitamin or mineral products while so engaged. They further agree that for a period of two years after their distributor relations terminate they will not solicit Nutrilite customers on behalf of like products. It is clear, too, that respondents have enforced the exclusive dealing provision of the agreements against distributors electing to handle other supplements by cancelling or threatening to cancel their distributorships and by refusing to supply distributors so cancelled with merchandise.

Under Section 3 of the Clayton Act, sales or contracts for sale upon agreements or understandings that buyers not deal in the products of competitors are unlawful if their effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. The evidence received herein discloses that the value of retail sales of Nutrilite for the year 1958 was \$19,145,000. This amount represented 61.52% of the total value of house-to-house sales of vitamin concentrates for that year; 34.6% of the total value of retail sales of vitamin and mineral combination preparations (such as respondents') through all types of outlets; and 8.6% of the total value of retail sales of vitamin concentrates through all types of outlets. In 1958, respondents had 80,700 distributors, 1,470

of whom purchased directly from respondents and all of whom had agreed not to sell any other vitamin and/or mineral products. The hearing examiner found that vitamin and mineral combination preparations sold through all types of outlets constituted the line of commerce to be examined in this case to the exclusion of vitamin and mineral combination preparations sold only by the house-to-house method, as contended for by counsel supporting the complaint, and vitamin concentrates, whether or not packaged with minerals, sold through all types of outlets, as contended for by respondents.

We think the hearing examiner was in error in so limiting the line of commerce to be considered. In our opinion, each of the foregoing commercial areas can be properly deemed a separate market or line of commerce within the meaning of Section 3. However, the outcome of this case is not dependent upon the selection of any one of these areas as the relevant line of commerce. It is established by the record herein that respondents are engaged in the sale of Nutrilite in commerce and that their contracts with all of their distributors contain the restrictive exclusive dealing provisions. From the figures given above, it is obvious that respondents' volume of business is substantial and that their exclusive dealing requirement affects a substantial share of the market in each of the three lines of commerce. We have no doubt that respondents' exclusive contracts have the probable effect of substantially lessening competition. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). All of the requirements of Section 3 having been met, it follows that a violation of that section has been established.

Respondents introduced certain economic data as justification for the use of their exclusive dealing arrangements. It is true, as pointed out by respondents, that in the *Maico* case, the Commission issued an order remanding the matter to the hearing examiner for the purpose of obtaining evidence as to the economic effect of the exclusive dealing agreements used by that company. In the Matter of *The Maico Company, Inc.*, 50 F.T.C. 485 (1953). It is also true that the proof necessary to establish a violation of certain other provisions of the statutes administered by the Commission, such as Section 7 of the Clayton Act, may require an appraisal of economic data. However, since the date of the Commission's action in the *Maico* case, the courts have made it clear that in a situation such as that shown to exist in this record, the plain language of Section 3 makes irrelevant those economic considerations urged by respondents. *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied* 349 U.S. 940 (1955); *Anchor Serum Company v. Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954); *Tampa Electric Co. v. Nashville Coal Co.*, 276 F. 2d 766

(6th Cir. 1960), *cert. granted* June 27, 1960. Respondents' appeal from the initial decision's findings that they have violated Section 3 of the Clayton Act is denied.

In addition to enforcing the exclusive dealing provision of their distributor agreements, respondents also have enforced and threatened to enforce a companion covenant which provides that terminated distributors shall not solicit Nutrilite customers on behalf of competing supplements or disclose customer names within two years after such severance. The hearing examiner found that their activities in that respect unlawfully obstructed and prevented competition with respondents. Respondents ask us to find that the two-year clause is reasonably designed to protect trade secrets and imposes no undue hardships because the dealer is free to sell others' wares to anyone except former Nutrilite customers. However, respondents' enforcement measures have included bulletins to the distributor organization warning that violation of the two-year clause will subject offenders to legal proceedings by way of damages, injunction, or both, and that distributors discontinuing the sale of Nutrilite must start their businesses anew. Their status as independent business men and women notwithstanding, discontinued distributors are required to cut themselves off completely from their present and former customers for Nutrilite. They likewise are precluded from subjobbing a new supplement line to present or former Nutrilite distributors who bought from others; and they call on any new customer at their peril inasmuch as they have no way of knowing whether the prospect has been a Nutrilite user or customer. The seriousness of the handicaps imposed on terminated distributors who attempt to continue their businesses by marketing competitive supplements while abiding by the two-year covenant is, therefore, obvious.

