

Complaint

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VIII

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

IN THE MATTER OF

HMH PUBLISHING CO., INC.

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

Docket 8516. Complaint, June 29, 1962—Decision, Mar. 28, 1963

Order requiring the Chicago publisher of "Playboy" magazine, among others, with sales for 1960 in excess of \$3,500,000, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by making payments to certain operators of chain retail outlets in railroad, airport, and bus terminals, and in hotels and office buildings without making comparable payments available to their competitors, and making the payments to the favored customers on the basis of individual negotiations and not on proportionally equal terms.

COMPLAINT

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

PARAGRAPH 1. Respondent HMH Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PAR. 3. Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other

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competing customers in connection with the purchase and sale of respondent's publications were:

Customer	Approximate Amount Received	
	1960	1961 (Jan.-June)
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
Faber-Coe & Gregg, New York City-----	1,616.43	3,517.64
Greyhound Post Houses, Forest Park, Ill.-----	5,371.10	7,118.20
Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Stanley M. Lipnick for the Commission.

Mr. G. Duane Vieth and *Mr. Stuart J. Land*, of *Arnold, Fortas & Porter*, of Washington, D.C.,

Mr. Maurice Rosenfield, of Chicago, Ill. for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 5, 1963

The complaint herein was issued by the Commission on June 29, 1962, wherein the respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The respondent filed its answer on September 4, 1962, admitting in part and denying in part the allegations of the complaint and asserted an affirmative defense that any payments made by it were granted to meet equal and comparable payments of one or more of its competitors. On September 11, 1962, counsel for the parties met with the hearing examiner for a prehearing conference and an order was issued reciting the results of the conference. The order contained a directive to each party to prepare a trial brief setting forth a statement of anticipated issues and disclosing, among other things, the names of the witnesses and the documentary exhibits which the party plans to introduce. The order further provided that a party may not introduce any testimony or exhibits which have not been referred to in his trial brief. Complaint counsel was to submit his trial brief on or before October 1, 1962, and the respondent on or before October 22, 1962. Complaint counsel complied with such directive and submitted a trial brief which was prepared in a commendable manner.

A motion of respondent that the time to file its trial brief be extended to November 9, 1962, was granted. On November 9, 1962, respondent filed a motion for leave to withdraw the answer to the complaint filed on September 4, 1962, and to file a substitute answer submitted with the motion. The substitute answer read: "Pursuant to Section 4.5 (b) (2) of the Commission's Rules of Practice, respondent admits all material allegations of the complaint. Respondent reserves the right to submit proposed findings and conclusions and the right to petition for review under Section 4.20 of the Rules of Practice."¹ Complaint counsel filed answer to the motion wherein he did not oppose respondent's motion to file the substitute answer with the reservation that such answer should not foreclose him from putting into the record evidence relating to the scope of the order which should be issued.

On November 20, 1962, counsel for the parties again met with the hearing examiner, at which time the hearing examiner announced that he would issue an order granting leave to the respondent to file the substitute answer. Thereupon complaint counsel stated that he wished to present certain evidence which would bear upon the scope of an order to be entered herein. Respondent's counsel opposed the request. After some discussion, it was agreed that complaint counsel would file a motion requesting that the matter be set for hearing for the stated purpose and respondent would be given the opportunity to file answer to such a motion. At the conference, complaint counsel stated specifically the type of evidence that he intended to present and the meeting was adjourned with the understanding that counsel for the parties would confer with the view of attempting to enter into a stipulation which would make it unnecessary to have any hearings in this proceeding. An order was entered granting leave to respondent to file the aforementioned substitute answer. There was submitted to the hearing examiner a stipulation, dated November 23, 1962, executed by counsel for the parties and on November 29, 1962, an order was issued receiving the said stipulation into the record herein, closing the record for the receipt of evidence and fixing January 4, 1963, and January 21, 1963, for the filing of proposed findings and replies thereto, respectively. Proposed findings of fact, conclusions of law and order were filed by counsel for the parties.

The hearing examiner has given consideration to the proposed

¹ Section 4.5(b)(2) of the Commission's Rules reads:

"(2) *Admitting allegations of complaint.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearings as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer, the respondent may, however, reserve the right to submit proposed findings and conclusions and the right to petition for review under § 4.20."

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findings filed by the parties hereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

The material allegations of the complaint in this proceeding, which are admitted by the respondent in its substitute answer, read:

PARAGRAPH ONE: Respondent HMH Publishing Co. Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PARAGRAPH TWO: Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PARAGRAPH THREE: Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PARAGRAPH FOUR: In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PARAGRAPH FIVE: As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances

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were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

<i>Customer</i>	<u><i>Approximate Amount Received</i></u>	
	<i>1960</i>	<i>1961 (Jan.-June)</i>
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
Faber-Coe & Gregg, New York City-----	1,616.43	3,517.64
Greyhound Post Houses, Forest Park, Ill.-----	5,371.10	7,118.20
Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PARAGRAPH SIX: The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

By stipulation of November 23, 1962, entered into by counsel supporting the complaint and counsel for respondent, it was agreed that the evidentiary record herein, in addition to the complaint and the substitute answer, shall include the following:

1. Respondent made the following payments to the following persons in addition to the payments listed in Paragraph 5 of the Complaint. The payments were made on substantially the same terms applicable to the payments listed in the said Paragraph 5:

	<u><i>Approximate Amount Received July 1961 to July 1962</i></u>
ABC Vending Corp., Long Island City, New York-----	\$2,097.04
Union News Co., New York, New York-----	56,300.16

2. The Federal Trade Commission has never issued a cease-and-desist order against Respondent under Section 2(d) of the Clayton Act or under any other statute administered by the Commission. Prior to the Complaint herein, no complaint charging a violation of any of such statutes had been issued against Respondent.

The sole question involved is the appropriate order to be entered herein. In the complaint, there is set forth the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. Counsel in support of the complaint proposes such order. It reads:

IT IS ORDERED that respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value

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to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from HMH Publishing Co., Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

In the instant case, the facts are found to be as alleged in the complaint. It is the opinion of the hearing examiner that under such circumstances it is incumbent upon him to adopt the order proposed by the Commission unless he can find or the parties can demonstrate the impropriety of any of its provisions.

Respondent proposes that the following order be issued:

IT IS ORDERED that Respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and other representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of "Playboy" magazine in commerce, as commerce is defined in the amended Clayton Act to forthwith cease and desist from:

Paying or contracting for the payment of any allowance or anything of value to or for the benefit of any customer who operates chain retail outlets in railroad, airport or bus terminals, and hotels or office buildings, or similar locations, as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of "Playboy" magazine, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such magazine.

The respondent's objections to particular provisions of the order proposed by counsel in support of the complaint present the following questions:

(1) Whether the order should apply to all publications distributed, sold or offered for sale by respondent, or only to "Playboy" magazine.

(2) Whether the order should prohibit discriminatory allowances in favor of any customer, or only in favor of a customer who operates chain retail outlets in railroad, airport or bus terminals, and hotels or office buildings, or similar locations.

(3) Whether any allowances paid by respondent must be affirmatively offered and otherwise made available to all competing customers, or whether they must merely be made available.

(4) Whether the order should include a definition of the word "customer" or whether no such definition should be included.

The respondent in objecting to the inclusion of all "publications" sold or offered by respondent and in advocating that the order be re-

stricted to "Playboy" magazine, in its brief in support of its proposed findings, had this to say:

The Complaint in this proceeding alluded specifically only to Respondent's principal publication, "Playboy" magazine, which the Complaint acknowledged to be one of the "most popular and widely circulated magazines in the United States." The Commission has ruled that an order now issued in Section 2(d) proceedings should be limited to the category of products specifically challenged in the proceeding, rather than to extend to all products made by a respondent. See *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (decided March 21, 1962) (order restricted to "paper products" and reference to "other merchandise" eliminated) and *Quaker Oats Co.*, Docket No. 8119 (decided April 25, 1962) (order restricted to "cat food and related products").

In the complaint it is stated that the violations were committed "in connection with the handling, sale, or offering for sale of publications sold to them by respondent" and there is nothing in this record to establish that the violations were limited to the sale of "Playboy" magazine. In *Vanity Fair* [60 F.T.C. 568, 573], the order contained in the initial decision related broadly to "paper products or other merchandise." The facts therein, as stipulated, disclosed that respondent manufactured and sold "household paper products." The record did not reveal whether respondent made or sold any other products so the Commission struck the words "or other merchandise" from the initial decision of the hearing examiner. However, the Commission refused to limit the order to "household paper products" as requested by the respondent therein but made it apply to "paper products" although the latter is more comprehensive than the former. This was held proper by the United States Court of Appeals for the Second Circuit [7 S. & D. 583] (CCH 1962 Trade Cases p. 70, 569). In the opinion of the Commission in *Vanity Fair* [60 F.T.C. 577], which is regarded as a guiding light in the framing of Section 2(d) orders, it is said:

It must be remembered that a cease and desist order of the Federal Trade Commission does not punish or impose compensatory damages for past acts. Its purpose is to prevent illegal practices in the future. Thus, where a violation has been uncovered, it is reasonable and necessary that the order, if it is to have the desired preventative effect, be broad enough so that its terms may not be easily evaded. This proposition is supported by a long line of cases, including *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *E. Edelmänn & Company v. Federal Trade Commission*, 239 F. 2d 152, 156 (7th Cir. 1956), *cert. denied* 355 U.S. 941 (1958); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-429 (1957); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959); *P. Lorillard Company v. Federal Trade Commission*, 267 F. 2d 439, 445 (3rd Cir. 1959), *cert denied* 361 U.S. 923 (1959), and many others.

Notwithstanding this authority, the 1959 amendments to the Act, which will govern the enforcement of this order, introduce a new factor to be considered in the formulation of orders. The Supreme Court in its recent opinion in

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Federal Trade Commission v. Henry Broch & Company, 30 LW 4105 (January 15, 1962), stated that the severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. See also, *Swanee Paper Corporation v. Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961).

The opinion further stated [60 F.T.C. 578]:

Orders under the Clayton Act should be made as definitive as possible, but the fact remains that Section 2(d) of that Act is in itself a very narrow definition of an illegal trade practice. The court in *P. Lorillard Company v. Federal Trade Commission*, *supra*, observed that Section 2(d) is much narrower in scope than Section 2(a). Because Section 2(d) covers a limited area in which forms of violations are like or related, it appears that in most circumstances a Section 2(d) order should not be confined to the exact forms of the violations found. In *Shulton, Inc.*, Docket No. 7721 (July 25, 1961), a Section 2(d) case, we rejected an argument for limiting the order, stating that the narrow order requested would be virtually worthless since it would do little more than prohibit respondent from engaging in the illegal practice by the same means previously employed. The narrow order requested in this proceeding as to the forms of violations to be prohibited would be objectionable for the same reason.

In the opinion of the Commission in *Quaker Oats* [60 F.T.C. 798, 807], it is said:

The Commission's view on the framing of Section 2(d) orders in light of the amendments to Section 11 of the Clayton Act (Public Law 86-107, 86th Cong. 73 Stat. 243), and recent court decisions involving this question is set forth in detail in our opinion in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720.

The order therein is explained [60 F.T.C. 807, 808]:

We believe that the limitation in this order to "cat food and related products" is fully justified. The Quaker Oats Company conducts the grocery trade portion of its business through two divisions: the Coast Fisheries Division and the Grocery Products Division. The Coast Fisheries Division produces and markets Puss 'n Boots Cat Food only. The Grocery Products Division markets a number of packaged products but it does not sell Puss 'n Boots Cat Food. There are many differences in the distribution systems between the two divisions. The violation found consisted of a \$250.00 payment by the Coast Fisheries Division to the Benner Tea Company. In the particular circumstances of this case, we see no reason for extending the scope of the order to products other than those marketed by the Coast Fisheries Division, i.e. cat food, and to products related to cat food. Cf. *The Bankers Securities Corporation v. Federal Trade Commission*, 297 F. 2d 403, 30 LW 2294 (3rd Cir. 1961).

Respondent argues that the impropriety of making the order applicable to payments made by respondent to "any customer" is clearly established by the Commission's decision in *Transogram Company, Inc.*, Docket No. 7978 [61 F.T.C. 629] (Opinion dated September 1962). There is nothing in the cited case which would merit such a

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conclusion. In the opinion of the Commission therein, it is said [61 F.T.C. 701]:

The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must disregard accumulated experience, or that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future. It does mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 435.

It is further said [61 F.T.C. 702]:

The argument, advanced by some of the respondents, that the order should apply only to publications of jobber customers is untenable. The distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalogue would have been turned down on the ground that it came from retailers rather than from jobbers. Nor is there merit to the claim that a limitation to jobber customers is required by the need for specificity in the order's provisions. This need is satisfied by narrow and precise definition of the practice involved. An offer to engage in that practice will be recognizable no matter what kind of customer makes it.

And following the last quoted paragraph, there is reference to a note reading [61 F.T.C. 702]:

Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360. There the respondent, a broker, carried a variation of the customer-limitation argument to the extreme of requesting that the order be applied to two named buyer and seller clients. The Supreme Court rejected this contention, stating that the Commission did not exceed its discretion in banning repetitions of the violation in connection with transactions involving *any* seller and buyer.

The respondent considers the provision prohibiting respondent from making a payment which is not "affirmatively offered and otherwise made available" to competing customers as being unusual and unique and it goes on to state that such a requirement goes far beyond the terms of Section 2(d) which direct only that the payments be "made available" to competing customers.

The Commission has held in a number of cases that a customer must be informed of an allowance before it can be deemed to be available. In *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89, 95 (1954), in rejecting respondents' contention that the hearing examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for

services or otherwise offer such credits when they have been made available to sellers competing with such customers, the Commission stated:

Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the disfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535, 1548 (1956), the Commission said:

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. *In the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

In *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059, 1060 (1957), it is said:

The Commission's interpretation of the word "available" used in Section 2(d) as requiring an offer has been clearly expressed in the matters of *Kay Windsor Frocks, Inc., et al.*, Docket No. 5735, and *Henry Rosenfeld, Inc., et al.*, Docket No. 6212. It is that, under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals.

It is further stated:

Once a seller determines upon a plan of advertising allowances, the plan must be affirmatively made known to every customer. Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. In this respect the seller's offering of a plan serves a worthwhile purpose.

In the initial decision in *Exquisite Form Brassiere, Inc.*, Docket No. 6966 [57 F.T.C. 1036, 1039], adopted by the Commission on October 31, 1960, it is said:

It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.

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The foregoing pronouncements interpreting the statutory term "available" leave no doubt that an affirmative offering to each and every competing customer must be made by the seller once the latter decides to grant advertising allowances to any. It should be apparent that respondent's objections to the use of the words "affirmatively offered" are groundless, in that it does not involve any obligation on the respondent which is not imposed by the statute as construed by the Commission.

Respondent contends that the concluding paragraph of the order proposed by counsel supporting the complaint, which defines the word "customer," should be deleted for the reason that it goes far beyond the terms of Section 2(d), its inclusion is completely unjustified on this record and the definition is so vague as to be virtually meaningless. The hearing examiner is unable to follow the respondent's reasoning in this connection. As disclosed by the complaint, the respondent sells its publications through Independent News which acts in the capacity as national distributor for respondent in dealing with the customers of respondent. The purpose of the definition is to include within the term "customer" the type of customer referred to in the complaint.

CONCLUSIONS

1. The acts and practices of respondent, as described hereinbefore, are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.
3. The order proposed by counsel supporting the complaint is appropriate in this proceeding.

ORDER

It is ordered, That respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and

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otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from HMM Publishing Co., Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 28th day of March 1963, 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.

IN THE MATTER OF

ALUMINOUS COATINGS, INC., ET AL.

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

Docket 8518. Complaint, June 29, 1962—Decision, Mar. 28, 1963

Order entered on default of respondents, requiring Hallandale, Fla., distributors of roof and other surface paints or coatings which they purchased, to cease misrepresenting—through salesmen carrying out their sales plan for securing dealers and in advertising furnished such salesmen, prospective dealers, and the public—the makers, quality, and guarantees of their paints; sales, advertising, and other assistance offered to their dealers; net profits to be expected; and other misrepresentations as in the order below set forth.

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 Aluminous Coatings, Inc., a corporation, Aluma-Glo Corporation of America, a corporation, and Nathan Backer, individually and as an officer of said corporations,

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. Respondents Aluminous Coatings, Inc., and Alumaglo Corporation of America are corporations organized, existing and doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at 313 East Beach Boulevard, in the city of Hallandale, State of Florida.

Respondent Nathan Backer is an individual and an officer of said corporate respondents. He formulates, directs and controls the acts and practices of said corporate respondents, and his address is the same as that of said corporations. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of paints or coatings for roofs and other surfaces to distributors 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 products, when sold, to be shipped from their place of business in the State of Florida, or from the place of manufacture of said products in the States of Pennsylvania or New Jersey, 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 products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents are now, and have been, in direct and substantial competition, in commerce, with corporations, firms and individuals in the sale of the same or similar products.

PAR. 5. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan by means of which they secure distributors or dealers for the sale and distribution of their products to the purchasing public. These distributors or dealers are solicited and secured by salesmen employed by the respondents, such salesmen having been selected and trained by respondents for this purpose. The primary function of these salesmen is to establish said dealerships and to obtain orders for the products of respondents by means of written contracts or "franchise" agreements with which are combined provisions for "initial" orders of respondents' products. These dealers or distributors also are required to sign trade acceptances as payment for the products purchased.

PAR. 6. As a part of said sales plan but not restricted thereto, said salesmen for respondents, acting within the scope of their employment, for the purpose of inducing prospective dealers to enter into franchise agreements and to purchase respondents' products, represented and continue to represent, directly or by implication, to prospective dealers or franchise purchasers that:

1. Dealer purchasers of respondents' products will be granted exclusive and protected territories within which to operate their business of reselling respondents' products.
2. The paint or coating offered for sale is made from or contains pigments manufactured or produced by the Aluminum Company of America.
3. The paint is manufactured by the Aluminum Company of America.
4. Respondent corporations Aluminous Coatings, Inc., and Alumaglo Corporation of America are a part of, division or subsidiary of the Aluminum Company of America.
5. The paint offered for sale is regularly advertised and will continue to be advertised by the Aluminum Company of America on its national broadcast known as "Alcoa Presents" or the "Alcoa Hour".
6. Due to the widely known Alcoa trademark and its public acceptance, the prospective franchise dealer will have the advantage of displaying and selling a paint highly acceptable to the general public.
7. Respondents will perform all sales promotions and advertising, which will make selling by the dealer unnecessary.
8. Any dealer who has unsold paint left on hand will be protected and such merchandise will be picked up by respondents, with money refunded for the unsold paint.
9. Respondents will erect highway advertising signs, will paint the dealer's house, and will distribute individual brochures and samples in the entire franchise territory.
10. The purchaser can reasonably expect to earn a specified net profit based upon the amount of his purchases, varying from \$2,000 to \$10,000 a year.
11. The paint is equal to or superior to any firstline paint on the market.
12. The paint is unconditionally guaranteed for 10 years.
13. Prospective dealers are especially selected because of their good credit and high standing in the community.
14. The supply of paint purchased by the dealer will be sold out before the first payment falls due.

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15. It will not be necessary for a dealer to make any payments for the paint until it is sold.

16. One gallon of the paint, or coating material, will cover 100 square feet of surface or more than competitive paints.

17. The paint will waterproof basements, remedy leaking roofs, and may be effectively applied to any type of surface, including concrete, wood and metal.

18. The paint has been successfully tested and used by Government agencies and large industrial firms.

19. Trade acceptances signed by dealers will not be sold or transferred.

20. Respondents manufacture the paint or other products offered for sale and sold by them.

PAR. 7. In truth and in fact:

1. Dealer purchasers of respondents' products will not be granted exclusive or protected territories within which to operate their business of reselling respondents' products.

2. The paint or coating offered for sale is not made from and does not contain pigments manufactured or produced by the Aluminum Company of America.

3. The paint is not manufactured by the Aluminum Company of America.

4. Respondent corporations Aluminous Coatings, Inc., and Alumaglo Corporation of America are not a part of, division or subsidiary of the Aluminum Company of America.

5. The paint offered for sale has not been regularly advertised and will not continue to be advertised by the Aluminum Company of America on its national broadcast known as "Alcoa Presents" or the "Alcoa Hour".

6. Respondents' paint does not bear the Alcoa trademark.

7. Respondents will not perform all sales promotions and advertising, and selling by the dealer will thus be necessary.

8. Respondents will not protect any dealer by picking up any paint he has on hand nor do they refund money for the unsold paint.

9. Respondents will not erect highway advertising signs, paint the dealer's house, and distribute individual brochures and samples in the entire franchise territory.

10. The purchaser of respondents' products cannot reasonably expect to earn annually from \$2,000 to \$10,000 or any other specified net profit based upon the amount of his purchases.

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11. Respondents' paint is not equal to or superior to any firstline paint on the market.

12. Respondents' paint is not unconditionally guaranteed for 10 years.

13. Prospective dealers are not especially selected because of their good credit or high standing in the community. On the contrary and as a general rule respondents' products will be sold to any person who will contract to purchase them and has the necessary funds to pay the purchase price.

14. In most instances the dealer is unable to sell the paint supplied by respondents before his first payment falls due.

15. Respondents' dealers are required to pay for the paint whether or not it is sold.

16. Respondents' paint or other material will not satisfactorily cover 100 square feet of surface or cover more surface than competitive paints.

17. The paint will not in all instances waterproof basements or remedy leaking roofs, and it is not effective when applied to some types of surfaces.

18. The paint has not been successfully tested or used by Government agencies and large industrial firms.

19. Trade acceptances signed by dealers are given or transferred by respondents to a financial company which attempts to secure payment without regard to respondents' representations.

20. Respondents do not manufacture the paint or other products offered for sale and sold by them.

Therefore, the representations set forth in Paragraph 6, above, and others similar thereto are and were false, misleading and deceptive.

PAR. 8. Also in the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents have made and now make certain statements with respect to the said products in circulars and other advertising media furnished to their salesmen for use in soliciting the purchase of said products, and also in circulars and advertising distributed to prospective dealers and members of the public. Among and typical of such statements are the following:

A SUPERIOR COATING

Highest Quality Material The material stays bright and never needs to be painted or repainted for many years to come

As our dealer you are entitled to and will receive continuous cooperation.

Ten Year Replacement Guarantee

Furnish us with the names of your most important prospects * * * These names (as well as any others which you may submit at a later date) will be circularized in your behalf. Prospects developed from such circularization will

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be followed up by our Sales Promotion Department with a special letter and literature.

Can be easily applied with an ordinary Brush or Spray Gun

PAR. 9. By and through the use of the statements and representations set forth above respondents represent and have represented that:

1. Their products are superior or are composed of the highest quality material.
2. Their products will give effective service and last for years.
3. They will give their dealers continuous cooperation in the operation of their franchises.
4. Their products are unconditionally guaranteed for 10 years.
5. They will continuously circularize prospects furnished by their dealers.
6. Their products are easily applied:

PAR. 10. In truth and in fact:

Respondents' products are not of the highest quality, and in many instances the cans in which the products are packed and shipped are bulged and in unsalable condition when received by the dealer purchaser; said products are not received in salable or usable condition in many instances and will not be effective for years or any other substantial length of time; respondents do not cooperate with their dealer purchasers in the operation of their franchises; said products are not guaranteed unconditionally but on the contrary the guarantee is subject to limitations and conditions; respondents do not continuously circularize the prospects of their dealers or follow up the initial contacts; respondents' products are not easily applied but on the contrary in many instances said products are too thick or otherwise in such condition that they can be applied only under difficult circumstances.

Therefore, the statements and representations referred to in Paragraphs 8 and 9, above, were and are false, misleading and deceptive.

PAR. 11. The use by respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products has had and has the tendency and capacity to mislead and deceive a substantial number of their said dealers as well as members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of said dealers as well as members of the purchasing public to purchase substantial quantities of the respondents' products because of such erroneous and mistaken belief.

PAR. 12. The acts and practices of respondents as hereinbefore set forth were and are all to the prejudice and injury of their representatives or dealers, their competitors and the public, and constituted and now constitute unfair and deceptive acts and practices and unfair

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methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

Mr. John W. Brookfield, Jr., and *Mr. Robert E. O'Brien* supporting the complaint.

Mr. Murray Glantz, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

FEBRUARY 5, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on June 29, 1962, charging them with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, by the use of false, deceptive and misleading statements and representations with respect to their products in connection with securing distributors or dealers for the sale and distribution thereof to the purchasing public, and in connection with inducing the purchase of such products by prospective dealers and members of the public. After being served with said complaint respondents appeared by counsel and thereafter filed answer denying that they had made certain of the statements and representations alleged in the complaint and admitting the making of others, and denying that any of said representations were false, misleading and deceptive.

Pursuant to notice duly given, a prehearing conference was convened before the undersigned on September 17, 1962, in Washington, D.C., which was attended by counsel supporting the complaint and counsel for respondents. At said conference agreement was reached concerning the narrowing of issues in a number of respects, and as to the procedure to be followed in expediting the trial of the proceeding. A prehearing order embodying the stipulations, admissions and agreements made at said prehearing conference, and governing the future course of the proceeding was issued by the undersigned on October 12, 1962. Pursuant to said order counsel supporting the complaint supplied to counsel for respondents a list of witnesses which they proposed to call and a list of documents which they proposed to offer in evidence, and otherwise complied with said order. Counsel for respondents failed to supply to counsel supporting the complaint a list of the witnesses which he proposed to call or of the documents which he proposed to offer in evidence, and failed to comply with the undersigned's prehearing order in other respects. By order

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issued November 8, 1962, the undersigned ordered that respondents be foreclosed from calling any witnesses or offering any documentary evidence at the hearings scheduled herein, unless within 5 days from the date of such order full compliance was made with the undersigned's prehearing order. No further action was taken by respondents, following the issuance of the undersigned's order of November 8, 1962, to comply therewith or with the prehearing order issued October 12, 1962.

Hearings on the charges were thereafter held from November 26 to November 28, 1962, in Atlanta, Georgia, before the undersigned hearing examiner. Although given due notice of said hearing, neither respondents nor their counsel made any appearance thereat. At said hearing testimony and other evidence were offered in support of the allegations of the complaint, said evidence being duly recorded and filed in the office of the Commission. Respondents having defaulted in appearing at the hearing and having failed to offer any evidence in opposition to the complaint, the undersigned entered an order at the close of the evidence offered in support of the complaint closing the proceeding for the reception of evidence and fixing a date for the filing of proposed findings, conclusions and an order. Proposed findings of fact, conclusions and an order were filed by counsel supporting the complaint on January 14, 1962. No proposed findings, conclusions or order have been filed on behalf of respondents, although given written notice of an opportunity to file same by order of the undersigned dated November 29, 1962.

After having carefully reviewed the entire record in this proceeding, and the proposed findings, conclusions and order, and based on his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following:

FINDINGS OF FACT

Identity of Respondents

1. Respondents Aluminous Coatings, Inc., and Aluma-Glo Corporation of America are corporations organized, existing and doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at 313 East Beach Boulevard, in the city of Hallandale, State of Florida. Respondent Aluma-Glo Corporation of America was organized by the individual respondent Nathan Backer in 1959, and said individual respondent organized respondent Aluminous Coatings, Inc., on June 17, 1960.

2. Respondent Nathan Backer is the president of the corporate respondents, and his wife is the secretary of said respondents. The

individual respondent Nathan Backer owns all of the stock of respondent Aluma-Glo Corporation and he and his wife, together, own all of the stock of respondent Aluminous Coatings, Inc. The individual respondent Nathan Backer formulates, directs and controls the acts and practices of the corporate respondents, and his address is the same as that of said respondents. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter found.

Business of Respondents

3. The corporate respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of paints or coatings for roofs and other surfaces to distributors or dealers for resale to the public. The paints or coatings sold and distributed by the corporate respondents have been and are now purchased from other firms and corporations. Since approximately June 1960, the corporate respondents have purchased their paints or coatings from Ohmlac Paint & Refining Company of Newark, New Jersey. Prior thereto such products were purchased from a manufacturer in Pittsburgh, Pennsylvania. There is no substantial difference in the products sold under the label of Aluminous Coatings, Inc., and those sold under the label of Aluma-Glo Corporation of America. Such products are sold and distributed to the public through independent retail and service establishments which, for the most part, are not primarily in the paint business but are engaged in selling other products or services, such as television and radio stores, garages, gasoline service stations and grocery establishments.

Interstate Commerce and Competition

4. In the course and conduct of their business the corporate respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their place of business in the State of Florida, or from the place of manufacture of said products in the States of Pennsylvania or New Jersey, 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 commerce, as "commerce" is defined in the Federal Trade Commission Act.¹

5. In the course and conduct of their business as aforesaid, the corporate respondents are now, and have been, in direct and substan-

¹ It was stipulated by counsel for respondents at the prehearing conference that the sales of said respondents in commerce were in excess of \$1,000,000 annually.

tial competition, in commerce, with other corporations, firms and individuals in the sale of the same or similar products.²

Sales Plan

6. In the course and conduct of their business, the corporate respondents have operated, and continue to operate, a sales plan by means of which they secure distributors or dealers for the sale and distribution of their products to the purchasing public. These distributors or dealers are solicited and secured by salesmen employed by the respondents. The primary purpose of such salesmen is to establish dealerships for respondents' products, and to obtain orders for such products. In connection therewith, said salesmen use written contracts or "franchise" agreements supplied to them by the corporate respondents, said agreements containing provisions for initial orders of respondents' products. In many instances the dealers or distributors are required to sign "trade acceptances" or promissory notes in payment for the products purchased by them. Respondents' salesmen are compensated on a commission basis, receiving payment weekly for sales made to dealers whom they have signed up during the preceding week.

Misrepresentations by Salesmen

7. As a part of said sales plan but not restricted thereto, the salesmen of the corporate respondents, acting within the scope of their employment, for the purpose of inducing prospective dealers to enter into franchise agreements and/or to purchase the products of said respondents, have represented and continued to represent, directly or by implication, to such dealers that:

(1) Dealer purchasers of respondents' products will be granted exclusive and protected territories within which to operate their business of reselling respondents' products.

(2) The paint or coating offered for sale is made from or contains pigments manufactured or produced by the Aluminum Company of America.

(3) The paint or coating offered for sale is manufactured by the Aluminum Company of America.

(4) The corporate respondents, Aluminous Coatings, Inc., and Aluma-Glo Corporation of America, are a part of or are divisions or subsidiaries of the Aluminum Company of America.

² While denying in their answer the allegation of the complaint with respect to the existence of competition with others, counsel for respondents at the prehearing conference admitted that the corporate respondents are in competition, in commerce, with other firms in the sale of paint products.

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(5) The paint or coating offered for sale is regularly advertised and will continue to be advertised by the Aluminum Company of America on its national broadcast known as "Alcoa Presents" or the "Alcoa Hour".

(6) Due to the widely known Alcoa trademark and its public acceptance, the prospective dealer or distributor will have the advantage of displaying and selling a paint highly acceptable to the general public.

(7) Respondents will perform all sales promotions and advertising which will make selling by the dealer or distributor unnecessary.

(8) Any dealer or distributor who has unsold paint left on hand will be protected and such merchandise will be picked up by respondents, with money refunded for the unsold paint.

(9) Respondents will erect highway advertising signs, will paint the dealer's house or place of business, and will distribute individual brochures and samples to prospective customers whose names are furnished to respondents by the dealer.

(10) The dealer can reasonably expect to earn a specified net profit based upon the amount of his purchases, such profit varying from approximately \$2,000 to as much as \$25,000 a year.

(11) The paint is equal to or superior to any firstline paint on the market.

(12) The paint is unconditionally guaranteed for a period of 10 years.

(13) The supply of paint purchased by the dealer will be sold out before the first payment thereon falls due.

(14) It will not be necessary for a dealer to make any payments for the paint until it has been sold.

(15) One gallon of paint, or coating material, will cover 100 square feet of surface, or more than competitive paints.

(16) The paint will waterproof basements, remedy leaking roofs, and may be effectively applied to any type of surface, including concrete, wood and metal.

(17) The paint has been successfully tested and used by Government agencies and large industrial firms.

(18) Trade acceptances or notes signed by dealers will not be sold or transferred by respondents.

(19) Respondents manufacture the paint or other products offered for sale and sold by them, or are affiliated with the manufacturers thereof.

8. The representations set forth in paragraph 7 above are, false, misleading and deceptive since in truth and in fact:

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(1) Dealer purchasers of respondents' products in many instances are not granted exclusive or protected territories within which to operate their business of reselling respondents' products.

(2) The paint or coating offered for sale is not made from and does not contain pigments manufactured or produced by the Aluminum Company of America.

(3) The paint is not manufactured by the Aluminum Company of America.

(4) Neither of the respondent corporations Aluminous Coatings, Inc., and Aluma-Glo Corporation of America is a part, or a division or subsidiary, of the Aluminum Company of America.

(5) The paint offered for sale has not been regularly advertised and will not continue to be advertised by the Aluminum Company of America on its national broadcast known as "Alcoa Presents" or the "Alcoa Hour".

(6) Respondents' paint does not bear the Alcoa trademark.

(7) Respondents will not perform all sales promotions and advertising, and selling by the dealer will thus be necessary.

(8) Respondents will not protect any dealer by picking up any paint he has on hand, nor do they refund money for the unsold paint.

(9) Respondents will not erect highway advertising signs, paint the dealer's house or place of business, or distribute individual brochures and samples to prospective customers whose names are furnished to respondents by the dealer.

(10) The purchaser of respondents' products cannot reasonably expect to earn annually from \$2,000 to \$25,000, or any other specified net profit, based upon the amount of his purchases.

(11) Respondents' paint is not equal to or superior to any firstline paint on the market.

(12) Respondents' paint is not unconditionally guaranteed for 10 years.

(13) In most instances the dealer is unable to sell the paint supplied by respondents before his first payment falls due, or at all.

(14) Respondents' dealers are required to pay for the paint whether or not it is sold.

(15) Respondents' paint or other material will not satisfactorily cover 100 square feet of surface or cover more surface than competitive paints.

(16) The paint will not in all instances waterproof basements or remedy leaking roofs, and it is not effective when applied to some types of surfaces.

(17) The paint has not been successfully tested or used by Government agencies and large industrial firms.

(18) Trade acceptances signed by dealers are given or transferred by respondents to a finance company, which attempts to secure payment without regard to respondents' representations.

(19) Respondents do not manufacture the paint or other products offered for sale and sold by them.

Misrepresentation in Advertising

9. In the course and conduct of their business and for the purpose of inducing the purchase of their products, the corporate respondents have made and now make certain statements with respect to the said products in circulars and other advertising media furnished to their salesmen for use in soliciting the purchase of said products, and also in circulars and advertising distributed to prospective dealers and to members of the public. Among and typical of such statements are the following:

A SUPERIOR COATING

Highest Quality Material

The material stays bright and never needs to be painted or repainted for many years to come.

As our dealer you are entitled to and will receive continuous cooperation.

Ten Year Replacement Guarantee

Furnish us with the names of your most important prospects * * * These names (as well as many others which you may submit at a later date) will be circularized in your behalf. Prospects developed from such circularization will be followed up by our Sales Promotion Department with a special letter and literature.

Can be easily applied with an ordinary Brush or Spray Gun

10. By and through the use of the statements and representations set forth above the corporate respondents represent and have represented that:

(1) Their products are superior or are composed of the highest quality material.

(2) Their products will give effective service and last for years.

(3) They will give their dealers continuous cooperation in connection with the resale of their products.

(4) Their products are unconditionally guaranteed for 10 years.

(5) They will continuously circularize prospects furnished by their dealers.

(6) Their products are easily applied.

11. The statements and representations set forth in paragraphs 9 and 10 above are false, misleading and deceptive since in truth and in fact:

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(1) Respondents' products are not of the highest quality, and in many instances the cans in which the products are packed and shipped are bulged and in unsalable condition when received by the dealer purchaser, or the cans become bulged and the tops thereof blow off while they are in the dealer's place of business.

(2) Said products will not be effective for years or for any other substantial length of time.

(3) Respondents do not cooperate with their dealer purchasers in connection with the resale of their products, outside of supplying the dealers with advertising literature which the dealers are expected to mail and distribute.

(4) Said products are not guaranteed unconditionally, but on the contrary the guarantee is subject to substantial limitations and conditions.

(5) Respondents do not continuously circularize the prospects of their dealers or follow up the initial contacts.

(6) Respondents' products are not easily applied but, on the contrary, in many instances said products are too thick or otherwise in such condition that they can be applied only with great difficulty.

Effect of Practices

12. The use by the corporate respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products has had and now has the tendency and capacity to mislead and deceive a substantial number of their said dealers, as well as members of the purchasing public, into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of said dealers, as well as members of the purchasing public, to purchase substantial quantities of said respondents' products because of such erroneous and mistaken belief.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The acts and practices of the corporate respondents, as hereinabove found, were and are all to the prejudice and injury of their distributors or dealers, their competitors and the public, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

3. In view of the complete dominance of the corporate respondents by the individual respondent Nathan Backer, and the practice of said

respondent of conducting his business activities under different corporate names, it is the opinion and conclusion of the examiner that the order to be issued herein should run against said respondent individually, as well as an officer of the corporate respondents, so as to prevent evasion of said order and to make said order more effective in terminating the practices herein found to be illegal.

ORDER

It is ordered, That respondents Aluminous Coatings, Inc., a corporation, and Aluma-Glo Corporation of America, a corporation, and their officers, and Nathan Backer, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of paint, roof coating or any other product or products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Purchasers of their products will be granted exclusive territory for the resale of their said products or will be given exclusive or protected areas in which to resell respondents' products.
2. The products sold by respondents are made from or contain pigments manufactured or produced by the Aluminum Company of America, or that respondents' products are manufactured by the Aluminum Company of America.
3. Respondents are a part of, a division of, a subsidiary of, or in any manner connected with Aluminum Company of America; or that respondents are affiliated with or connected with any company or organization with which in fact they are not affiliated.
4. Respondents' products have been advertised by Aluminum Company of America, or that respondents' dealers will have the advantage of the "Alcoa" trademark in promoting the sale of said products.
5. Respondents will perform all necessary sales promotions or advertising for their products, or that no selling effort by dealer purchasers will be required; or misrepresenting in any manner the advertising and sales promotion aid that respondents will give their dealer purchasers.
6. Respondents will pick up or take back unsold paint in the hands of dealers or make refunds to dealers for such products.
7. Purchasers of respondents' products for resale will earn from

\$2,000 to \$25,000 a year, or earn any amounts in excess of those usually and customarily earned by respondents' dealer purchasers.

8. Respondents' products are equal or superior to firstline paint; or otherwise misrepresenting the quality of such products or the period of time for which such products will be effective.

9. Respondents' products are guaranteed for 10 years or any other period of time or in any other manner, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

10. Products purchased by a dealer from respondents will be resold before payment therefor is due.

11. Payment will not be required for the products sold by respondents to dealer purchasers until the products have been resold; or misrepresenting in any manner the time within which payment will be required by respondents.

12. Respondents' products will effectively cover more surface area than competitive products; will waterproof basements or remedy leaking roofs; or in all instances can be easily applied or will be effective when applied to all types of surfaces.

13. Respondents' products have been tested, approved or used by any governmental agency, or any other organization or concern, which has not so tested, approved or used such products.

14. Trade acceptances signed by purchasers of respondents' products will not be transferred, sold or assigned.

15. Respondents manufacture the products sold by them, or are manufacturers of paints, roof coatings, or related products.

16. Respondents will cooperate with and continuously aid the purchasers of their products in carrying on their business of reselling said products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall, on the 28th day of March 1963, 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.

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IN THE MATTER OF

CONTINENTAL WAX CORPORATION ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket. 7351. Complaint, Jan. 6, 1959*—Decision, Mar. 29, 1963*

Order requiring Mount Vernon, N.Y., distributors of their liquid "Six Month Floor Wax", also known as "Continental Grip-Kote", to cease representing falsely—in newspaper advertising, by radio and television, and on the product can—that the wax would give six months' satisfactory use on floors, and to cease using "six months" in the trade name of the product.

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 Continental Wax Corporation, a corporation, and Lee Hall, Herbert Heller, and Jack Heller, 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 Continental Wax 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 10 Warren Place, Mount Vernon, New York.

Respondents Lee Hall, Herbert Heller, and Jack Heller 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 advertising, offering for sale, sale, and distribution of a household wax product known as Continental Six Month Floor Wax and/or Continental Grip-Kote to 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 State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein

*As amended May 5, 1959.

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have maintained, a substantial course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their household wax product, respondents have made certain false and misleading statements with respect to the durability and other characteristics of their product in advertisements contained in newspapers having interstate circulation, as well as over radio stations and television channels having sufficient power to carry over state lines, and further, have made false and misleading representations on the product itself, which product was and is shipped from the places of manufacture in the States of Indiana and New York to various other States of the United States.

Among and typical of the false and misleading statements contained in the said advertisements and representations referred to above, disseminated as hereinabove set forth, but not limited thereto, are the following:

A. *Newspaper advertisements*

SAVE TIME * * * end weekly waxing drudgery!

SAVE WORK * * * waxings last for *half a year!*

SAVE MONEY * * * a little goes a 6-month way! with 6 month floor wax

* * * * *

The new "living" wax—the world's first and only wax—*guaranteed* Not to Walk Away, Wash Away, Wear Away for SIX FULL MONTHS * * *

* * * The wax with built-in brilliance that keeps your floors shimmering bright for six months at a time! Wax your floors now and to keep them clean all they need for the next six months is just the occasional flick of a damp mop! * * *

B. *Radio advertisements*

Science announces the world's first and only Six Month Floor Wax.