Respondents further contend that the *Numanna* decisions¹ represent judicial approval for their two-year clause and that the initial decision's order forbidding them to enforce that clause arbitrarily takes away respondents' rights to resort to the courts for redress of wrongs. In the first of those cases, the trial court granted a temporary injunction against a competing marketer of food supplements and others, including various defendant distributors, who the court found had by concerted action and other unfair trade practices induced over 1700 Nutrilite distributors to discontinue buying respondents' product and to handle the supplement of the defendant marketer. On appeal, the preliminary injunction was up-

¹ *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corporation*, Civil Action No. 6142, U.S. District Court, Eastern District of Wisconsin; and *Numanna Laboratories Corporation v. Mytinger & Casselberry*, 215 F. 2d 382 (C.A. 7, 1954).

held and the proceedings in the court below subsequently were dismissed by consent. In the opinion rendered by the Court of Appeals, it is particularly evident that decision there turned on considerations apart from the legal status of the two-year clause. In fact, that court specifically expressed its reservations to the lower court's reference to that provision as a contract instead of as a "purported" contract. Hence, the *Numanna* cases cannot be regarded as clear-cut legal tests of the validity of the two-year covenant.

It goes without saying that orders of the Commission should not impinge on the rights of those being proceeded against to petition the courts for redress of wrongs. However, in instances of proved violations of laws administered by it, the Commission has the power and duty to issue an appropriate order to terminate such violations. The paragraph of the order specifically excepted to forbids respondents to enjoin or to threaten to enjoin distributors from selling competitive products to persons to whom they formerly sold Nutrilite, or to enjoin or threaten to enjoin them from revealing the names of such customers to any of respondents' competitors. The latter part of that prohibition can be construed as forbidding respondents from proceeding against disclosure of customer names by distributors under any circumstances whatsoever, including those in which such disclosures are against public policy for other reasons. Its clarification is accordingly warranted. Furthermore, the first part of the prohibition should be broadened to expressly forbid continued use in respondents' distributor agreements of restrictive provisions against soliciting former Nutrilite purchasers, as well as prohibiting threatened or actual enforcement thereof for purpose of rendering the distributors subservient to respondents in the conduct of their businesses. The order is being appropriately modified. The appeal of respondents from the hearing examiner's findings sustaining the complaint's charges under the second count is otherwise denied, however.

The remaining exceptions to be considered pertain to charges of misrepresentation of Nutrilite in promotional statements explanatory of a consent decree of injunction issued by the U.S. District Court for the Southern District of California. The decree was entered April 6, 1951, and it "Ordered, Adjudged and Decreed" that the corporate respondent and its agents be enjoined from specified acts and practices, including representations that the preparation was an effective treatment for 54 named diseases and conditions. The decree also set forth certain allowable claims which might be made respecting the need for or usefulness of Nutrilite and specified that respondents at their option could submit advertising material

to the Food and Drug Administration for its inspection and comment. The hearing examiner found that the respondents have falsely represented in promotional literature and otherwise that such decree constituted an endorsement or approval of Nutrilite by the United States Government, such Court, and the Food and Drug Administration, and that their advertising falsely implied that the allowable claims contained in the injunction applied only to Nutrilite and no other supplement and that no other sellers of such products has the right to submit his promotional material for inspection and comment.

The decree was based upon the agreement and consent of the respondents on the one hand, and Food and Drug officials on the other. Their agreement contemplated that a criminal indictment against respondents and other also pending multiple seizure proceeding would be dismissed; and they were subsequently thus disposed of. The case disposed of under the decree was a complaint for injunction charging misbranding. The decree was one of consent and was entered without any findings by the court on issues of fact or law. Under court practice, the consent feature rendered the making of factual findings unnecessary, the consent taking the place of and standing in lieu of findings as to the facts.

The Nutrilite dealers had been deeply concerned over the outcome of those cases and their effects on future sales activities. When the decree issued, respondents immediately set about to reinstate distributors' morale. In a pamphlet denying that they had been doing virtually any of the things enjoined in the decree, respondents explained their motives for entering into the agreement for settlement, as follows:

* * * In exchange, Mytinger & Casselberry secured a list of more than 60 definite claims they could make for Nutrilite, the right to use testimonials and the right, at M & C's option, to submit literature to FDA for its advance comment, or to the Court for its approval. These are rights which FDA had never granted to anyone before in all its forty-year history. For obvious reasons, Mytinger & Casselberry considered the trade a good one. * * *

Two other pieces of literature recommending and explaining the consent decree's use as a sales tool stated:

THE TRUTH—The Consent Decree is one of the strongest sales tools a Nutrilite Distributor can use. It is an official document, bearing the signatures of officials of the Federal Government. The prospective customer is immediately convinced that the Nutrilite Distributor is speaking the truth—making only honest claims for his product. WHAT OTHER FOOD SUPPLEMENT DISTRIBUTOR CAN SAY: "HERE IS A LEGAL DOCUMENT SIGNED BY A UNITED STATES DISTRICT JUDGE AND UNITED STATES ATTORNEYS THAT BACKS UP THE CLAIMS I MAKE FOR MY PRODUCT"?

* * * * *

Nutrilitte Food Supplement has a Federal Court-approved list of claims that can be made in selling the desirability of food supplementation with Nutrilite. No other vitamin-mineral food supplement has such an approved list of claims.