Now for the first time in history, wax your floors just twice a year. * * *

Whether your floors are hardwood or linoleum, tile or terazzo, just a quick swipe and this new Six Month Floor Wax shines back in an instant, gleaming bright. So why be a slave to your floors? Save work, save time, save money. End weekly waxing once and for all with the wax that's guaranteed not to walk away, wash away, wear away for half a year * * * .

C. *Television advertisements*

Video

1. EXTERIOR SHOT OF SCHOOL
2. CAN STARTS FROM PINPOINT TO ZOOM UP
3. CAN ZOOMS UP TO FULL FRAME
4. CUT TO SHOT OF CLASSROOM INTERIOR; SUPER: "GUARANTEED FOR 6 FULL MONTHS"

Audio

1. Now—at last—
2. CONTINENTAL
3. SIX MONTH FLOOR WAX—the *living* wax—
4. guaranteed to last for six full months!

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- | | |
|---|---|
| 5. CUT TO SHOT OF KIDS PLAYING IN ROOM | 5. Tests in this classroom proved even thousands of footsteps couldn't destroy SIX MONTH WAX! |
| 6. FLIP TO SCARRED & MARRED TIGHT AREA. BUFFER COMES IN, BUFFS AND KEEPS BUFFING AREA | 6. It protects and shines up to <i>six months</i> at a time with just occasional buffing! |
| 7. PINPOINT ZOOM CAN FROM DEMO AREA, UP TO HALF FRAME: SUPER: "END WEEKLY WAXING" | 7. End weekly waxing forever! |
| 8. LOSE SUPER; ZOOM CAN UP FULL | 8. Get SIX MONTH FLOOR WAX today! |

D. *Advertisements on product*

SIX MONTH FLOOR WAX

won't walk away, wash away, wear away for six full months!

SAVES WORK

Waxings last 6 months

Makers of Famous Six Month Floor Wax . . .

If you follow these simple directions your floors will require rewaxing only twice a year . . . and

YOU NEED NOT WAX AGAIN FOR 6 FULL MONTHS.

PAR. 5. Through the use of the aforesaid statements and other advertisements, respondents represented that their said household wax product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection.

PAR. 6. The statements and representations as set forth in the foregoing paragraphs were false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product 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. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public

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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. John T. Walker supporting the complaint.
Bass & Friend of New York, N. Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JUNE 4, 1962

Continental Wax Corporation, a corporation, Lee Hall, Herbert Heller and Jack Heller, individually and as officers of said corporation, hereinafter called respondents, are charged with falsely advertising their household wax product "Six Month Floor Wax" in violation of the Federal Trade Commission Act. Respondents answered and denied the substantial allegations of the complaint. During the course of hearings, upon motion of counsel supporting the complaint and over the objections of counsel for respondents, the complaint was amended to include allegations particularizing the respects in which it was claimed that respondents' advertising was false and deceptive.

Hearings have been completed and proposed findings of fact, conclusions of law and order have been filed by respective counsel. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record the undersigned hearing examiner makes the following findings of fact and conclusions of law, and order based thereon:

FINDINGS OF FACT

1. The respondent Continental Wax Corporation is a corporation organized and doing business under the laws of the State of New York, with its principal office located at 10 Warren Place, Mount Vernon, New York. The respondents Lee Hall, Herbert Heller and Jack Heller are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including those found herein. Their address is the same as that of the corporate respondent.

2. The respondents are now, and for several years last past have been engaged in the manufacture, advertising, offering for sale, sale and distribution of liquid floor waxes, including a household liquid floor wax called "Six Month Floor Wax," sometimes called "Continental Grip-Kote," to wholesale distributors and retailers for resale to the public. In the course and conduct of their business, the respondents now cause and for sometime last past have caused their

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liquid floor waxes, 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 maintain, and for sometime last past have maintained, a substantial course of trade in said liquid floor waxes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the conduct of their business, and for the purpose of inducing the sale of said "Six Month Floor Wax," respondents have made certain statements and representations with respect to the durability and other characteristics of said "Six Month Floor Wax" in newspaper advertisements having interstate circulation, on radio and television stations having sufficient power to carry over state lines, in printed material attached to the can containing the wax product and on the written guarantee and instructions attached to the metal can containing the "Six Month Floor Wax" (CX-1A).

4. Some of the statements and representations contained in respondents' advertising complained about will be set out herein. CX-1A is a one quart size metal can in which respondents' "Six Month Floor Wax" is marketed and sold. It is also sold in one gallon size cans. On the front and back of the can, CX-1A, are the following statements and representations, among others:

Self-Polishing	Waterproof
CONTINENTAL	
GRIP-KOTE	
for	SIX
all	
types	MONTH
of	
floors	FLOOR WAX
Protects like	
paste wax	
won't walk away, wash away,	
wear away for six full months!	

On the right side of the can, CX-1A, are the following statements and representations:

SAVES WORK
 Waxings last 6 months
 SAVES TIME
 No more floor scrubbing
 SAVES MONEY
 You use *less*
 With Genuine
 Carnauba Wax
 best for hardwood, linoleum,
 rubber, asphalt and vinyl plastic
 tile and terrazzo floors.

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* * * * *

Makers of famous Six Month Floor
Wax, tested and approved in 35 years
of heavy duty professional use.

Below the heading "Directions" on the right side of CX-1A are the following statements and representations:

* * * * *

FOR MARKS, SCUFFS
AND SPILLS

Unlike other waxes, marks, scuffs and spills can be removed easily by damp mopping with cold water. Let dry—rebuff to renew lustre.

NOW WAX ONLY TWICE A YEAR

If, in heavy traffic areas, your floors show signs of wear during the first month or so, they can be "repaired" by damp mopping and then applying an additional light coat of wax to these areas.

Thereafter, damp-mopping will keep your floors clean. And rebuffing, always in the direction from the least towards the most walked on areas—will renew their brilliance.

If you follow these simple directions, your floors can be kept looking like new and, you need not wax again for *six full months*.

The following statements and representations are contained in CX-1B, the guarantee and instruction booklet attached to CX-1A:

10 STEPS To Beautiful Floors

* * * * *

You don't re-wax for 6 months. If you follow these simple steps in caring for your floors, after the first month or so they will require re-waxing only twice a year—with occasional damp-mopping to keep them clean and rebuffing to keep them bright.

5. The following are some of the newspaper advertisements complained about:

WAXWORK COMES JUST TWICE A YEAR with the new Continental Grip-Kote Six Month floor wax. You'll be able to hibernate from waxing whether you're floored by hardwood, linoleum, terrazzo, vinyl, rubber or asphalt tile. This protecting wax will stand up under long walks, repeated washings. Self-polishing and slip-resistant, it needs only an occasional re-buffing to look bright again.

(The above statements and representations are contained in CX-3, a newspaper advertisement which appeared in the Chicago Daily Tribune, issue of Wednesday, March 18, 1959.)

End weekly waxing forever! Amazing Continental Six Month Floor Wax won't walk away, wash away, wear away for six full months—or your money back! Yes, Continental Six Month Floor Wax protects and shines up to six months at a time. Made with costly, imported Carnauba wax, Six Month Floor Wax—the living wax—keeps all types of floors sparkling bright without weekly waxing—an occasional buffing is all the care they need for half a year when you wax the Six Month way. Don't be a slave to your floors—get Continental Six Month Floor Wax today!

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(The above representations were contained in CX-6, newspaper advertisement placed by respondents in the Boston Traveler, issue of Wednesday, February 25, 1959.)

WAX YOUR FLOORS just twice a year with Continental 6-month floor wax!

* * * * *

Now, you can end weekly waxing! Continental 6-month floor wax will shine and protect your floors six months at a time. It's waterproof, self-polishing, slip-resistant. Won't walk away, wash away or wear away for a full half year! Made with costly imported Carnauba wax.

Save Time! No more wax scrub-ups.

Save Work! Waxings last for half a year.

Save Money! You use less—a little goes a 6-month way.

(The above advertisement, CX-20, appeared in the New York Daily News, issue of September 18, 1958.)

CONTINENTAL "GRIP-KOTE"
6 MONTH FLOOR WAX

* * * * *

At last you can wax your floors just twice a year! CONTINENTAL SIX MONTH FLOOR WAX is guaranteed not to walk away, wash away, wear away for six full months—or your money back! SIX MONTH FLOOR WAX, the new *living* wax for your home, frees you from the back-breaking chore of weekly waxing! Now you can wax your floors the SIX MONTH way—and have beautiful, gleaming floors that need just occasional buffing to gleam mirror-bright for the next six months! Don't be a slave to weekly waxing! Get

CONTINENTAL SIX MONTH
FLOOR WAX today!

(The above advertisement, CX-30, appeared in the Baltimore Evening Sun, issue of Wednesday, February 18, 1959.)

6. Among some of respondents' radio advertising complained about are the following:

Imagine! Just an occasional buffing is all they need till 1959. You see, unlike many synthetic resin type waxes that wear away or crack and must be replaced every few weeks, the protective brilliance of Continental Six Month Wax is easily renewed with a buffing cloth. Continental is a new living wax for home use that keeps floors shimmering bright for half a year. So end weekly waxing drudgery. Wax your floors now the Continental Six Month way then don't wax again till next year.

(The above advertisement, CX-35, appeared on Radio Station WINS, New York, New York, on or about August 21, 1958.)

Now for the first time in history, wax your floor just twice a year. Yes, self-polishing Continental Grip Coat is guaranteed to protect and shine for six months at a time. Imagine! A new waterproof carnauba floor wax so tough it actually laughs at spots, spills, scuffs, streaks and stains.

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(The above advertisement, CX-36, was a two minute "spot" announcement which appeared on Radio Station WCBS, New York, New York, on, or about August 21, 1958.)

7. The following statements and representations were contained in television advertisements sponsored by respondents:

VIDEO

1. EXTERIOR SHOT OF SCHOOL
2. CAN STARTS FROM PINPOINT TO ZOOM UP
3. CAN ZOOMS UP TO FULL FRAME
4. CUT TO SHOT OF CLASSROOM INTERIOR; SUPER: "GUARANTEED FOR 6 FULL MONTHS"
5. CUT TO SHOT OF KIDS PLAYING IN ROOM
6. FLIP TO SCARRED & MARRED TIGHT AREA. BUFFER COMES IN, BUFFS AND KEEPS BUFFING AREA.
7. PINPOINT ZOOM CAN FROM DEMO AREA, UP TO HALF FRAME; SUPER: "END WEEKLY WAXING"
8. LOSE SUPER; ZOOM CAN UP FULL

AUDIO

1. Now—at last—
2. CONTINENTAL
3. SIX MONTH FLOOR WAX—the *living wax*—
4. guaranteed to last for six full months!
5. Tests in this class room proved even thousands of footsteps couldn't destroy SIX MONTH WAX!
6. It protects and shines up to six *months* at a time with just occasional buffing!
7. End weekly waxing forever!
8. Get SIX MONTH FLOOR WAX today!

(The above was received in evidence as CX-34 and is a twenty second television film commercial.)

VIDEO

MS JINX

HOLDS PRODUCT

TILT DOWN TO FLOOR

ON JINX

AUDIO

JINX: Hello. I'm Jinx Falkenburg and I've got a secret that's just too good to keep.

Continental Six Month Floor Wax. It's an amazing new self-polishing wax that protects and shines for up to six months at a time. Longer than even the costliest paste waxes.

Scuffs, streaks and stains disappear with just a flick of a damp mop. Continental actually renews itself without rewaxing.

It never turns yellow, never gives your floors that tarnished look. Your floors stay "brand new looking" month after month. Use Continental and you'll enjoy the six most carefree months of your life.

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VIDEO

PRODUCT STARTS PINPOINT ON GLEAMING FLOOR. RAPIDLY PULLS OUT TO FULL SCREEN.

ANIMATION: WORDS "WON'T WALK AWAY, WASH AWAY, WEAR AWAY FOR SIX FULL MONTHS" PULL OUT TO SCREEN CENTER AND MOVE UP.

SUPER: HARDWOOD, LINOLEUM, TILE OR TERRAZZO.

TURN CAN BOLD PRINT: "END WEEKLY WAXING" "NOW WAX ONLY TWICE A YEAR."

TURN CAN BOLD PRINT:
SAVE WORK
SAVE TIME
SAVE MONEY

CU PRODUCT CLEAN

(The above is CX-68, a television one minute "spot" announcement.)

FS SHOT OF DOOR. DOOR STARTS TO SWING OPEN AS CAMERA DOLLYS THRU.

WAIST SHOT OF JINX. SHE HAS MOP HANDLE IN HAND AND IS MAKING MOVEMENTS THAT COULD BE TAKEN FOR WAX APPLYING

JINX STOPS MOVEMENT. TALKS TO CAMERA

ON JINX

PICKS UP PIGGY BANK.

PRODUCT STARTS PINPOINT ON GLEAMING FLOOR. RAPIDLY PULLS OUT TO FULL SCREEN.

AUDIO

TEX: (V.O.) Only Continental—The self-polishing, six-month floor wax, guarantees it won't walk away, wash away, wear away for half a year or your money back. Perfect for all types of floors.

So end weekly waxing once and for all! Now, wax your floors just twice a year.

Save work—save time—save money.
Give your floors a six month shine.

Get Continental, the world's first and only Six Month Floor Wax—TODAY!

TEX: (V.O.) This is Tex. Here's Jinx.

Oh—oh. The weekly waxing grind?

JINX: Heavens, no. I only wax my floors twice a year. You see, I use Continental Six Month Floor Wax. An amazing new water-proof Carnauba wax that actually renews itself without rewaxing. Just look at these scuffs and stains left over from the children's party. But with just a flick of a damp mop, my floors gleam right back.

Our floors never get that dingy look. And talk about economy! Why, just one quart of Six Month Wax outlasts up to 6 quarts of ordinary wax.

and that's just like money in the bank.

ANXR: (V.O.) Only Continental—the self-polishing six month floor wax;

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VIDEO

ANIMATION: WORDS "WON'T
WALK AWAY, WASH AWAY,
WEAR AWAY FOR SIX FULL
MONTHS" PULL OUT TO SCREEN
CENTER AND MOVE UP.

SUPER: HARDWOOD, LINOLEUM,
TILE OR TERRAZZO

TURN CAN BOLD PRINT: "END
WEEKLY WAXING" "NOW WAX
ONLY TWICE A YEAR"

TURN CAN BOLD PRINT:
SAVE WORK
SAVE TIME
SAVE MONEY

ON PRODUCT CLEAN

AUDIO

Guarantees it
won't walk away, wash away, wear
away for half a year or your money
back.

Perfect for all types of floors.

So end weekly waxing once and for
all! Now, wax your floors just twice
a year.

Save work—save time—save money.

Give your floors a six-month shine.

Get Continental, the world's first and
only Six Month Floor Wax—TODAY!

(The above is CX-69, a television one minute "spot" announcement.)

8. During the hearings, upon motion of counsel supporting the complaint and over the objection of counsel for respondents, the original paragraphs 5 and 6 of the complaint were deleted and the following substituted:

PARAGRAPH FIVE: Through the use of the aforesaid statements and other advertisements, respondents represented that their said household wax product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection.

PARAGRAPH SIX: The statements and representations as set forth in the foregoing paragraphs were false, misleading and deceptive.

9. It is the contention of counsel supporting the complaint that, through the use of the statements and representations quoted in paragraphs 4, 5, 6, and 7 hereof, respondents represented that said "Six Month Floor Wax" will last and be effective for a period of six months for all the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt and wear resistance; beauty; appearance; gloss and protection. Further, the complaint alleges and Commission counsel contends that these statements and representations are false and deceptive for the reason that "Six Month Floor Wax" will not last and afford an effective coating of wax for a period of six months for all the purposes for which said wax was advertised or for which floor wax is used by the consumer, as alleged in Paragraph 5 of the amended complaint.

10. A reasonable and fair interpretation of the quoted statements and representations made by respondents in their advertising demonstrate that respondents have represented to the public that an effective

coating of "Six Month Floor Wax" will remain on the floor for a period of six months after application. In numerous advertisements in newspapers and on radio and television, some of which are quoted in paragraphs 4, 5, 6 and 7 hereof, this representation is made without qualification. No mention is made that the floor must be cleaned from time to time by sweeping, damp-mopping with a solution of "Six Month Floor Wax" and water, and then re-buffed. In fact, these particular advertisements emphasize to the public that, by using "Six Month Floor Wax" the housewife can eliminate weekly floor cleaning and re-waxing forever. It having been found that respondents have represented that "Six Month Floor Wax" will provide an effective coating of wax for a period of six months after application, the next question to decide is, is this statement true? Will "Six Month Floor Wax" provide an effective coating on the average household floor for a period of six months after its application? Commission counsel claims that it will not. Respondents contend that it will provide an effective coating for a period of six months.

11. The testimony of each of the witnesses who testified in support of and in opposition to the allegations in the complaint will not be separately discussed. Some of the expert witnesses who testified in support of the complaint were in the employ of competitors of respondents who, according to some of the exhibits received in evidence, have made advertising representations concerning their own products of a similar nature to those complained about in this proceeding. The fact that respondents' competitors may have made similar representations concerning the performance characteristics of their own floor waxes does not excuse respondents for any deceptive practices shown and found herein. However, the circumstance that these witnesses were in the employ of competitors of respondents and, in their demeanor and testimony, appeared to this hearing examiner to be biased and prejudiced against respondents and the performance characteristics of "Six Month Floor Wax," does have a bearing on their credibility and the weight to be given their testimony. These factors are being taken into consideration in this decision. Also, some of these witnesses testified concerning purported comparative tests which they had made of "Six Month Floor Wax" and other competitive waxes. Some of these tests were slanted in favor of the competitive wax or waxes. The standards set up for some of the tests were so selected that the results thereof did not reflect a true comparison of respondents' "Six Month Floor Wax" with the other waxes used in the tests. In other words, the results reflected a false superiority of the other waxes over "Six Month Floor Wax." Nevertheless, upon consideration of the entire record, including the testimony of other witnesses, the hearing exam-

iner finds that "Six Month Floor Wax" will not provide an effective coating of wax on the average household floor for a period of six months after application, as respondents have represented it will do.

12. Respondents also contend that their representation that "Six Month Floor Wax" will provide an effective coating of wax on the floor for a period of six months is not false and deceptive as alleged because of respondents' maintenance instructions printed on the can (CX-1A) and in the guarantee (CX-1B) attached to the can. These instructions are, when the waxed floor becomes dirty or scuffed, the floor should be swept, then damp-mopped with a 10% solution of "Six Month Floor Wax" and water, and then re-buffed. As stated in paragraph 10 hereof, irrespective of these instructions, much of respondents' advertising omits any reference whatsoever to maintenance and unequivocally represents that "Six Month Floor Wax" will provide an effective coating of wax on the floor for six months after application and no re-waxing will be necessary. Also, there is evidence to the effect that, even if respondents' maintenance instructions are followed by sweeping, damp-mopping with a 10% solution of "Six Month Floor Wax" and water, and then re-buffed, this will not always remove the dirt and scuff marks. Therefore, it is found that said statements and representations are false and deceptive, as alleged in the complaint.

13. Respondents also contend that the evidence adduced on behalf of the Commission with respect to the lasting qualities of respondents' "Six Month Floor Wax" relates to a different "Six Month Floor Wax" from that now being sold and distributed by respondents. This is so, say counsel for respondents, because the formulation of "Six Month Floor Wax" which has been manufactured and sold by respondents since March 1960, is a different formulation from the first and second formulations of "Six Month Floor Wax" which had been manufactured, distributed and sold by respondents. Respondents say that the first formulation of respondents' "Six Month Floor Wax" was manufactured and distributed from approximately 1956 until the end of 1958; the second formulation began to be manufactured, distributed and sold during December of 1958 or January 1959, and continued until March 1960, when the present formulation of "Six Month Floor Wax" began to be produced, distributed and sold by respondents. Respondents further say that neither the first nor second formulation of "Six Month Floor Wax" has been manufactured or distributed since March 1960, and the only evidence presented by counsel supporting the complaint with respect to the performance characteristics of "Six Month Floor Wax" relates to either the first or second formulations. Counsel for respondents say that none of the evidence offered by Commission counsel involved the current or third formulation of "Six

Month Floor Wax.” Therefore, respondents argue, there was no evidence offered by counsel supporting the complaint as to the performance characteristics of the present formulation of “Six Month Floor Wax” from which it can be determined whether or not respondents’ advertising and trade name is false and misleading; the only evidence in this respect, they contend, being the testimony of respondents’ consumer witnesses who purchased “Six Month Floor Wax” after March 1960 and the testimony of the plant manager and chief chemist of the corporate respondent, Abraham Ashkin. Even assuming this to be true, it is no defense to the allegations in the complaint. If it were so held, any false advertiser could change the formula of his product from time to time and thus insulate himself from successful prosecution of proceedings instituted under Section 5 of the Federal Trade Commission Act.

14. It should also be pointed out that several consumer witnesses who testified on behalf of respondents testified concerning their use of and the performance characteristics of a floor wax manufactured and sold by respondents under the trade name “Continental 18.” “Continental 18” is an industrial wax manufactured and sold by respondents for use in private and public office buildings, schools, hospitals, auditoriums, and indoor areas accustomed to heavy pedestrian traffic. The evidence shows that “Continental 18” is a heavier and longer lasting wax than “Six Month Floor Wax” and contains more expensive ingredients than “Six Month Floor Wax.” Consequently, the two waxes are not comparable and “Continental 18” is not competitive with respondents’ “Six Month Floor Wax” or other household liquid floor waxes. Therefore, the testimony of the consumer witnesses concerning the performance characteristics of “Continental 18” is not applicable to “Six Month Floor Wax.”

15. The evidence shows that “Six Month Floor Wax” is a water emulsion self-polishing household liquid floor wax with performance characteristics similar or superior to competitive household liquid floor waxes, depending on the standards or criteria set for comparison. In any event, respondents’ trade name “Six Month Floor Wax” and their advertising claims have the tendency to deceive a substantial portion of the purchasing public into the mistaken belief that “Six Month Floor Wax” will last for six months, when such is not the fact and to purchase substantial quantities of “Six Month Floor Wax” by reason of said mistaken belief. As a consequence, substantial trade in commerce has been, and is being unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

16. There remains the question of the appropriate remedy, if any,

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with respect to the use of the words "Six Month Floor Wax" in the corporate respondent's trade name. As announced by the Supreme Court in *Federal Trade Commission v. Royal Milling Co., et al.*, 288 U.S. 212 [2 S. & D. 217] and *Jacob Seigel Co. v. Federal Trade Commission*, 327 U.S. 608 [4 S. & D. 476] a trade name should not be excised if a less drastic remedy will prevent the deception. In view of the finding herein that corporate respondent's use of the words "Six Month Floor Wax" in its trade name is deceptive, is there any change or modification in the trade name "Six Month Floor Wax" short of excision which will prevent the deception complained about? Qualifying words could be added to the trade name "Six Month Floor Wax," such as "Will not last for six months," or "Will last for one month," but this would not mitigate the confusion. The corporate respondent is already using the words "Continental Grip-Kote" on the can (CX-1A) as a part of its trade name, although in less prominent lettering than "Six Month Floor Wax." In the opinion of this hearing examiner, deception in corporate respondent's trade name can only be remedied by the complete excision of the words "Six Month Floor Wax."

CONCLUSION

The acts and practices of respondents as found herein are all to the prejudice and injury of the public and 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.

ORDER

It is ordered, That respondents, Continental Wax Corporation, a corporation, and its officers, and Lee Hall, Herbert Heller and Jack Heller, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the household liquid wax "Six Month Floor Wax," also known as "Continental Grip-Kote," or any other product of substantially similar composition or possessing similar properties, whether sold under the same name or any other name, forthwith cease and desist from:

1. Representing, directly or by implication, that said household liquid floor wax will last for a period of six months or for any other definite period of time which is in excess of that for which said wax product is usually and customarily effective, for any and all of the purposes for which liquid floor waxes are ordinarily used.

2. Using the words or term "six month" or any other words or term denoting a definite period of time, in the trade name, to designate or describe the household liquid wax product, which is in excess of that for which said product is usually and customarily effective.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

This matter is before the Commission for consideration of respondents' exceptions to the hearing examiner's initial decision holding them to have violated the Federal Trade Commission Act. Respondents, a corporation and three of its officers, are charged by the complaint with false advertising of a household floor wax sold under the trade names "Six Month Floor Wax" and "Continental Grip-Kote."

In his proposed finding of fact submitted to the hearing examiner, counsel for respondents avers: "The sole issue is whether six-month wax will last for six months." Hearings to resolve this "sole issue" produced approximately 2,300 pages of testimony. More than 200 exhibits were introduced into evidence with most of them having multiple pages, so the documentary evidence alone equals approximately 1,000 pages.

All of the hearing examiner's findings and conclusions with respect to this factual issue are contained in paragraph 11 of the initial decision. In this paragraph the hearing examiner advises that the testimony of the witnesses "will not be separately discussed"; that some of the witnesses who testified in support of the complaint were in the employ of respondents' competitors and appeared to be biased and prejudiced against respondents and their product; and that the tests conducted by these biased witnesses of the respondents' wax and their own products showed a false superiority of the other waxes over respondents' product. All of the thousands of pages of testimony and documents dealing with the sole factual question involved in this proceeding are disposed of in the following sentence: "Nevertheless, upon consideration of the entire record, including the testimony of other witnesses, the hearing examiner finds that 'Six Month Floor Wax' will not provide an effective coating of wax on the average household floor for a period of six months after application, as respondents have represented it will do."

This is, of course, not a factual finding at all but the broadest type of conclusion which is of no value whatsoever to the parties and to the Commission. No one can tell what evidence was relied upon and, except for the reference to the unidentified biased competitor witnesses, we have no clue as to which evidence was disbelieved. But

certainly at some stage in this proceeding someone must make factual findings on the lone factual issue and this task now falls upon the Commission.

Before embarking on an attempt to discover whether the record evidence establishes either that "Six Month Floor Wax" will or will not "last" for six months, it is necessary to define the issue with more exactness. The first question to be determined is just what did the respondents represent their product would accomplish or, stated another way, how would the consuming public interpret the representations made by the respondents. The complaint alleges in Paragraph 5 that the respondents had represented that their "* * * product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection."

This would appear to be a correct interpretation of the representations made by the respondents in their advertising. Approximately seven and one-half pages of the initial decision are devoted to quoting the respondents' advertising and there is no need to set out any of it here. Suffice it to say, we feel that the record establishes beyond question that the respondents have represented that six month floor wax will perform all of the functions for which a floor wax is normally purchased and used and will continue to perform these functions for a period of six months of normal household use.

Respondents' counsel contends, and the record supports him therein, that consumers purchase wax for the two purposes of beautification and protection. There is some argument between the parties as to which is the most important function in the mind of the purchasing consumer and there is record evidence on both sides of this question, but we see no reason or necessity to resolve this satellite issue, for we are sure that both factors are of importance to most consumers. There can be no doubt that respondents' advertising recognizes the consumer desire for both faculties since it stresses both protection and beauty.

And as we view it, the two factors of appearance and protection cannot be neatly segregated one from the other, for certainly few home owners would tolerate a dirty, scuffed and heel-marked floor even though the wax applied thereto was still present and affording protection. This record establishes beyond question that a certain amount of the dirt tracked in upon shoes becomes imbedded in the wax covering on a floor in such a manner that it is physically impossible to remove it without removing the wax. The record also shows that certain types of scuff marks, such as those made by composition or rubber soles and heels, will, on occasion, mar the floor even though a coating of wax is

present. These marks cannot be removed without removing the coat of wax. Thus, the record clearly shows and, as a matter of fact, the respondents' attorney conceded in oral argument before us, that a floor subjected to normal use will not maintain its beauty for six months under a coating of six month floor wax. Thus, the only question left to be decided is whether six month floor wax will afford protection to a floor for a period of six months.

The record contains the results of numerous tests conducted upon respondents' product. The tests were conducted in both research laboratories and in the homes of consumers. For the most part they were concerned with the wax's appearance after periods of use and were usually terminated when the wax no longer had a suitable appearance because of ground-in dirt, streakiness or scuff marks. However, several tests and a good deal of the testimony did concern itself with the durability of the respondents' wax as an effective floor-protecting agent. We turn now to a brief examination of this evidence.

Most of the tests conducted on respondents' product involve subjective analysis of the test results by persons experienced in such evaluations. Sections of flooring were covered with wax and subjected to varying degrees of wear, either from actually being walked upon or by a mechanical device designed to simulate wear. At the conclusion of the wearing period the experts examined the flooring and rendered their opinion as to its degree of gloss, the amount of dirt impregnated in the wax, the number of scuff marks and the amount of wax remaining on the surface. Of course, evaluations of this kind are subject to human error and experts can, and do, differ in their opinion as to the results of a test. However, the durability of a wax, that is, the length of time and the amount of wear which the wax will stand before it is completely eroded away by footprints, can be measured quite accurately by a radioactive isotope test. In this test the wax itself is impregnated with radioactive Carbon 14. The wax is then applied to the floor in the normal fashion and subjected to a measured amount of wear. It is possible to fairly accurately tell how much wax has been eroded away by taking periodic Geiger counter readings of the wax surface. The results of two tests of this type conducted on respondents' product are contained in this record. One of the tests was conducted by Franklin Research Company, a manufacturer of floor maintenance materials primarily for the industrial trade; the other was conducted by York Research Corporation, an independent testing laboratory.

The York laboratory tests was conducted at the instance of, and paid for by, the respondents. Both complaint counsel and respond-

ents' counsel placed copies of the results of this test in evidence and each finds support for his contentions in it. Such a versatile document deserves close scrutiny and attention.

The York test, conducted in the summer and fall of 1958, was supervised by the president of York Research Corporation, Mr. Warren C. Hyer, who was called as a witness to explain it. The test was conducted in an area of heavy traffic flow in the York laboratory. The test floor tiles were thoroughly cleaned and then coated with "Six Month Floor Wax" impregnated with a radioactive isotope of Carbon 14. The test area was then exposed to normal traffic for a period of five weeks. It was damp-mopped and hand-buffed once a week. A photoelectric counter determined the number of passes, *i.e.*, people walking or passing over the area. The counter indicated a traffic density of approximately 6,000 passes per week. At the end of each week, the radioactivity, and, hence, the amount of wax remaining, was measured by a Geiger counter. After five weeks the test was discontinued "because the radioactivity count was approaching the background level." The witness Hyer testified that at the end of the five-week period more than 96 percent of the wax had worn away.

All of this part of the test results would appear to be perfectly clear. It would seem that practically all of the wax had been eroded by 6,000 passes or walkovers per week during a five-week period. But the conclusions drawn by the testing laboratory seem to be in irreconcilable conflict with the test result itself. It is stated that the test area was subjected to traffic which was roughly equivalent to one year of home use. The mathematics leading to this conclusion are, at best, obscure. The "conclusions" section of the test advises that investigations by the laboratory show that the floor in the average home of a typical family of four persons will be subjected to 600 passes per day. According to this section of the test, the test floor was subjected to 40,000 passes during the five-week period.¹ When we divide 600 passes into 40,000 we get a quotient of 66 days. Thus, using the test conclusions' questionable figures, it would appear that 96 percent of the wax was eroded after a little more than two months of normal household wear.

In the last paragraph of the test conclusions, it is stated that the original wax coating would be left on the test area for a period of six months from the time of original application and that observations would be made at the end of this period. For a reason unexplained, the test was not continued for an additional five months but for merely one additional month. At the end of this time the area had been sub-

¹ The conflict between 6,000 passes for five weeks, totaling 30,000 passes, and the conclusions' 40,000 passes is unexplained in the test results or the testimony.

jected to an additional 26,000 passes, for a total of 66,000. It is concluded in an addendum to the original test results that there was sufficient wax remaining on the floor to produce a satisfactory luster when buffed with a commercial floor machine. If we again use 600 as the average number of passes to which the floor in an average home is subjected, it would appear that the test area was subjected to the equivalent of 110 days of home use. We can attach little significance to the witness Hyer's conclusion that the test floor was subjected to an amount of wear equivalent to home use "of from six months to one year" for this conclusion is in direct conflict with the test figures which show that the area was at the most subjected to the equivalent of 110 days of home wear. Moreover, the witness' testimony is inconsistent with the flat statement in the test conclusions (signed by him) that after only five weeks of wear the area was subjected to traffic "roughly equivalent to one year of home use."

It is our conclusion that this test shows conclusively that six month floor wax will not last on the floor of an average home for a period of six months but will be worn away in substantially less time. This conclusion is supported by the other radioactive isotope test conducted by Franklin Research Company. That test was conducted under circumstances roughly equivalent to the York test except that the test floor was subjected to only 5,000 passes or walkovers. At the conclusion of that period of wear (equivalent to less than 9 days of home wear), approximately 43 percent of the wax had been worn away. The witness who testified concerning that test stated that he knew of no other accurate method to determine the amount of wax physically removed from a floor by wear.

The radioactive isotope test we just described constitutes the only evidence in the record from which it can be definitely found that a stated amount of wax was removed from the floor by a stated amount of wear. All of the other evidence is concerned with the appearance of a floor after a measured amount of wear. As we stated at the outset, it is impossible to completely divorce appearance from durability in this field, for once a floor becomes unsightly the housewife must refurbish it whether wax remains thereon or not. Thus, several tests were conducted and continued until the point where the wax, in the opinion of the witnesses (housewives or experts), was no longer satisfactory. For example, Consumers Union, a nonprofit organization providing information to consumers on a wide variety of products, conducted a wear test in which the wax was subjected to only 3,000 walkovers. Mr. Morris Kaplan, the technical director of Consumers Union, testified that it was his opinion, based on the results of this test, that "Six Month Floor Wax" would not have a durability of six

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months under normal circumstances. Mr. Kaplan admitted that the test conducted by Consumers Union would not give a definitive finding that wax would not remain on the floor for six months. But he concluded that since, after the relatively mild tests to which it was subjected, the "degree of streakiness was poor, the degree of scratching resistance was poor, and the degree of scuffing resistance was poor and the general appearance was poor," that the function of the wax in protecting the floor and in providing a generally good appearance "had been seriously impaired" at the conclusion of the test. Another witness from Consumers Union, Dr. Ashton M. Lyon, who held a Ph.D. in chemistry, supported Mr. Kaplan's opinion, testifying, "My opinion is that on the basis of all the factors observed in our traffic performance test, that it was unlikely that it would be a satisfactory floor wax film at the end of six months."

At the instance of one of respondents' competitors, the Foster D. Snell Corporation, an independent testing laboratory, conducted a "household use" test of six month floor wax. Mr. Daniel Schoenholz, Director of the Product Development Department of the Snell laboratory, testified concerning the test. In the Snell test, 12 housewives were asked to clean their floors, apply "Six Month Floor Wax" and to notify the Snell laboratory when the floors required rewaxing. Within 40 days all of the housewives had notified the laboratory that the floor was no longer satisfactory. The median time the wax endured as an acceptable covering was 15 days. The principal reasons for dissatisfaction with the floor wax were that it had become impregnated with dirt, had heel marks and had lost its gloss.

For the most part, respondents based their defense upon the testimony of consumer-user witnesses. Quite a few of the witnesses had not used respondents' consumer brand of "Six Month Floor Wax" but had used one of respondent's industrial waxes made from a different formula. Several of the consumer witnesses did not testify concerning the use of "Six Month Floor Wax" in the home but described its performance in public buildings such as churches, schools, barber shops and stores. There is no way to determine the amount of traffic to which the wax was subjected in these places and there is nothing in the testimony which would support a finding that "Six Month Floor Wax" would endure as an effective floor covering in a home for six months. Several of the witnesses did testify that the wax was used in the kitchens of their homes, but this evidence too is unconvincing on the question of the durability of the wax. For example, one witness in Kansas City testified that she used it on the kitchen in a home but when asked how long the wax endured, she replied, "Well, I waxed the kitchen every three or four months and then wiped it up with cool

water in between. So actually just how long I had that on there I don't know."

It is the Commission's conclusion, based on all of the evidence adduced in this record, that Continental's "Six Month Floor Wax" will not endure for six months as a satisfactory covering of a floor subjected to the typical wear of an average home. Thus we find that all of the factual allegations of the amended complaint have been established by probative and substantial evidence.

The respondents' principal objection to the order proposed by the hearing examiner concerns the injunction against further use of the trade name "Six Month Floor Wax." It is contended that the Commission is without power to enjoin the further use of this name since the complaint does not specifically charge that the trade name itself is false and deceptive. This argument seems to conflict with the plain facts. Paragraph 4 of the complaint plainly includes the name "SIX MONTH FLOOR WAX" as "among and typical of the false and misleading statements" disseminated by the respondents. But aside from this fact which, as we see it, is in itself fatal to respondents' contention, we would certainly not hesitate to enjoin the future use of this trade name even if the complaint did not specifically charge it as deceptive. This is more than a trade name; it is an allegation concerning the performance of a product. It would certainly be anomalous to prohibit the respondents from representing that their wax would endure as an effective floor covering for six months and permit them to continue referring to it as "Six Month Floor Wax." Certainly, we recognize the continuing viability of the rule announced in *Federal Trade Commission v. Royal Milling Co.* (288 U.S. 212, 217) [2 S. & D. 217] that trade names should not be ordered excised "* * * if less drastic means will accomplish the same result." But, as the hearing examiner correctly pointed out, it is impossible to qualify the representation "Six Month Floor Wax" without directly contradicting it and thus any qualification would produce additional confusion.

The desired result of affording complete protection to the public from the misrepresentations promulgated by the respondents can only be obtained in this instance by complete eradication of the name "Six Month Floor Wax".

The record reveals that respondents have made two changes in the formula from which the wax is produced. The first formulation was manufactured and distributed from 1956 through 1958. Most of the evidence in the record, including the isotope tests, is concerned with this formulation. The second formulation was distributed from the last month in 1958 or the beginning of 1959 until March 1960. In March 1960, a second change was made in the formula and so far as

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the record reveals the product today produced and sold is made from this latest formula. It is respondents' contention that the order to cease and desist is founded upon evidence dealing with the performance of waxes which they no longer produce and that the only evidence with respect to the performance of its present product shows that the product will endure on a floor for six months. The evidence to which the respondents allude consists of the testimony of consumer users residing in the New Orleans, Louisiana, area. It is our view that this testimony will not support respondents' contention concerning the durability of their wax, and, further, there is no probative evidence in this record to support a conclusion that the longevity of respondents' product was improved by the changed formula. As a matter of fact, there is expert testimony in the record from the respondents' chemist who originated the "Six Month" formula to the effect that the first change in the formula decreased the effective life of the product. And, further, there is no showing in this record that the consumers who testified in New Orleans had actually used wax produced from respondents' latest formula.

As the initial decision points out, the Commission's right to enjoin false advertising of a product cannot be foreclosed by a midstream change in the product itself. Were we to hold otherwise, a loophole or escape hatch of gigantic proportions would be created. Certainly the Commission does not intend that its order be operative against products which are substantially unlike the product whose advertising the evidence reveals to be false and misleading. If, in fact, the respondents' current product is completely unlike the "Six Month Floor Wax" with which the evidence in this record deals and it will effectively endure for six months, then the order is inoperative with respect to it, for respondents would have a complete defense in an enforcement proceeding. But, on this record, the respondents have not established that their current product differs in any material respects from their earlier products and we consider the order as applicable to all of respondents' waxes.

With the exception of its failure to make factual findings on the effective life of respondents' product, the initial decision is adequate and, as supplemented by this opinion, will be adopted as the decision of the Commission.

Commissioner Elman concurring in the result.

FINAL ORDER

This matter having been heard by the Commission upon respondents' exceptions to the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

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The Commission having rendered its decision ruling on respondents' exceptions:

It is ordered, That respondents' exceptions to the initial decision be, and they hereby are, denied.

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

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

Commissioner Elman concurring in the result.

IN THE MATTER OF

ALBERT J. MADURI DOING BUSINESS AS CAM
COMPANY, ETC.

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

Docket C-323. Complaint, Apr. 5, 1963—Decision, Apr. 5, 1963

Consent order requiring a Verona, N.J., individual engaged in the sale of merchandise and catalogs, order blanks, and other supplies and equipment used in the operation of a mail order business, to cease making various misrepresentations concerning the size of his business, earnings, and profits to be made, opportunities, etc., as below indicated, to induce persons to enter into "distributorship" or "partnership arrangements with his companies and to purchase his said products.

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 Albert J. Maduri, an individual trading as Cam Company and Debb Company, 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 Albert J. Maduri is an individual trading and doing business as a sole proprietorship under the names of Cam Company and Debb Company, with his office and principal place of business located at 436 Bloomfield Avenue, Verona, New Jersey.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of merchandise and various kinds of catalogs, order blanks, and other supplies and equipment used in and necessary for the operation of a mail order merchandising business.