Before Nutrilite Food Supplement literature is released to the public it may, by court-approved right, be submitted to the Federal Food and Drug Administration for inspection and comment. No other vitamin-mineral food supplement company has the court-approved right to so submit its literature.

Before starting to sell Nutrilite Food Supplement, Nutrilite Distributors must take training and pass a quiz on the Federal Court-approved facts about vitamins and minerals.

As noted by the hearing examiner, the promotional material has carried an underlying theme that the decree constituted a vindication of past acts and practices by respondents and was in the nature of a meritorious award.²

The consent decree, however, is an injunction and its order is as authoritative and binding upon respondents as if resulting from lengthy trial and factual findings. It was issued by the court to abate alleged wrongdoing and to prevent its future repetition and not to vindicate respondents' past practices. The decree accordingly did not constitute an endorsement or approval of Nutrilite by our Government. Respondents' advertising techniques have included repetitious emphasis on the words "approved" and "court-approved" in juxtaposition to the terms "Federal Court", "U.S. District Court" and "Food and Drug Administration." That this has had the capacity and tendency to engender erroneous beliefs by distributors and users that Nutrilite was officially endorsed or approved is clearly evident from the record.

In the promotional literature furthermore, the allowable claims also are held out as an approved list of claims and the decree is described as a legal document backing up the distributors' claims for the product. The claims listed as allowable in the decree, however, constitute facts on vitamins and minerals which have been scientifically recognized as equally applicable to any product containing the vitamins and minerals present in Nutrilite. Respondents' representations that the allowable claims dealt with in the decree are applicable only to Nutrilite are, therefore, false and misleading.

The record also supports the hearing examiner's conclusions that the advertising statements imply that respondents alone and no other seller of vitamin products have a right to submit their promotional literature to the Food and Drug Administration for inspection and comment. All marketers of food, drug or cosmetic

² To illustrate, in a speech before a conference of key agents respondent William S. Casselberry pointed to the consent decree and its allowable claims as "one of our biggest accomplishments". And a distributor addressing a meeting of its fellow agents stated: "Thank God for the Consent Decree." "Now we know the true worth or value of this document, the hundreds of thousands of dollars the company spent in getting it for us."

Order

57 F.T.C.

preparations are privileged to submit promotional material to that agency for comment; and the Administration's policy of inviting such submissions goes back 35 years or more. Respondents' unqualified statements that they alone have rights or court-approved rights in that respect is a deceptive half-truth. Furthermore, it is evident from the record that such representations have had capacity and tendency to mislead distributors and users and to handicap respondents' direct selling competitors.

The appeal also excepts to the provision of the order to cease and desist which prohibits representations that the consent decree is anything other than an injunction prohibiting, restraining and limiting respondents' advertising practices. Respondents state that its language can be construed to bar any references whatsoever to the decree's allowable claims and even as prohibiting statements that the decree is a consent decree at all. That provision of the order is not worded as an unqualified prohibition against using the term "consent decree" to designate, describe or refer to the decree. It does proscribe past deceptive explanations and interpretations of that document by respondents which by their silence as to the injunctive purpose and effect of the decree imply official and documentary endorsement of the product and claims. Furthermore, the order does not forbid references in respondents' advertising to the allowable claims in the event such statements are not made in word settings implying that the decree operates to confer rights on respondents to make them to the exclusion of others. Under the order, respondents' rights to truthful and nondeceptive explanation and discussion of the provisions of the decree in their advertising are fully protected. Those exceptions to the order are accordingly denied.

The appeal is denied and the initial decision, as modified in accordance with this opinion, is being adopted as the decision of the Commission.

Commissioner Tait concurs in the result.

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 denied the appeal for reasons stated in the accompanying opinion and having further determined that the order to cease and desist contained in the initial decision should be modified:

Complaint

It is ordered, That the fourth numbered paragraph contained in the second section of the initial decision's order to cease and desist be, and it hereby is, modified to read as follows:

"Entering into, continuing or enforcing, or threatening to enforce, any agreement or understanding which in any manner restricts or limits respondents' terminated distributors or customers from selling products like or similar to respondents' products to any other prospective purchaser or which in any manner restricts said distributors or customers from using or disclosing the names of their own customers for promoting the distribution of products other than respondents' products."

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

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

Commissioner Tait concurring in the result.

IN THE MATTER OF
HIT-RECORD DISTRIBUTING COMPANY
OF CINCINNATI ET AL.

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

Docket 7897. Complaint, May 20, 1960—Decision, Sept. 28, 1960

Consent order requiring a distributor of phonograph records in Cincinnati, Ohio, to cease giving concealed payola to disc jockeys or other personnel of radio and television programs to induce frequent playing of their records in order to increase sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hit-Record Distributing Company of Cincinnati, a corporation, and Isadore Nathan, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hit-Record Distributing Company of Cincinnati is a corporation organized, existing and doing business