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

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of inducing persons to enter into "distributorship" or "partnership" arrangements with his aforesaid companies, and to purchase his merchandise, catalogs and supplies, respondent has made many representations respecting the kind and nature of his business or organization, the merchandise available for sale and the profits which may be earned in the conduct of a mail order business of the kind offered by the respondent. Said representations have been made by and through the use of various trade names, in advertisements in magazines of national circulation, and in circulars, form letters and other advertising material mailed and distributed in commerce by the respondent directly to proposed purchasers and from which orders for said merchandise and said supplies and equipment were and are ordered by such purchasers. Typical but not all inclusive of said statements or representations were the following:

1. How would you like to get into a Billion Dollar business.
2. * * * I am still the sole owner of a mail order business that employs as many as 21 men and women.
3. I have come up with a mail order plan that, I believe, can easily pay you up to \$100 a week in your spare time.
4. All you have to do to make \$5,000 a year and more is to distribute our catalogs.
5. There are an estimated 80,000,000 mail order customers in the U.S.A.
6. * * * We are sending this guarantee through the U.S. Mail. Using the mails to Defraud is a very serious crime.
7. The cost of a Distributorship is \$10.00 a year. This small fee helps cover part of our clerical cost.
8. Customers of distributors may buy catalogs only from us. As an example, if one of your customers bought 1,000 catalogs from us, you, as distributors, would receive 20% commission on each and every order that your customer sent to us that he received from these 1,000 catalogs.
9. * * * We will pay you a lifetime commission * * *.

10. Our best all time distributor is David K. Pope of Flint, Michigan. Mr. Pope received over \$20,000 in commission checks from us over a three year period. His Christmas check alone for three straight Christmas seasons added to over \$3,000 each check on a total of over \$9,000 for just 3 Holiday seasons.

11. There is absolutely no reason why you, too, cannot receive \$20,000 in commission checks from us during the next three years * * *.

12. We urge you to become a distributor immediately. We are limited as to how many distributors we can handle. Once we reach our quota we will not be able to mail you this offer again.

13. I am certain that you have never tried to make money with the best money making plan of all time. How can I be sure? Very simple. Everyone who has tried the best money making plan has made money. Some people, of course, have made more money than others but they all have made money.

14. There are over 5,000 men and women currently working full-time at this plan and they are making as much as \$300 a week. 2,000 part-timers working this plan are making up to \$100 a week. These figures prove that this plan is the most successful home operated plan of all time.

15. (This plan) it has more repeat business than any other plan. The other good point is that the plan works during both prosperous and depressed times.

16. This plan is so profitable that even an invalid or physically disabled person can operate this business by hiring a man or woman to work for him. The profits from the plan are so tremendous that there will still be a nice income for the disabled or invalid after paying his worker a full salary.

17. Now many of you may think there is a "catch" to this offer. You may think that it all is too good to be true. There is only one "catch" to our offer and we mention it before you join our factory buying service. We have our regular wholesale customers who buy from us at wholesale prices which are 20% to 40% above our factory prices. We have found that from January 1 to November 15, we can double our volume of business without paying our workers overtime. It is during this period of ten and a half months that we can use a certain amount of factory buying members who will help move our tremendous inventory and keep our many workers busy eight hours a day.

The "catch" then is that factory buying members may buy as often and as much as they want but only from January 1 to November 15. All factory priced orders that we receive postmarked after November 15 will be returned unfilled. We, frankly, are entirely too busy with our regular wholesale business after November 15 right till Christmas. Because of this overtime factor, we would lose money on Each and Every factory priced order filled during this 45 day rush period.

18. Advertised in Life Magazine

19. Advertised in Look Magazine

PAGODA PERFUME

Pagoda perfume by Ravel. Nationally advertised in Harper's Bazaar, Town & Country, Mademoiselle and Vogue.

20. Guaranteed by Good Housekeeping

21. Factory Price List No. 4

All prices with the exception of three items are FACTORY PRICES.

Wholesale Price List No. 317-H

22. All our items are * * * fully guaranteed

PAR. 5. By and through the use of the aforementioned statements and representations, and others of similar import and meaning not

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specifically set out herein, respondent represents directly or by implication:

- A. 1. That he is engaged in a billion dollar business.
2. That he employs as many as 21 men and women.
3. That through his plan one can easily make up to \$100 a week in his spare time.
4. That all one has to do to make \$5,000 or more a year is to distribute respondent's catalogs.
5. That there are approximately 80,000,000 mail-order customers in the U.S.A.
6. That persons interested in respondent's plan can be assured that all respondent's claims are true because otherwise he would be subject to a penalty action under the postal laws.
7. That the purpose of the \$10 distributorship fee is to cover part of respondent's clerical cost.
8. That if a customer of a distributor purchased 1,000 catalogs from respondent then said distributor would receive 20 percent commission on all sales resulting from sales to customers of the distributor's customer.
9. That a distributor will receive a lifetime commission on all purchases by his customers.
10. That respondent's best all time distributor had a net profit of \$20,000 in a 3-year period.
11. That anyone can make a net profit of \$20,000 in a 3-year period by becoming a distributor.
12. That respondent is limited as to how many "distributors" he can handle.
13. That everyone who has tried the plan has made money.
14. That there are over 5,000 men and women currently working full-time at respondent's plan and they are making as much as \$300 a week. And that there are 2,000 working part-time at said plan and they are making up to \$100 a week.
15. That his plan has more repeat business than any other plan and that it works well in both prosperous and depressed times.
16. That profits are so tremendous that invalids or physically disabled persons can afford to hire persons to work the plan for them.
17. That factory buying members can only buy respondent's products from January 1 to November 15.
18. That all the items in the catalog represented as having been advertised in Life Magazine were in fact so advertised in that magazine.
19. That Pagoda perfume is being advertised in Look, Harper's Bazaar, Town & Country, Mademoiselle and Vogue.

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20. That all items that are represented as having the Good Housekeeping Seal are in fact guaranteed by Good Housekeeping.

21. That persons purchasing products from Factory Price List No. 317-H are paying factory or wholesale prices.

22. That all merchandise is unconditionally guaranteed.

PAR. 6. In truth and in fact:

1. Respondent is not engaged in or conducting a billion dollar business.

2. Respondent at no time employs as many as 21 men and women.

3. "Distributors" of respondent's products cannot reasonably expect to make up to \$100 a week in their spare time.

4. "Distributors" of respondent's catalogs cannot reasonably expect to make \$5,000 a year.

5. There are not 80,000,000 mail-order customers in the U.S.A.

6. Persons interested in respondent's plan are not in all instances protected from misrepresentations by respondent under the postal laws.

7. The \$10 "distributorship" fee is not for the purpose of defraying part of respondent's clerical cost but is, in fact, a source of profit to respondent.

8. "Distributors" receive commissions only on merchandise purchased by their customers. If a customer later becomes a "distributor" and in turn sells merchandise to other customers, the original "distributor" receives no commission on such sales.

9. "Distributors", in order to continue receiving their commissions, must pay an additional \$10 "distributorship" fee each year.

10. Respondent's best all time "distributor" never had a net profit of \$20,000 in any 3-year period.

11. No one can reasonably expect to earn \$20,000 over a period of 3 years by becoming a "distributor".

12. Respondent is in no way limited as to how many "distributors" he can handle and has never ceased to advertise for "distributors" for his plan.

13. Not every one has made money at respondent's plan. In fact, very few of respondent's "distributors" or "partners" have ever made money.

14. There are not now and never have been 5,000 men and women working full-time at respondent's plan nor have those who have worked full-time made up to \$300 a week. Similarly, there are not now and never have been 2,000 men and women working part-time at respondent's plan nor have those who have worked part-time made up to \$100 a week.

15. Respondent's plan does not have more repeat business than

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any other plan. Furthermore, the plan is no better or safer than any other business during depressed times.

16. Invalids and physically disabled persons cannot reasonably expect to hire persons to work the plan for them, pay a full salary to such persons, and still have a nice income from the remaining profits.

17. Factory buying members who purchase from the factory price list are not limited to buying from January 1 to November 15, but may, in fact, buy at any time during the year.

18. Not all items represented as having been advertised in Life Magazine were in fact advertised in that magazine.

19. Pagoda perfume has not been advertised in Look Magazine since 1956, nor in Town & Country since 1945, and was never advertised in Harper's Bazaar, Vogue or Mademoiselle.

20. Many of the items so advertised are not guaranteed by Good Housekeeping.

21. Persons purchasing from Factory Price List No. 4 or Wholesale Price List 317-H are not purchasing at factory or wholesale prices but at prices in excess of factory and wholesale prices.

22. Respondent's guarantee is not unconditional. The advertised guarantee fails to set forth the nature, conditions, and extent of the guarantee, the manner in which the guarantor will perform and the identity of the guarantor.

Therefore, the statements and representations referred to in Paragraphs 4 and 5 were and are false, misleading and deceptive.

PAR. 7. Respondent, for the purpose of inducing the purchase of his merchandise, has engaged in the practice of using fictitious prices by indicating certain prices for each item listed in his catalog which are greatly in excess of the prices listed for such items in his "factory" and "wholesale" price lists and thereby representing directly or by implication that the catalog prices are the prices at which the said merchandise is usually and customarily sold at retail in the trade areas where the representation is made; and that the difference between respondent's "factory" and "wholesale" prices and his catalog prices represents savings from the usual and customary retail prices of the merchandise offered for sale.

In truth and in fact, said prices, as set forth in respondent's catalog, are not the usual and regular retail prices of such items, and the difference between respondent's said "factory" and "wholesale" prices and his catalog prices does not represent savings from the usual and customary retail prices in the trade area where the representation is made.

PAR. 8. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals, in the sale of said merchandise

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and said supplies and equipment used in and necessary for the operation of a mail order merchandising business.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's said articles of merchandise and said catalogs, order blanks and other supplies and equipment by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondent as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Albert J. Maduri is an individual trading and doing business as a sole proprietorship under the names of Cam Company and Debb Company, with his office and principal place of business located at 436 Bloomfield Avenue, in the city of Verona, State of New Jersey.

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 Albert J. Maduri trading as Cam Company and Debb Company, or under any other name, or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise and various kinds of catalogs, order blanks, and other supplies and equipment used in and necessary for the operation of a mail order merchandising business, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That respondent's said "distributors" have net earnings of up to \$300 a week or any other amount in excess of the net earnings usually and customarily received by respondent's said "distributors"; or that prospective "distributors" will realize net earnings in excess of amounts usually and customarily earned by respondent's said "distributors"; or misrepresenting in any other manner the net earnings of respondent's "distributors" or the potential net earnings of prospective "distributors".
2. That any specified prices for said merchandise are available during a specified period of time, or any other limited period of time, when such restrictions on times of purchase at such prices are not imposed by respondent.
3. That respondent is conducting a billion dollar business, or employing as many as 21 men and women, or misrepresenting in any manner or by any means the size of respondent's business or the number of people in his employ.
4. That there are an estimated 80,000,000 mail-order customers in the U.S.A. or misrepresenting in any manner or by any means the number of mail-order customers in the U.S.A.
5. That the existence of postal laws insures the accuracy or truthfulness of respondent's statements respecting his merchandising program or plan.
6. That the "distributorship" fee is for the purpose of defraying part of respondent's clerical cost or in any manner or by any means misrepresentating the prospective "distributors" the conditions, terms or fees applicable to respondent's plan.
7. That respondent is limited as to the number of "distributors" he can handle or that his offer for prospective "distributors" is for a limited duration.

8. That respondent's plan has more repeat business than any other plan or that the plan is profitable in both prosperous and depressed times.

9. That physically disabled persons who become "distributors" can afford to hire persons to work the plan for them.

10. That respondent has 5,000 persons working full-time or 2,000 persons working part-time at his plan, or misrepresenting in any other manner the number of persons working full-time or part-time at his plan.

11. That everyone who has tried respondent's plan has made money.

12. That any article of merchandise is being or has recently been advertised in any magazine or through any other medium unless such article is being or has recently been so advertised.

13. That any article of merchandise has been guaranteed or approved by any organization or company unless such article is, in fact, guaranteed or approved by said organization or company.

14. That any amounts in excess of actual bona fide factory prices for the said articles of merchandise are the "factory" prices.

15. That any amounts in excess of prices generally paid by dealers in the trade areas in which the representations are made are the "wholesale" prices.

16. That any of respondent's products are guaranteed unless the nature, conditions and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

17. That by purchasing any of respondent's articles of merchandise, customers are afforded savings amounting to the difference between respondent's stated "factory" or "wholesale" selling prices and the catalog prices used for comparison with the said "factory" or "wholesale" selling prices, unless the comparative prices used represent the prices at which the merchandise is usually and customarily sold at retail in the trade area involved, or are the prices at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of his business; or misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise.

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

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Complaint

IN THE MATTER OF

SEAL PLAC, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION, THE FLAMMABLE FABRICS, AND THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-324. Complaint, Apr. 5, 1963—Decision, Apr. 5, 1963

Consent order requiring New York City importers to cease selling in commerce fabric which was so highly flammable as to be dangerous when worn, and to cease distributing scarfs and fabric squares which were not labeled with any of the information required by the Textile Fiber Products Identification Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Flammable Fabrics Act, and the Textile Fiber Products Identification Act, the Federal Trade Commission, having reason to believe that Seal Plac, Inc., a corporation, and Murray Rudolph, individually and as officer of said corporation, and doing business as Atomic Trimming Company, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act and the Textile Fiber Products Identification 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 charge in that respect as follows:

PARAGRAPH 1. Respondent Seal Plac, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Murray Rudolph is president of the corporate respondent, and formulates, directs and controls the acts, practices and policies of the corporate respondent. The business address of both respondents is 315 West 36th Street, New York, New York.

In addition thereto, individual respondent Murray Rudolph, as an individual, does business as Atomic Trimming Company, the address of which is also 315 West 36th Street, New York, New York.

PAR. 2. Respondents subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have sold and offered for sale in commerce; have imported into the United States; and have introduced, delivered for introduction, transported, and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce"

is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such 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.

PAR. 3. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products, and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile products so shipped in commerce; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, or labeled with any of the information required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, or in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were scarfs and fabric squares.

PAR. 5. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Flammable

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Fabrics Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Seal Plac, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 315 West 36th Street, in the city of New York, State of New York.

Respondent Murray Rudolph is an officer of said corporation. He also trades as Atomic Trimming Company, a proprietorship also located at 315 West 36th Street, New York, New York, and his address is the same as that of said corporation and proprietorship.

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

ORDER

It is ordered, That the respondents Seal Plac, Inc., a corporation, and its officers, and Murray Rudolph, individually and as an officer of said corporation, and doing business as Atomic Trimming Company, or any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or

(b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;

any fabric which, under the provisions of Section 4 of the said

Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

It is further ordered, That respondents Seal Plac, Inc., a corporation, and its officers, and Murray Rudolph, individually and as an officer of said corporation, and doing business as Atomic Trimming Company, or any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported, in commerce, or the importation into the United States of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of textile fiber products which have been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber products, whether in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further 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 this order.

IN THE MATTER OF

PHILIP KASPER ET AL. TRADING AS KASPER FURS

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

Docket C-325. Complaint, Apr. 5, 1963—Decision, Apr. 5, 1963

Consent order requiring manufacturing furriers in Chicago to cease violating the Fur Products Labeling Act by failing, on labels and invoices, to show the true name of the animal producing certain furs, to disclose when fur was artificially colored, and to describe as "natural" furs which were not bleached, etc.; and by using the term "American Broadtail" improperly; failing, in labeling, to identify the manufacturer etc., of fur products, and to show the country of origin of imported furs; failing to comply with other labeling and invoicing requirements; and substituting nonconforming labels for those originally fixed by manufacturers or distributors.

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 Philip Kasper and Max M. Kasper, individually and as copartners trading as Kasper Furs, hereinafter referred to as respondents, have 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. Philip Kasper and Max M. Kasper are individuals and copartners trading as Kasper Furs with their office and principal place of business located at 17 North State Street, Chicago, Illinois. Respondents are manufacturers and retailers of fur products.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for 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 have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have 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 falsely or deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products with labels which described such fur products as "American Broadtail" thereby implying that the furs contained in such fur products were entitled to the designation "Broadtail Lamb" when in truth and in fact the furs contained therein were not entitled to such designation.

PAR. 4. Certain of said fur products were misbranded in that they were falsely or deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of the imported furs contained in such fur products.

Among such misbranded fur products, but not limited thereto, were fur products with labels which described such fur products as "Ameri-

can Broadtail", thereby implying that the country of origin of the furs contained in the fur products was the United States when in truth and in fact the furs contained in such fur products were of foreign origin.

PAR. 5. 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 in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

- (a) To show the true animal name of the fur used in the fur product.
- (b) To disclose that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when in fact the fur contained in the fur products was bleached, dyed or otherwise artificially colored.
- (c) To show the name, or other identification issued and registered by the Commission of one or more of the persons who manufactured any such fur product for introduction in commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.
- (d) To show the name of the country of origin of the imported furs contained in fur products.

PAR. 6. 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) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required, in violation of Rule 10 of said Rules and Regulations.
- (b) Fur products were not described as natural when such fur products were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) 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 set forth in the required sequence, in violation of Rule 30 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 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.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondents 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.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

- (a) To show the true animal name of the fur used in the fur product.
- (b) To disclose that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when in fact the fur contained in the fur products was bleached, dyed or otherwise artificially colored.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which described such fur products as "American Broadtail" thereby implying that the furs contained in such fur products were entitled to the designation "Broadtail Lamb" when in truth and in fact the furs contained therein were not entitled to such designation.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of the imported furs contained in such fur products in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which described such fur products as "American Broadtail", thereby implying that the country of origin of the furs contained in the fur products was the United States when in truth and in fact the furs contained in such fur products were of foreign origin.

PAR. 10. 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) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required, in violation of Rule 10 of said Rules and Regulations.

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(b) Fur products were not described as natural when such fur products were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

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

PAR. 11. Respondents, in selling, advertising, offering for sale and processing fur products which had been shipped and received in commerce, misbranded said fur products, by substituting for the labels affixed to such fur products, by manufacturers or distributors pursuant to Section 4 of the Fur Products Labeling Act, labels which did not conform to the requirements of said Section 4, in violation of Section 3(e) of said Act.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents, Philip Kasper and Max M. Kasper, are individuals and copartners trading as Kasper Furs with their office and principal place of business located at 17 North State Street, Chicago, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Philip Kasper and Max M. Kasper, individually and as copartners trading as Kasper Furs or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution in commerce of any fur products; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution, of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

1. Misbranding fur products by:

A. Falsely or deceptively labeling or otherwise falsely or deceptively identifying fur products as to the name or names of the animal or animals that produced the fur from which such fur products were manufactured.

B. Falsely or deceptively labeling or otherwise falsely or deceptively identifying fur products by representing, directly or by implication, that the country of origin of the furs contained in the fur products is the United States when the furs contained in such fur products are of foreign origin.

C. Misrepresenting directly or by implication in any manner the country of origin of the furs contained in fur products.

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

E. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".

F. Failing to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

G. Mingling information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with nonrequired information.

H. 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.

- I. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.
2. Falsely or deceptively invoicing fur products by:
 - A. Failing to furnish invoices to purchasers of fur products showing all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
 - B. Misrepresenting or in any manner falsely or deceptively identifying fur products as to the name or names of the animal or animals that produced the fur from which such fur products were manufactured.
 - C. Representing directly or by implication that the country of origin of the furs contained in fur products is the United States when the furs contained in such fur products are of foreign origin.
 - D. Misrepresenting directly or by implication in any manner the country of origin of the furs contained in fur products.
 - E. Failing to set forth on invoices the term "Dyed Broad-tail-processed Lamb" in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".
 - F. Failing to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.
 - G. Failing to set forth on invoices the item number or mark assigned to a fur product.

It is further ordered, That respondents Philip Kasper and Max M. Kasper, individually and as copartners trading as Kasper Furs or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the selling, offering for sale, or processing fur products which have been shipped or received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the

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Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WICHITA SEWING CENTER, INC., ET AL.

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

Docket C-326. Complaint, Apr. 5, 1963—Decision, Apr. 5, 1963

Consent order requiring Wichita, Kans., sellers of sewing machines and vacuum cleaners to the public to cease using bait advertising to obtain leads to prospective purchasers, such as offering a new sewing machine for \$24.50 and then discouraging an interested customer from accepting the offer in order to sell a more expensive machine; advertising excessive amounts as the usual prices for their products; and representing falsely that their merchandise certificates—actually valueless and nothing more than a “sales gimmick”—would be worth their face amount of \$85 or \$50 when applied on the purchase of their sewing machines and vacuum cleaners, respectively.

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 Wichita Sewing Center, Inc., a corporation, and North End Sewing Center, Inc., a corporation, and Ralph R. Graham and Charles R. Crawley, individually and as officers of said corporations, and Valjean F. Webb, individually and as an officer of North End Sewing Center, Inc., 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 Wichita Sewing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 1050 South Hydraulic Street, in the city of Wichita, State of Kansas.

Respondent North End Sewing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 1909 Broadway, in the city of Wichita, State of Kansas.

Respondents Ralph R. Graham and Charles R. Crawley are officers

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of the said corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is 1050 South Hydraulic Street, in the city of Wichita, State of Kansas.

Respondent Valjean F. Webb is an officer of North End Sewing Center, Inc. He participates in the formulation, direction and control of the acts and practices of North End Sewing Center, Inc., including the acts and practices hereinafter set forth. His address is 1909 Broadway, in the city of Wichita, State of Kansas.

All of the aforementioned respondents have cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of sewing machines and vacuum cleaners to the public.

PAR. 3. In the course and conduct of their business, respondents cause, and have caused, their said products, when sold, to be shipped from their places of business in the State of Kansas 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 products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of securing leads to prospective purchasers of their products, respondents have conducted and now conduct simple contests and drawings through which they offer new sewing machines and vacuum cleaners as prizes. To all persons who enter such contests or drawings, respondents send through the mails advertising material and merchandise certificates.

Also in the course and conduct of their business, and for the purpose of inducing the sale of their sewing machines and vacuum cleaners, respondents have made certain statements and representations with respect thereto in newspaper advertisements, direct mail advertising and through other advertising media. Respondents employ sales agents or representatives who call upon prospective purchasers in their homes or await prospective purchasers at respondents' places of business. Said sales agents or representatives have also made certain statements and representations with respect to respondents' sewing machines and vacuum cleaners for the purpose of inducing the sale of such sewing machines and vacuum cleaners. By and through the statements and representations made in advertising and by their sales agents or representatives, respondents have represented, directly or by implication, that:

(1) Respondents were making a bona fide offer to sell a brand new sewing machine for \$24.50.

(2) Respondents' usual and regular retail selling prices for the Model 606 Sewmor sewing machine, Model 202 Sewmor sewing machine and Electro-Hygiene vacuum cleaner were \$219.50, \$199.50, and \$169.95 respectively.

(3) The merchandise certificates given to prospective purchasers, when applied on the purchase of respondents' sewing machines or vacuum cleaners would have a value or be worth the face amount of such certificates, to wit: \$85 in the case of sewing machines and \$50 in the case of vacuum cleaners, and would thus enable the purchaser to realize a saving from respondents' usual and regular retail prices for such merchandise in amounts equal to the said face amounts of such certificates.

PAR. 5. In truth and in fact:

(1) Respondents were not making a bona fide offer to sell a brand new sewing machine for \$24.50. On the contrary, respondents' representations were made for the purpose of obtaining leads to persons interested in purchasing a sewing machine. After obtaining such leads, respondents or their sales agents or representatives called upon such persons at their homes or waited upon them at respondents' places of business. At such times and places, respondents or their sales agents or representatives would make no effort to sell the low-priced product but would discourage prospective purchasers from accepting the offer by various means, including disparagement of the product itself, in order to sell different and more expensive machines. In instances where the purchaser insisted on the advertised model, delivery was delayed as long as 6 weeks, whereas the higher-priced models were available for immediate delivery.

(2) The amounts set forth in subparagraph (2) of Paragraph 4 hereof were in excess of the prices at which such sewing machines and vacuum cleaners were usually and regularly sold by respondents in the recent, regular course of their business.

(3) The aforesaid merchandise certificates, when applied on the purchase of respondent's sewing machines and vacuum cleaners do not have a value of and are not worth the face amount of said certificates. Purchasers do not realize a saving from respondents' usual and regular retail selling price for such merchandise in the amounts equal to the said face amounts of such certificates. In fact, respondents sell substantially all of their sewing machines and vacuum cleaners through the use of such certificates. Such certificates are, therefore, valueless and constitute nothing more than a "sales gimmick" as respondents' usual and regular retail prices for their merchandise are not their stated usual and regular retail selling prices but are such prices less the face amounts of their merchandise certificates.

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Therefore, the representations referred to in Paragraph 4 were and are false, misleading and deceptive.

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

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Wichita Sewing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business

located at 1050 South Hydraulic Street, in the city of Wichita, State of Kansas.

Respondent North End Sewing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 1909 Broadway in the city of Wichita, State of Kansas.

Respondents Ralph R. Graham and Charles R. Crawley are officers of said corporations, and their address is 1050 South Hydraulic Street, Wichita, Kansas.

Respondent Valjean F. Webb is an officer of North End Sewing Center, Inc., and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Wichita Sewing Center, Inc., a corporation, and North End Sewing Center, Inc., a corporation, and their officers, and Ralph R. Graham and Charles R. Crawley, individually and as officers of said corporations and Valjean F. Webb, individually and as an officer of North End Sewing Center, Inc., 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 sewing machines, vacuum cleaners or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(1) Any merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

(2) Any amount is respondents' usual and regular retail selling price for any merchandise when such amount is in excess of the price at which such merchandise has been usually and regularly sold by the respondents at retail in the recent, regular course of their business; or otherwise misrepresenting respondents' usual and regular retail selling price for any merchandise.

(3) Merchandise certificates possess a certain value or worth when applied on the purchase of respondents' merchandise unless purchasers of respondents' merchandise will realize such stated value or worth when said certificates are applied on the purchase of respondents' merchandise.

(4) By purchasing respondents' merchandise, customers are afforded a saving amounting to the difference between respondents' selling price and any other price used for comparison with that selling price, unless the comparative price used represents

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the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondents at retail in the recent, regular course of their business; or misrepresenting in any other manner the savings available to purchasers of respondents' merchandise.

It is further 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 this order.

IN THE MATTER OF

MANCO WATCH STRAP CO., INC., ET AL.

MODIFIED ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 7785.—Modified order, April 8, 1963

Order modifying order of Mar. 13, 1962 (60 F.T.C. 495), as modified July 26, 1962 (61 F.T.C. 298), to make it apply to "metal expansion watch bands" instead of to "imported merchandise".

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondents having filed a motion pursuant to Section 5.7 of the Commission's Rules of Practice to reopen this proceeding and to modify the final order entered by the Commission on July 26, 1962, and the Commission having determined that the reopening of this matter is justified to clarify the meaning of its order and is in the public interest,

It is ordered, That this matter be, and it hereby is, reopened and the final order of the Commission is modified to read as follows:

It is ordered, That respondents, Manco Watch Strap Co., Inc., and Topps Products Corp., corporations, and their officers, and respondents Samuel Mandel, Marvin Mandel, Morris Mandel, and Eugene Mandel, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of metal expansion watch bands in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, selling, or distributing any such product packaged, or mounted in a container, or on a display card, with-

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out disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the allegations of the complaint insofar as they charge as a deceptive practice that the respondents' unpackaged watch bands fail to have adequately identified thereon the country or place of origin, are herein and hereby dismissed for lack of evidence.

IN THE MATTER OF

J. H. LEVITT & BERGER, INC., ET AL.

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

Docket C-327. Complaint, Apr. 8, 1963—Decision, Apr. 8, 1963

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by failing to label fur products with the required information, to invoice furs which were not artificially colored as "natural", and to comply with other invoicing requirements; and by furnishing false guaranties through representing falsely in writing that they had a continuing guaranty on file with the Commission.

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 J. H. Levitt & Berger, Inc., a corporation, and J. Harry Levitt and Harry Berger, individually and as officers of said corporation, hereinafter referred to as respondents, have 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. Respondent J. H. Levitt & Berger, Inc., is a corpora-

tion formed under the laws of the State of New York with its office and principal place of business located at 242 West 30th Street, New York, New York. On or about December 31, 1961, said corporation became inactive but was not dissolved. Individual respondents J. Harry Levitt and Harry Berger were sole officers of the said corporation and controlled, directed and formulated its acts, practices and policies prior to the time the firm became inactive. Respondent Harry Berger is currently president of the firm of Berger & Seidman, Inc., 242 West 30th Street, New York, New York, and respondent J. Harry Levitt is president-treasurer of J. Harry Levitt, Inc., 242 West 30th Street, New York, New York.

The corporate respondent during its period of activity and the individual respondents have at all times been manufacturers of fur products.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for 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 have manufactured for sale, 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.

Among such misbranded fur products, but not limited thereto, were fur products without labels affixed thereto showing the information required to be disclosed by the aforesaid Section 4(2) of the Fur Products Labeling Act.

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 that 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 in that they were not invoiced as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not

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limited thereto, were fur products covered by invoices which failed to disclose the true name of the animal that produced the fur used in the fur product.

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) Fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored were not described as natural, in violation of Rule 19(g) of said Rules and Regulations.

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

PAR. 7. Respondents furnished false guaranties under Section 10(b) of the Fur Products Labeling Act with respect to certain of their fur products by falsely representing in writing that they had a continuing guaranty on file with the Federal Trade Commission when respondents in furnishing such guaranties had reason to believe that the fur products so falsely guaranteed would be introduced, sold, transported and distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act and Rule 48(c) of said Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondents as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such com-

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plaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent J. H. Levitt & Berger, Inc., is a corporation formed under the laws of the State of New York with its office and principal place of business located at 242 West 30th Street, New York, New York. On or about December 31, 1961, said corporation became inactive but was not dissolved. Respondents J. Harry Levitt and Harry Berger were sole officers of the said corporation.

Respondent Harry Berger is currently president of the firm of Berger & Seidman, Inc., 242 West 30th Street, New York, New York, and respondent J. Harry Levitt is president-treasurer of J. Harry Levitt, Inc., 242 West 30th Street, New York, New York.

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

ORDER

It is ordered, That respondents J. H. Levitt & Berger, Inc., a corporation, and its officers, and J. Harry Levitt and Harry Berger, individually and as officers of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising, or offering for sale, in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce as "commerce", "fur", and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Failing to set forth on labels the item number or mark assigned to a fur product.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing all the information required to be disclosed by

each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

C. Failure to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

D. Failure to set forth on invoices the item number or mark assigned to a fur product.

3. Furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur products may be introduced, sold, transported, or distributed in commerce.

It is further 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 this order.

IN THE MATTER OF

NATIONAL BAKERS SERVICES, INC.

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

Docket 7480. Complaint, Apr. 30, 1959—Decision, Apr. 10, 1963*

Order requiring a Chicago corporation, engaged in licensing some 182 bakeries throughout the United States to produce a bread from its special formula and to market the bread under its exclusive trademark "Hollywood"—in such connection making available to its licensees a "special mix" and providing and paying for all advertising matter and services—to cease representing falsely in such advertising—in newspapers, by radio and television, etc.—that its "Hollywood Bread" contained fewer calories than other foods and that consumption of the bread would cause a loss in weight or prevent a weight gain.

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 National Bakers Services, Inc., a corporation, hereinafter referred to as respondent,

*Published as amended July 22, 1959.

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 National Bakers Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 W. Monroe Street, Chicago, Illinois.

PAR. 2. Respondent is now, and for more than five years last past has been, engaged in the business of granting to various bread-baking companies and firms, located throughout the United States, the right to use a certain formula for making a certain food product, as "food" is defined in the Federal Trade Commission Act. Said food product is known and designated as "Hollywood Bread" and "Hollywood Special Formula Bread." It is hereinafter referred to as "Hollywood Bread."

In connection therewith respondent makes available to its licensees a "special mix" to be used in said formula, and in addition thereto respondent provides all advertising matter and services for said licensees in order to further the sale of said food product by said licensees, by arranging, furnishing, and placing all advertising material used in advertising said food product to the public. All such advertising is paid for by respondent.

The volume of business of said licensees in selling said food product is substantial.

PAR. 3. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said food product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product; and has disseminated, and caused the dissemination of, advertisements concerning said food product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements and representations

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contained in said advertisements disseminated as hereinabove set forth are the following:

(a)

(Picture of Elizabeth Taylor)

REDUCING DIETS
must be nourishing

* * * * *

It is no wonder that Hollywood Bread is considered a valuable aid in weight control by millions of beauty-conscious women. . .
* * * a welcome treat on restricted diets.

* * * * *

Only about
46 CALORIES (Statement is encircled
PER SLICE! with black stars.)
(18-gram slice)

* * * * *

(b)

The extra protein bread for healthy
little stars . . . and figure-wise
mothers

* * * * *

Adults who are watching their weight can watch their nutrition, too, by including Hollywood Special Formula Bread in their daily diet.

* * * * *

(c)

when a woman's
Panther Slim

(Picture of Elizabeth Taylor and
panther with basket of bread in
his mouth)

* * * she's *vital* as well as slender.
A good figure is more than luck when a
lady watches her weight the famous
Hollywood Way. *Hollywood Bread* is high
in protein, vitamins and minerals, yet
has *only 46 calories per 18 gram slice*.

* * * * *

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent represented, directly or by implication:

- (a) That said bread is a low calorie food;
- (b) That said bread is substantially lower in calories than and, therefore, substantially different in caloric value from ordinary breads; and
- (c) That eating said bread will cause the consumer to lose weight or prevent the consumer from gaining weight.

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PAR. 6. The aforesaid advertisements referred to in Paragraph 5 are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

- (a) Said bread is not a low calorie food;
- (b) Said bread is not substantially different in caloric value from ordinary breads; and
- (c) Eating said bread will not cause the consumer to lose weight and will not prevent the consumer from gaining weight.

PAR. 7. The dissemination by respondent of said false advertisements, as alleged herein, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael J. Vitale and *Mr. Arthur B. Edgeworth* for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds, Sr.*, *Mr. James L. Perkins* and *Mr. Donald Bixler*, of Chicago, Ill., and *Wald, Harkrader & Rockefeller*, by *Mr. Robert L. Wald*, of Washington, D.C., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

APRIL 30, 1962

This proceeding has been brought under the Federal Trade Commission Act, charging, in substance, that respondent has violated said Act by disseminating in commerce alleged false and misleading advertising of the food product "Hollywood Bread." It is charged that this food product is misrepresented, directly or by implication, in that respondent has claimed untruthfully in its advertising that (1) such bread is a low-calorie food; (2) that it is substantially lower in calories and therefore substantially different in caloric value than ordinary bread; and (3) that eating said Hollywood Bread will cause the consumer to lose weight, or prevent the consumer from gaining weight. The respondent denies these charges. In this initial decision it is determined that the material allegations of the complaint have been established, and an appropriate order is accordingly being issued herein.

The complaint herein was issued April 30, 1959. After its service, but before respondent had filed answer, counsel supporting the complaint, on July 8, 1959, filed their motion to amend the complaint. Respondent, on July 21, 1959, filed an answer thereto objecting to the proposed amendment, but on July 22, 1959, the hearing examiner then assigned to the case issued his order authorizing the proposed amend-

ments on the grounds that they would facilitate determination of the proceeding on the merits, and also that they were reasonably within the scope of the original complaint. He also extended respondent's time to answer, and respondent on August 26, 1959 duly filed its answer to the complaint as amended.

On August 18, 1959, prior to any hearings, the proceeding was transferred to the undersigned hearing examiner. On and between October 28, 1959, and November 30, 1960, some twelve hearings were held in Washington, D.C., and in Chicago, Illinois. The case-in-chief was rested January 6, 1960, and respondent rested its defense November 30, 1960, subject to the examiner's ruling on certain proffered documentary evidence. This evidence was received on December 30, 1960, by an order which also terminated the reception of evidence, since counsel supporting the complaint had waived the presentation of any evidence in rebuttal. The proposed findings, conclusions and order of the parties, respectively were duly filed March 15, 1961, but thereafter, in September 1961, upon leave granted, certain supplemental memoranda were filed by counsel for the parties analyzing the Commission's decision in *Docket 7472, Bakers Franchise Corporation, et al.*, which was issued July 19, 1961 [59 F.T.C. 70], and upon which counsel held differing views, as hereinafter more fully discussed.

The proceeding has been ably and vigorously contested throughout by counsel for the parties. Numerous interlocutory rulings were necessitated on various objections and motions of the parties. While all such matters inhere in the record for such further action before higher authority as the respective parties hereafter deem appropriate, for clarity the disposition of several of such matters is now stated.

Appeal was taken to the Commission on June 24, 1960, by counsel supporting the complaint from certain rulings relating to evidentiary matters. On June 28, 1960, counsel supporting the complaint filed a document entitled "Motion To Amend Complaint To Conform To Proof", which was actually a request for leave to add certain individual officials of respondent corporation, as parties respondent. This motion came long after the case-in-chief had rested, respondent's defense had substantially progressed, and a number of its witnesses had already testified. The examiner therefore, on July 12, 1960, certified the motion to the Commission. On July 21, 1960, the Commission issued an order denying said interlocutory appeal, and also denying said motion for amendment of the complaint by adding new parties respondent.

At the hearing held November 10, 1960, respondent in its defense subpoenaed and sought to examine a Commission employee, one Albert

Hamilton Porter, who had acted as a Commission's attorney-examiner during the investigation of the case prior to trial. Respondent sought to prove by this witness, in substance, that he was not qualified to make a survey of public opinion, and that his interviews with the consumer-type witnesses who had already testified in this proceeding concerning their impressions as to certain of respondent's advertisements were not properly conducted. Porter had not been called as a witness for the Commission, and this examiner ruled in substance that as a Commission employee he was barred from testifying generally as to his official acts and reports, both under the Commission's rules of confidentiality and under the Federal Trade Commission Act, since the Commission had not waived its privileges. The examiner ruled also that Porter had conducted no survey, and that the said witnesses had not testified as a part of a survey, but only each severally as a consumer witness under long-prevailing and judicially-approved practice in such cases.

There is no issue as to the corporate existence and capacity of the respondent; the fact that it is operating in interstate commerce; or the fact that respondent's advertisements in question have been transmitted by various media in interstate commerce. The evidence submitted by Commission's counsel in support of the complaint consists of some sixteen consumer or public witnesses who examined and gave their impressions of the meaning of certain published advertisements of Hollywood Bread disseminated by and through respondent. Two expert medical witnesses also testified for the Commission, and various documents, Commission's Exhibits 1 to 25, inclusive, and 28, were received in evidence. Respondent's evidence was presented through two expert witnesses with medical qualifications; two food chemists; one expert in bread advertising; one expert in market research; and one officer of the respondent corporation. Respondent's documentary evidence, its Exhibits 1 through 18, was also received. Considerable testimony, offers of proof, and a number of exhibits offered by each of the parties were rejected for reasons stated on the record, repetition of which is unnecessary here.

The factual and legal proposals submitted by the respective parties are extensive. All such proposed findings of fact and conclusions of law which are not incorporated herein, either as submitted or in substance and effect, are hereby rejected. The proposed order submitted by counsel supporting the complaint is adopted herein, in substance.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the witnesses who appeared before him. All procedural and evidentiary matters have been thoroughly reviewed, and rulings made thereon during the course of the proceeding are

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hereby confirmed. All arguments, proposals and briefs of counsel have been carefully studied and considered in the light of the entire record. Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established by reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, all the material allegations of the complaint; and further finds that evidence submitted by or relied upon by respondent fails to establish facts constituting any valid defense to the charges of violation contained in the complaint.

More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

The product here involved, respondent's "Hollywood Bread", is a basic food which, in the classic expression used by one of respondent's expert medical witnesses, Dr. Robert M. Kark, "* * * is the staff of life * * *". It is to be noted that § 12 *et seq.*, of the 1938 amendments to the Federal Trade Commission Act, Congress, in the public interest, specifically protected the public from false advertising of food by making it unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) by United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food * * * ; or (2) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food * * * .

The dissemination or the causing to be disseminated of any false advertisement * * * shall be an unfair or deceptive act or practice in commerce within the meaning of Section 5.

Although the general principles of law pertaining to the interpretation of advertising matter in unfair-practices cases have now become basic and well known, it is of major importance in the present type of case, that Congress has expressly provided governing rules of interpretation of the general advertising of foodstuffs, as follows:

Sec. 15. * * * (a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are

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customary or usual. No advertisement * * * shall be deemed to be false if it * * * contains no false representation of a material fact, * * *

* * * * *
 (2) * * * (b) The term "food" means * * * articles used for food or drink for man or other animals, * * * and * * * articles used for components of any such article.

In passing upon the questioned advertisements in evidence herein, which were published in newspapers and brochures or by radio announcements, the examiner has carefully considered all pertinent evidence, has followed these guiding principles of interpretation, and, with respect to Hollywood Bread wrappers, has also considered them in the nature of "labels" upon a food product. The examiner has in like spirit followed the general legal principles of interpretation of "labels".

As already stated, in the memoranda of counsel relating to the Commission's decision in *Bakers Franchise Corporation, et al., supra*, their views differ widely as to the applicability and effect of this decision upon the proceeding at bar. It is substantially the position of respondent's counsel that the two cases are entirely different from each other, and since in *Bakers Franchise Corporation, et al.*, the principal issue was the excision of the use of the trademark "Lite Diet" bread, which issue is not present herein, said decision is not controlling here. Counsel supporting the complaint, however, insist that the case is applicable on the doctrine of *stare decisis*. It is true that there is no issue here of excision of a trademark or name. It is also true that the complaint herein, as originally framed, followed the general allegations of *Bakers Franchise Corporation*, but that case, which had been pending prior to the issuance of the complaint herein, had caused some confusion, and counsel supporting the complaint herein moved to amend the complaint before answer "to obviate a question that arose at a recent hearing concerning the wording of the complaint" [in *Bakers Franchise Corporation*] and "[s]ince the complaint in this case is almost identical to the other and to avoid the controversy raised concerning the pleading in" *Bakers Franchise Corporation*, counsel supporting the complaint in the case at bar submitted an amendment rearranging the language and changing the charges herein. It is therefore clear that this case is being tried on somewhat different issues than those upon which *Bakers Franchise Corporation* was tried, and, strictly speaking, that case cannot be considered as decisive of the instant case. But in connection with the relevancy of evidence and other matters, certain rulings of the Commission in the *Bakers Franchise Corporation* case state principles which are applicable here, and which will be referred to further hereinafter.

The record is replete with many irrelevant and immaterial matters,

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but insofar as pertinent to the issues framed in this case, the evidence shows the following facts:

Respondent National Bakers Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 W. Monroe Street, Chicago, Illinois.

Respondent is now, and for more than five years last past has been, engaged in the business of granting to various bread-baking companies and firms, located throughout the United States, the right to use a certain formula for making a certain food product, as "food" is defined in the Federal Trade Commission Act. Said food product is known and designated as "Hollywood Bread" and "Hollywood Special Formula Bread". It is hereinafter referred to as "Hollywood Bread".

In connection therewith respondent makes available to its licensees a "special mix" to be used in said formula, and in addition thereto respondent provides all advertising matter and services for said licensees in order to further the sale of said food product by said licensees, by arranging, furnishing and placing all advertising material used in advertising said food product to the public. All such advertising is paid for by respondent. The volume of business of said licensees in selling said food product is substantial.

In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said food product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product; and has disseminated, and caused the dissemination of, advertisements concerning said food product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product in commerce as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

- (a) (Picture of Elizabeth Taylor)
REDUCING DIETS
must be nourishing

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* * * * *

It is no wonder that Hollywood Bread is considered a valuable aid in weight control by millions of beauty-conscious women * * *

* * * a welcome treat on restricted diets.

* * * * *

Only about
46 CALORIES (Statement is encircled
PER SLICE! with black stars.)
(18-gram slice)

* * * * *

(b) when a woman's
Panther Slim

(picture of Elizabeth Taylor and panther with basket of bread in his mouth)
* * * she's *vital* as well as slender. A good figure is more than luck when a lady watches her weight the famous *Hollywood Way*. *Hollywood Bread* is high in protein, vitamins and minerals, yet has *only 46 calories per 18 gram slice*.

* * * * *

The respondent's advertising in question consists of 14 advertisements (Commission's Exhibits 1-14, inclusive) which were disseminated in newspapers in commerce. Commission's Exhibits 15 to 22, inclusive, were radio broadcasts. The basic theme of each of these advertisements was that Hollywood Special Formula Bread contains "only about 46 calories per 18-gram slice". The newspaper advertisements, for the most part, contain the picture of some glamorous Hollywood star, such as Elizabeth Taylor, with references to her vitality and slimness, the effect of such advertising being to convey to the reader that use of this bread by the consumer would make the person who ate such bread also equally trim, slim and lithe. Some of the pictures show such stars in company with such creatures as black panthers or tigers carrying baskets of Hollywood Bread in their mouths, and accompanying the motion-picture star. These only add further emphasis, by implication, to the representation that the use of such product would make one slim and lithe like such animals. While some of the advertisements are less alluringly framed, nevertheless the overall impression of each of them is that eating Hollywood Bread will reduce one's weight or prevent the increase thereof. As is pointed out in *Bakers Franchise Corporation, supra*, it is difficult to summarize the testimony of consumer witnesses. In the present case, as in *Bakers Franchise*, "the direct examination of the consumer witnesses followed a simple pattern. They were handed one of respondent's advertisements and then asked what" the advertisement meant to them. Naturally each of the witnesses testified somewhat differently, but upon study of the entire testimony of the 16 consumer witnesses,

the three charges of the complaint are found to be abundantly supported.

The testimony of these witnesses was specifically offered by counsel supporting the complaint as an aid to the hearing examiner, and not as absolute proof per se. And since the witnesses only testified to the first four of such exhibits, the examiner, of necessity, has carefully considered the remaining exhibits (Commission's Exhibits 5-22, inclusive). Eight of these consumer witnesses were women, and eight were men, all from the vicinity of Alexandria or Arlington, Virginia. Of these witnesses, six were housewives, one a police officer, one a real-estate developer, one a salesman, one unidentified as to occupation, and six were employees of various branches of the United States Government. Four of the witnesses testified that they had previously eaten Hollywood Bread; another testified that her doctor instructed her to eat such bread in connection with her dieting.

It has been contended throughout by counsel for respondent that these witnesses were not fairly selected or interrogated by the attorney-examiner who interviewed them. It is true that these witnesses all came from the metropolitan area of Washington, D.C., and were not called from various distant parts of the country where some of the advertisements had been printed. This is immaterial, since an advertisement, wherever it is published, may be presumed to give the same general impression to those who read it.

Counsel for respondent objected originally to the use of these exhibits with such consumer witnesses because they bore certain marks, but after such marks had been erased, announced their satisfaction with their presentation to such witnesses. There is no evidence from which it can be found or inferred that these marks were on the exhibits at the time they were first presented to the witnesses in the interviews prior to the hearing. These interviews occurred about a year before the witnesses testified. Respondent's counsel sought to discredit and destroy the testimony of these consumer witnesses by calling the attorney-examiner who had conducted the interviews, but his testimony was rejected by the examiner, as hereinbefore stated. They also later attempted to discredit such evidence by hypothetical statements concerning the method of interview in questions put to the witness Gleiss, a market research expert and executive vice president of Gould, Gleiss and Benn, Inc., which is an independent market research agency located in Chicago, Illinois, and engaged in the business of conducting surveys and other market research services for advertisers and the like. These questions attempted to frame the method whereby proposed consumer witnesses were interviewed by the investigator for the Commission, and to base his expert opinion upon

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such matters to the effect that the Commission's method of selecting and preparing consumer witnesses to testify concerning advertising is an improper way to conduct surveys, or otherwise to elicit the impressions of such witnesses. The objection of counsel supporting the complaint to such evidence was sustained. In brief, it may be said here that the testimony of consumer witnesses must stand upon its own merits in each particular instance, and cannot be weakened, contradicted or impeached by the testimony of one who never saw these witnesses, and who would, in effect, be usurping the function of the hearing examiner in determining the credibility of the witnesses and the weight of their testimony.

In evaluating the testimony of consumer witnesses, the usual criteria applicable to all witnesses must be and have been employed herein. Even when they have been interviewed by representatives of the Commission prior to testifying, their testimony cannot be disregarded for this reason. Counsel for respondent object to any previous conferences with such witnesses being had by Commission personnel, but in the orderly process of preparing proceedings for trial, it would appear that failure to interview such witnesses would be a serious defect in preparation by counsel supporting the complaint. Theoretically, an ideal witness, of course, would be one who knew absolutely nothing about the case before being sworn. But from time immemorial it has always been considered proper for witnesses to be interviewed in advance, prior to their testimony, both by investigators, and by counsel calling such witnesses. Many courts refuse to permit cross-examination on this subject, since it is so inherent in competent trial practice. Whether or not such witnesses are unduly influenced thereby, or whether they fail to interpret the advertising correctly, are altogether different questions, which call for their resolution upon the whole record by the trier of the facts. There is no evidence herein from which it can be directly found or fairly inferred that these consumer witnesses were improperly influenced by any representative of the Commission prior to testifying. Such consumer testimony certainly cannot be summarily rejected merely because a hearing examiner would prefer to interpret such advertising matter for himself, or because he disagrees with some or all of the opinions of such consumer witnesses. The examiner certainly cannot arbitrarily disregard the evidence of any "public witness" as to what such advertising means, whether favorable or unfavorable to the party calling such witness. Of course, if any such testimony is highly prejudiced or unreasonable, such matters go to the credibility, value and weight of such evidence.

In the present case, as to the consumer witnesses' interpretation of

Commission's Exhibits 1 through 4, the examiner arrives at the same conclusions as such witnesses did with respect to the representations made in the said advertisements. Moreover, he cannot see how any fair-minded person, lacking specific technical knowledge, could come to any other conclusions. In this connection, however, the examiner has carefully weighed and entirely disregarded the impression evidence given by one consumer witness, Edward J. Chapin (R. 154-185), because this witness claimed to have special knowledge of the matters in question, and therefore cannot be considered as fairly representative of ordinary consumers who would read the advertisements. The examiner's determination of these matters is based not only upon the testimony of the other consumer witnesses and upon that of the experts who testified with regard thereto, but also upon his own practical judgment and experience. For these and many other reasons, unnecessary to state here, the examiner rejects respondent's plea that all the testimony of the consumer witnesses must be summarily disregarded. See in this connection the Commission's decision of January 12, 1961, in Docket 7748, *Stanley Perkis, an individual trading as Murray Hill House* [58 F.T.C. 71].

In addition to the testimony of the consumer witnesses, there was some professional expert testimony relating to the interpretation of the advertising as well as to the falsity thereof. Four eminent nutritionists, all with great professional background and experience, testified in this case. Dr. Bernice K. Watt, a nutrition analyst for the United States Department of Agriculture, and Dr. Oral L. Kline, Director of the Division of Nutrition, Food and Drug Administration, testified in support of the complaint. Respondent presented the testimony of Dr. Max K. Horwitt, Medical Research Adviser of the Department of Public Welfare of the State of Illinois, and Dr. Robert M. Kark, Professor of Medicine at the University of Illinois College of Medicine. All of these experts have spent many years as consultants to various Government agencies and departments, and all were renowned research specialists and authors. These four very eminent experts are all substantially agreed as to the nutritional qualities of bread. There is abundant evidence in the record pertaining to the nutrition contained in bread; but the nutritional qualities of respondent's Hollywood Bread are not at issue in this case. Therefore, no useful purpose can be served by discussing at length any of the extensive evidence on this subject. Insofar as any testimony of these four expert witnesses relates to the interpretation of the advertising matter in question, however, their evidence has been fully considered and weighed with all other pertinent evidence in the record.

We now pass to a consideration of the evidence specifically relating to each of the three charges of the complaint. As to the first issue,

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that respondent has falsely claimed its bread to be a low-calorie food: while respondent contends that it has not advertised Hollywood Bread as a "low-calorie food", the record positively shows the contrary. See Commission's Exhibits 3 and 25, and Respondent's Exhibits 16 and 18. Commission's Exhibit 3, which is the advertisement the public sees first, refers to Hollywood Bread in direct connection with the expression "low-calorie foods". And respondent's vice president, Medina, admitted that these advertisements contained these words. The latter three exhibits are the elaborate little diet brochures referred to in the said advertisement, which, upon inquiry, are sent by respondent to those interested. The first two brochures are different editions of substantially the same document, each being entitled "Diet and Calorie Guide". The third is entitled "Calorie and Diet Chart". All of these brochures naturally extol the virtues of Hollywood Bread, and the specific daily and weekly diets set forth therein, except for one or two menus, uniformly call for the use of two slices of Hollywood Bread at each meal. The "Calorie and Diet Chart" (RX 18) has the word "Hollywood" and a picture of a loaf of Hollywood Bread immediately under the word "diet", and on the last page, following the list of calorie contents of various foods, states "Hollywood Special Formula Bread", and immediately thereunder, that the chart is designed "to help you like low-calorie foods". The implications from this and each of the other three said exhibits, that Hollywood Bread is a low-calorie food, are undeniable.

Five of the consumer witnesses testified, in substance, that from the advertisement they had just read (CX 3), they understood Hollywood Bread was a low-calorie food. Dr. Horwitt, as an expert witness for respondent, while contending that there is no such absolute scientific term as a "low-calorie food", nevertheless admits that this expression is frequently used by the laity. Since respondent has specifically used this language in its advertising to the public, it must be found that respondent has represented therein that Hollywood Bread is a low-calorie food, and it is so understood by the public. There is substantial, credible expert testimony in the record that bread is not a low-calorie food, and therefore such representation of Hollywood Bread as a low-calorie food is false, misleading and deceptive.

As to the second issue, that respondent has represented its bread to be substantially lower in calories than ordinary bread, while occasionally respondent has referred in its advertisements to its bread as a "slim slice" or "thinly sliced" (See CX 5 and RXs 13, 14 and 15), for the most part its advertisements make no statement regarding the thickness of its slices of bread, and nine of the consumer witnesses testified, in substance, that they got the impression from the advertisements

they read (CXs 1-4) that Hollywood Bread had less calories than other bread; and there is evidence that this comparison was by the slice, which they believed to be of the same size and weight as the customary slices of bread other than Hollywood Bread. Dr. Kline expressly testified that in his opinion the average consumer, reading Commission's Exhibit 4, for example, "would take this to mean that the bread [Hollywood Bread] is considerably different from other similar products on the market in respect to its caloric value". It is respondent's basic theme, "Only about 46 calories in an 18-gram slice," which appears in each of the four exhibits, which chiefly leads the said witnesses to their conclusions. After considering these matters and all other evidence pertaining to this issue, the examiner, therefore, finds that respondent has represented that its Hollywood Bread is substantially lower in calories, and therefore substantially less in caloric value, than ordinary bread, when compared slice for slice.

The evidence shows that bread cut in ordinary-sized slices contains approximately 63 or 64 calories and weighs about 23 grams per slice, but that the consuming public generally does not know this fact, and assumes from respondent's advertising that an 18-gram slice of Hollywood Bread is the same weight as a slice of ordinary bread, and therefore, since it contains "only about 46 calories" per slice, that Hollywood Bread is significantly lower in calories than other bread. The evidence discloses that all breads, when sliced in equal portions, have about the same caloric values, and on any weight-to-weight balance, there is no substantial difference in the caloric values of different breads. See also the Commission's opinion in *Bakers Franchise Corporation, et al., supra*, [59 F.T.C. 70], where a representation similar to that here in question is analyzed and the falsity thereof disclosed. It is therefore found that respondent's advertisements are false, misleading and deceptive, in that they lead the public to believe that Hollywood Bread is substantially lower in caloric value than ordinary bread.

As to the third issue, that respondent has falsely represented that eating Hollywood Bread will cause the consumer to lose weight or prevent him from gaining weight, respondent's counsel contend that the evidence discloses that the advertising as interpreted by about 12 consumer witnesses and as it must reasonably be interpreted by anyone, does not convey the impression that Hollywood Bread is offered as a diet in and of itself, but only as part of a diet. The witnesses so considered the advertising they read, and the hearing examiner is in full agreement with respondent's counsel; but nevertheless the consumer witnesses testified, and the examiner finds, that the respondent's advertising does indicate to the reader that Hollywood Bread itself, as

a part of a diet, will cause the consumer to lose weight, or will prevent the consumer from gaining weight. In other words, in the context of the various advertisements in evidence, it is clear that Hollywood Bread is so associated and classified with low-calorie foods that one reading the advertisements must conclude that this product is offered as one which will reduce weight or prevent its gain. The use of the glamorous movie stars, lithe animals, and various expressions all in the context of the various advertisements cannot be otherwise interpreted. Since the evidence shows that bread itself is incapable of reducing weight or staying weight gain, the respondent's said advertising, which so indicates, is false, misleading and deceptive.

With respect to all of respondent's advertising in question here, it is notable that respondent's advisor and expert witness on bread advertising, Elwood J. Sperry, testified in Chicago on June 22, 1960, that he "fought very strenuously" against the inclusion of the phrase "only 46 calories per 18-gram slice" which appeared in all of respondent's advertising of Hollywood Bread. He had been objecting to respondent's use of such advertising for several years prior to his testimony, and testified that "at one time, through the president, I stopped all Hollywood [Bread] advertising then until a meeting was had by all concerned * * * but all persons connected or having to do with the advertising said it [the expression "only 46 calories per 18-gram slice"] was mandatory and must be included in all copy of advertising". Mr. Sperry, after a visit to the Federal Trade Commission, had also strongly recommended that the Commission's criticism of "exemplary and exaggerated use of the motion picture stars" in respondent's advertising of its bread was well founded, and such practice should be discontinued. He believes his advice in this respect has been followed by the respondent. He further objected to the use of "only 46 calories per 18-gram slice" in respondent's advertising without a definite explanation of the size of the slice referred to, and also objected to the use of the phrase "stay slender" in such advertising.

It must also be remarked that in most of the earlier advertising of respondent it had never indicated that its bread was thinly sliced, but in connection with its defense, respondent's newer type of transparent bread wrappers were received in evidence, having been adopted some months after this litigation had begun (RXs 13-15, inclusive), in which the slogan theretofore used, "About 46 calories in an 18-gram slice" (See RXs 11 and 12) had been changed to "Thinly sliced" or "Thin Sliced". This is tantamount to an admission by respondent that its use of the expression "About 46 calories in an 18-gram slice" and similar statements, as previously used in nearly all of its advertising matter, was deceptive, and that its expert, Mr. Sperry, had been

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eminently correct in urging its deletion, or at least the inclusion of a clear explanation of what it meant.

As already referred to, the examiner finds from the record that the ordinary person does not understand what an 18-gram slice is. Such a person is unable to compare it with the ordinary slice of bread, which weighs 23 grams and contains approximately 63 calories as against the 46 calories in respondent's 18-gram slice. The ordinary member of the public, of course, cannot be expected to have any real understanding of this technical terminology, and does not understand the difference between nutritional values and caloric values. Dr. Kline testified to this effect.

It is of special significance that one of respondent's experts on nutrition, Dr. Horwitt, testified with respect to diets:

It is not the kind of food that you are dieting on, it is the amount of, the various techniques which are used, psychological techniques which are used to make a person decrease his weight, represent all kinds of techniques to cheat him, or trick him, or to make him—cheat himself, I mean, to get him to the point where he feels he is doing something to reduce his weight.

In the prescription of diets by the medical profession, of course, it is necessary and proper that such psychological devices be used to induce reluctant patients to revise their thinking and adopt diets which will control their weight. But, as the Supreme Court said long ago in *F.T.C. v. Raladam Co.* (1931), 283 U.S. 643 at page 653 [2 S.&D. 116, 122],

Of course, medical practitioners * * * are not in competition * * *. They follow a profession and not a trade and are not engaged in * * * business.

But respondent here is a corporation engaged in trade, competing for the bread market, and interested primarily in selling Hollywood Bread. It is not a professional expert prescribing for the psychological ills of patients, and the use by it of any psychological tricks to mislead and deceive the public is an unwarranted misapplication of such principles. The respondent's advertising in all the respects charged, therefore, violates the provisions of the Federal Trade Commission Act.

Upon consideration of the whole record, the hearing examiner reaches the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the respondent, and of the subject matter of this proceeding.
2. This proceeding is in the public interest.
3. The acts and practices of the respondent, as hereinabove found, are in violation of the Federal Trade Commission Act.

Accordingly,

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread", or any other product of substantially similar composition, whether sold under the same names or under any other name or names, do forthwith cease and desist from:

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

(a) Hollywood Bread or any similar product is a low-calorie food;

(b) Said bread is substantially different in caloric value from ordinary breads;

(c) Said bread contains fewer calories than ordinary breads;

(d) A slice of Hollywood Bread contains fewer calories than a slice of ordinary breads, unless it is clearly and conspicuously disclosed in immediate conjunction therewith that Hollywood Bread is sliced thinner than some ordinary breads;

(e) Eating Hollywood Bread or any similar product will cause the consumer to lose weight or will prevent the consumer from gaining weight;

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

OPINION OF THE COMMISSION

FEBRUARY 1, 1963

By Dixon, *Commissioner*:

This matter is before the Commission for consideration of respondent's exceptions to the hearing examiner's initial decision in which he found and concluded that respondent had violated, and was violating,

the Federal Trade Commission Act by disseminating false advertising of a food in commerce.

Respondent National Bakers Services, Inc. (sometimes herein referred to as National or respondent), is engaged in the business of licensing bakeries to produce a bread from respondent's special formula and to market the bread under respondent's exclusive trademark, "Hollywood." Respondent's 182 baker-licensees are located throughout the entire United States and "Hollywood" bread is sold, and "Hollywood" bread advertising has appeared, in each State of the United States.

An important part of the service rendered by respondent to its licensed bakeries is the preparation and dissemination of advertising extolling the merits of "Hollywood" bread. The baker-licensee pays the respondent a fee of one or more cents per loaf to defray the cost of preparation and placement of the advertising. The choice of media is determined in consultation with the licensee and may be either radio, television, or newspapers. The principal medium utilized is newspapers, which account for 75 percent of respondent's advertising expenditures.

National prescribes the wrapper in which the baker-licensee must market "Hollywood" bread. In the event a bakery wishes to engage in advertising in addition to the advertising placed by respondent, it must submit advance copies of the proofs to respondent for approval. Thus, respondent controls and directs all advertising of "Hollywood" bread.

The respondent supplies its licensees with formulas to produce both light and dark "Hollywood" bread. The advertising makes the same claims for both types and such differences as exist between them are, for the purposes of this proceeding, immaterial.¹

The most common form in which bread is marketed in the United States is in loaves of one-pound weight, sliced into approximately 20 slices of one-half inch thickness, with each slice weighing 23 grams. White bread is usually enriched by the addition of the nutrient elements thiamine, riboflavin, niacine and iron—elements which are diminished or lost when wheat is made into white flour. Such enrichment brings the nutrient level of white bread closer to that of whole wheat bread, with riboflavin content slightly higher than in whole wheat bread. The minimum specifications of commercial white and whole wheat bread are fixed by Federal and State laws, with the result that these breads are remarkably standardized throughout the

¹ "Dark Hollywood" bread is apparently not a whole wheat bread for the calorie content of standard whole wheat bread is significantly lower than the calorie content of respondent's bread.

United States. Of course, bakers are free to, and do, add additional elements such as vitamin B, wheat germ, calcium and milk products.

Bread produced from respondent's formula meets the basic requirements of Federal and State laws and is enriched by the addition of a "special mix" formulated by respondent. National contends that "Hollywood" bread contains between 37 percent and 42 percent "extra protein" when compared to standard commercial white and whole wheat bread. Respondent admits that there is no significant difference in the calorie content of "Hollywood" bread and commercial white bread. Both contain approximately 276 calories per 100 grams. Standard whole wheat bread at 240 calories per 100 grams is the lowest calorie wheat flour bread produced.

There is a superficial difference between the finished form in which "Hollywood" bread and standard white and dark breads are presented to the consumer. While standard breads are normally sold sliced into twenty 23-gram slices per one-pound loaf, "Hollywood" bread is sliced into twenty-five 18-gram slices per one-pound loaf. Because it is smaller, and for no other reason, the 18-gram slice of "Hollywood" bread contains approximately 46 calories as compared to the approximately 63 calories contained in the 23-gram slice of standard white bread. This thinner slice is the only significant difference that exists between "Hollywood" bread and most other commercial breads. While respondent protests that its bread is additionally enriched by the addition of proteins, the record clearly indicates that it is common practice in the United States for bakers to add additional enrichment of various kinds, including proteins, to their bread.

All of the advertising disseminated by respondent is directed and designed to appeal to the figure and weight conscious consumer. The advertisements stress "weight control," being "figure wise," "watching weight," and keeping "slim," "slender," "vital," "trim," and "lithe." All of these desirable ends are represented as attainable the "Hollywood way"—in the words of one of the advertisements, "a good figure is more than luck when a lady watches her weight the famous Hollywood way." The advertisements do not explain the "Hollywood way" except to point out that "Hollywood" bread has "46 CALORIES PER 18 GRAM SLICE."

The complaint, as amended by order of the hearing examiner, alleges that respondent's advertising contains three false representations: (1) that "Hollywood" bread is a "low calorie food"; (2) that it is lower in calories than ordinary breads; and (3) that eating "Hollywood" bread will cause the consumer to lose weight or prevent gaining weight. We shall consider these charges seriatim.

With respect to the first complaint allegation, the hearing examiner

found that respondent's advertising conveyed to consumers the impression that "Hollywood" bread was a "low-calorie food." As to the truth or falsity of this representation, he found: "There is substantial, credible expert testimony in the record that bread is not a low-calorie food, and therefore such representation of Hollywood Bread as a low-calorie food is false, misleading and deceptive." (Initial Decision at page 1128.) This is, of course, not a factual finding at all, but merely a summary conclusion. We are left in the dark as to the identity of the expert or experts who supplied the convincing testimony. Our review of the record reveals that the two experts called to testify in support of the complaint did indeed state on direct examination that bread is not a low-calorie food. However, on cross-examination, these experts testified that bread was not a high-calorie food." Neither expert could give a definition of the term "low-calorie food." In the opinion of one expert, bread is in the "intermediate zone." The two experts called by respondent testified in essence that the term "low-calorie" had little or no scientific meaning since whether a food is of a high or low caloric value depends upon the norm to which it is compared.

Bread is definitely low in calories when compared to peanut butter, chocolate, salad oil or lard, but is quite high in relation to water cress or cucumbers. The caloric value of food ranges in a continuum from the extremely low 12 calories per 100 grams contained in raw cucumbers to the 902 calories per 100 grams found in lard. Bread, at approximately 276 calories per 100 grams occupies a place in the scale which cannot be accurately described by relative words such as "high" or "low."

An official publication of the United States Department of Agriculture, placed in evidence in this record, contains the following declaration:

Bread has a place in the well-balanced diet, including the reducing diet. The fact that five slices of white bread supply only 10 percent of the calories recommended for a man 25 years of age (National Research Council recommended allowances) indicates that bread should not be considered a high calorie food.

While we do not read this statement as indicating that bread is, in fact, a "low-calorie food," we feel that an explicit finding that it is not would be difficult to reconcile with the quoted statement.

Of course, we recognize that the term "low-calorie" is in common usage but there is no showing in this record that the term has a common, accepted meaning. Apparently it means different things to different people. From the testimony in this record, it appears that consumers are almost wholly ignorant of the exact, or even approximate, caloric content of the various foods. In spite of the wide variety

of authoritative and factually sound published data available at little or no cost on this subject, the public appears to entertain many misconceptions and prejudices and their buying habits are probably motivated in accordance with such erroneous beliefs. For example, it is popular to consider bread as quite high in caloric content when compared to raw beef. In actual fact, the opposite is true. Most beef cuts are considerably higher in caloric content than bread. For example, a medium-lean porterhouse steak will contain 342 calories per 100 grams of weight; a rib roast contains 319 calories per 100 grams; and hamburger contains 364 calories per 100 grams. On the other hand, it is doubtful that very many consumers would label apple pie as low in calories and yet it contains less calories per 100 grams than ordinary white bread, 246 calories compared to 276 calories for bread.

Thus, as we view it, this record does not support a finding as to the exact meaning of the term "low-calorie" and we are, as a consequence, unable to find as a fact that "Hollywood" bread rating approximately 276 calories per 100 grams is not in that category. The hearing examiner's contrary finding on this point must be reversed.

The second of the three complaint charges is the most important by far. In our view, the other two charges are variations on this central theme that respondent has represented its bread to be lower in calories than ordinary commercial bread. If respondent has made this representation and it is found to be false or misleading, then an order coping with all possible methods of capitalizing upon the misrepresentation can be entered.

There is not the slightest doubt but that respondent's advertisements are intended to, and do, convey the impression that "Hollywood" bread is lower in calories than standard breads. While the whole of each of the advertisements is directed to this deception, the particular language used to hammer home the point is "ONLY ABOUT 46 CALORIES PER 18 GRAM SLICE."

The record reveals that the consuming public has no conception of the gram weight or calorie content of standard commercial bread and that this statement when made in the context of the other statements advocating "keeping slim," conveys and forces the conclusion that "Hollywood" bread is lower in calories. Respondent's clear intention to convey this impression is indicated *inter alia* by the fact that it frequently places the legend "UP TO 42% EXTRA PROTEIN" in close proximity to the "46 CALORIES PER 18-GRAM SLICE" representation. One of the advertisements joins these two representations by enclosing them within a dotted-line box. The respondent's experts testified that the thin slice of "Hollywood" bread does not con-

tain 42 percent more protein but, in fact, contains approximately the same amount of protein as a standard slice of ordinary bread. The protein representation would be truthful only if the "Hollywood" bread and standard breads were similarly sliced. No matter how the housewife reads these two representations, she must receive a false impression. The consumers are not informed by the advertising that the calorie comparison implied is between units of unequal weight while the protein comparison is between units of the same weight. Quite naturally they assume, as intended, that units are of the same size and that on this basis respondent's bread is both lower in calories and higher in protein.

Our conclusion concerning the misleading impression created by respondent's advertisements is not based solely upon the use of the term "ONLY 46 CALORIES PER 18-GRAM SLICE" but also upon a viewing of the advertisements as a whole as they would be viewed by the average consumer.² Viewed in this manner, the advertisements definitely create the impression that "Hollywood" bread is specially concocted by formula which results in a bread of lower caloric content. The consumer and expert testimony in the record supports this conclusion and, indeed, there is nothing in the record which rebuts the evidence of consumer deception. Respondent attempts to make much of the quite obvious fact that the deception principally arises from the ignorance of the public as to the weight and caloric content of a standard slice of commercial bread. But this fact was known to respondent when it prepared and promulgated its advertising and the advertisements were designed to capitalize on the public ignorance. They are, therefore, clearly deceptive. That they would not mislead trained nutritionists is immaterial, for they were not directed to the esoteric few but to "* * * the public—that vast multitude which includes the ignorant, the unthinking, and the credulous * * *"³

Here, as in *Bakers Franchise Corporation* (Docket No. 7472, Order to Cease and Desist, July 19, 1961) [59 F.T.C. 70], we must conclude that respondent's failure to disclose in the advertisements the fact that its bread was sliced thinner is significant but not essential to the decision. As we pointed out in that matter, the mere disclosure within the context of advertisements of this stripe that the bread is thinly sliced may heighten rather than lessen the misleading impression created.

The arguments advanced by the respondent in this matter are sub-

² *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 [3 S. & D. 378] (6th Cir. 1941).

³ *Earl Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 [3 S. & D. 528, 531] (7th Cir. 1942).

stantially similar to those considered and rejected on similar facts in *Bakers Franchise*.

We come now to the third and final allegation, that respondent falsely represented “* * * that eating said bread will cause the consumer to lose weight or prevent the consumer from gaining weight.” The wording of this allegation gives us a good deal of trouble. We assume at the outset that we cannot interpret it literally as meaning that “eating” respondent’s product will have some druglike effect upon the body and effect a weight loss, with the result that the more consumed the thinner you become. Such an interpretation would do violence to common sense and was probably not intended by the drafter of the complaint or by the hearing examiner who approved this amended allegation. As we understand it, this charge is a ramification of the second and central charge that respondent has falsely advertised its bread as being lower in calories than standard commercial bread. The allegation must be read as though the words “in lieu of standard commercial bread” were inserted after the phrase “eating said bread.” As so interpreted, the charge means that respondent has falsely represented that the substitution of “Hollywood” bread for standard bread in the normal diet will effect a weight loss or prevent a gain in weight.

Of course, since “Hollywood” bread contains approximately the same number of calories as standard bread, the only way in which a consumer can reduce with “Hollywood” bread is by eating less of it. But respondent’s advertisements do not inform the consumer of this unvarying fact and therein lies their deceptiveness. The implication of the advertisement is that “Hollywood” bread contains less calories and that a consumer can eat an equal amount of it as other breads and yet effect a weight loss. This implication is false and respondent must be enjoined from its dissemination.

We are not persuaded that all deception ceases when the consumer takes a loaf of “Hollywood” bread home and discovers that the slices are, in fact, thinner than those to which she is accustomed. She is never told in the advertisements or on the bread wrapper itself that “Hollywood” bread is not intrinsically lower in calories than other breads. There is nothing in the thinner slice to suggest that “Hollywood” bread is not a lower calorie bread, and in all probability the consumer would consider the smaller slice as merely an additional weight-reducing faculty.

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There are several changes which must be made in the hearing examiner’s order. Section 1(a) forbidding representing “Hollywood”

bread as a low calorie food cannot stand, for the allegation was not proved. Section 1(b) we consider redundant to the prohibition in Section 1(c) against representing that "Hollywood" bread is lower in calories than standard bread. Section 1(b) would not be redundant could we foresee or imagine that respondent would ever wish to represent that its bread is higher in calories than ordinary bread, but as we view it such a possibility is too remote to warrant the entry of an order.

Respondent contends that the order to cease and desist promulgated by the hearing examiner is punitive and that while no order at all is warranted, the Commission could accomplish its ends by an order limited to the single provision contained in Section 1(d) of the hearing examiner's order. This provision would require respondent to cease disseminating advertisements which represent:

A slice of Hollywood Bread contains fewer calories than a slice of ordinary breads, unless it is clearly and conspicuously disclosed in immediate conjunction therewith that Hollywood Bread is sliced thinner than some ordinary breads.

We can understand the respondent's attenuated objections to the entry of this sole provision since it would permit advertising of substantially the same content as has been used in the past. Moreover, it is our view that the Commission order should contain no provision of this nature, since its effect is to sanction calorie comparisons when accompanied by disclosure of the thinner slice. We do not feel that such disclosure will have any appreciable clarifying effect on the deceptive advertisements and may well serve to heighten and not eliminate the deception. Therefore, the order which we shall issue will contain no provision of this type.

While the hearing examiner's order goes a long way toward enjoining the unlawful aspects of respondent's advertising, we are not convinced that it is completely adequate. Respondent's advertising is designed to appeal to weight-conscious consumers. The basic deception and unfairness here involved is the creation of the impression that "Hollywood" bread is more appropriate in a reducing diet than other breads because of its lower calorie content. Thus, the image is created that "Hollywood" bread is a reducing food possessed of special slenderizing properties. It seems to us basically unfair to present a bread which is exactly like other commercial bread in caloric content as being of special utility to a person desiring to lose weight.

We are not unconscious of the fact that the consumers in this country are today more weight and figure conscious than ever before. Whether this is due to publicity concerning the increased incidence of certain diseases in obese persons or because of the emphasis on glamour and attractiveness now prevalent is unimportant. The fact is that weight

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loss or weight stabilization claims have a very potent and irresistible appeal to a significant section of our population. Thus, as never before, we feel that advertising of this type should be completely truthful and undeceptive.

At the same time, the respondent has a legitimate interest in pursuing business by advertising and all other legitimate methods. It should be permitted to truthfully represent such special properties as its bread may have without the constricting bands of a punitive order. Doubtless respondent's bread can be truthfully advertised as a specially enriched bread which is thinner sliced in order to give the consumer an opportunity to serve smaller individual portions.

We have attempted to prepare an order which will meet the desirable end of coping with the basic deception found in respondent's advertising, but which will permit it to continue to advertise such special merits as its product actually possesses. We feel that these ends can be accomplished by an order which enjoins the dissemination of advertising which represents or implies that:

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions.

The initial decision of the hearing examiner is adopted as the decision of the Commission, except that: (1) such findings and conclusions as are in conflict with this opinion are vacated and set aside; (2) the order proposed by the hearing examiner is not adopted and in lieu thereof the Commission will issue its own order to cease and desist as described above.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED
FINAL ORDER

FEBRUARY 1, 1963

The Commission having rendered its decision, in part adopting and in part modifying the hearing examiner's initial decision, and having

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determined that pursuant to § 4.22(c) of the Commission's Rules of Practice respondent should be afforded the opportunity to file exceptions to the Commission's Proposed Final Order:

It is ordered, That respondent may, within twenty (20) days after service upon it of this order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto supporting the Proposed Final Order.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread," or any other products of substantially similar composition, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

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

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions.

2. Disseminating or causing to be disseminated any advertise-

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

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

Commissioners Anderson and Higginbotham not participating.

ON RESPONDENT'S EXCEPTIONS TO THE PROPOSED FINAL ORDER

APRIL 10, 1963

By the Commission:

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondent has filed exceptions to the proposed order to cease and desist issued by the Commission on February 1, 1963. Complaint counsel has filed an answer opposing allowance of respondent's exceptions and requests the Commission to reconsider its action dismissing one of the complaint charges. The Commission has considered the viewpoints of both parties and in this memorandum states its conclusions and announces its decision thereon.

Respondent's first exception is to paragraph 1(a) of the order which prohibits it from representing that "Hollywood Bread" contains fewer calories than other commercial breads. Respondent requests a proviso which would permit representing that a *slice* of "Hollywood Bread" contains less calories than a *slice* of ordinary bread when it is affirmatively disclosed that the "Hollywood" slice is thinner.

It is the Commission's view that allowing this exception would permit respondent to continue its advertising in much the same form as that found to be deceptive. For example, if we should allow this first exception, the order would not cover an advertising representation of this type: "THINNER-SLICED HOLLYWOOD BREAD CONTAINS ONLY FORTY-SIX CALORIES PER SLICE." Such a representation is still capable of deceiving a substantial segment of the public. The Commission has found that the public has no conception of the exact number of calories contained in a slice of bread and the adjective phrase "thinner sliced" will not necessarily serve to obviate the deception created by the calorie representation.

Respondent claims that provision 1(b) of the order fails as a matter of law because it requires an affirmative disclosure that Hollywood bread has no less calories than other bread. Respondent cites *Alberty v. Federal Trade Commission*, 182 F. 2d 36 [5 S. & D. 184]

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(D.C. Cir. 1950), and *United States Association of Credit Bureaus v. Federal Trade Commission*, 299 F. 2d 220, 223 [7 S. & D. 358] (7th Cir. 1962), in support of its contention. All that *Alberty* requires is that an order requiring affirmative disclosure must be buttressed by a finding “* * * that failure to make such statements is misleading because of the things claimed in the advertisements.” (182 F. 2d at 39.) In its opinion, the Commission found “There is not the slightest doubt but that respondent’s advertisements are intended to, and do convey the impression that ‘Hollywood’ bread is lower in calories than standard breads.” It is our view that this finding effectively disposes of *Alberty*.

In the *Credit Bureaus* case, the Court refused to affirm the part of our order which required an affirmative disclosure that the purpose of the skip-tracing forms used was the collection of debts. The case is inapposite. The Court’s decision was based upon a failure of the Commission or the hearing examiner to find that the forms used by the respondent were deceptive and, in fact, the petitioner’s forms were not attacked in the complaint as deceptive.

In its third exception, the respondent objects to the provision of paragraph 1(b) of the order which would require it, when making reducing or weight control claims, to disclose that the “only usefulness” of Hollywood bread in a diet derives from the fact that its thinner slices enable the consumer to serve and consume smaller portions. Respondent contends that “The record is uncontradicted that the usefulness of Hollywood Bread on a reducing diet derives *not only* from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions, *but also* from the fact that these smaller individual portions still provide as much nutrition as the larger slice of ordinary commercial bread.” We do not agree with respondent’s major premise. In the first place, the difference in protein content is not significant in relation to the body’s daily needs. Secondly, while the respondent’s expert did testify that a slice of Hollywood bread contained as much protein as a standard slice of ordinary bread, protein is certainly not the only nutrient found in bread. Bread is a source of other nutrients including minerals and vitamins. A person reducing his bread intake by eating a slice of “Hollywood Bread” when it has been his custom to eat a slice of ordinary bread, would deprive himself of all of the food value, except for protein, of the amount of bread not consumed.

Further, the opinion makes perfectly clear that the respondent may truthfully represent the ingredients, including the protein content of its bread. We held in the opinion “It should be permitted to truthfully represent such special properties as its bread may have * * *”

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and "Doubtless respondent's bread can be truthfully advertised as a specially enriched bread which is thinner sliced in order to give the consumer an opportunity to serve smaller individual portions."

In his reply to respondent's exceptions, complaint counsel asks the Commission to reconsider its decision not to enjoin the respondent from representing that "Hollywood Bread" is a low-calorie food. While Rule 4.22(c) does not provide for complaint counsel's request at this stage, it has been advanced with such earnestness and sincerity that the Commission is forced to conclude that its opinion does not adequately explain the reasons for its dismissal of this charge. Thus, in the belief that some additional clarification is needed on this point, the Commission here discloses other factors which motivated its decision. In the first place, it was not at all clear that the respondent had in fact represented that "Hollywood Bread" was a low-calorie food. The only evidence to support the charge was found in one of its newspaper advertisements and in a small brochure which the consumer can obtain by writing to respondent. The statements in both advertisement and brochure were on the innocuous side. In the advertisement it was stated "There is only one sure way to reduce—your low-calorie foods must be nutritious and healthful. Millions of beauty-conscious women include Hollywood Bread in their daily menus." The brochure contains several pages of sample daily menus and on the last page advises that the diets were designed "to help you like low-calorie foods." Of course, each of the menus included Hollywood bread. These oblique references are not substantial evidence that the respondent has advertised its bread to be a low-calorie food.

Thus, it is the Commission's view that the allegation failed on two factual grounds: As described in the Commission's opinion, for failure to establish that Hollywood bread is, in fact, not a low-calorie food, and for the above-described failure to show that it was, in fact, advertised as a "low-calorie food." Moreover, another and equally important reason for dismissing this charge exists. In its opinion the Commission found that "Hollywood Bread" is indistinguishable, insofar as calorie content is concerned, from the ordinary white bread sold by thousands of small and large bakeries throughout the United States. Therefore, a finding that Hollywood bread is a high-calorie food or merely that it is not a low-calorie food would reflect unfavorably on all bread. If such a finding were necessary to this case and the evidence in support thereof were substantial and convincing, then, of course, the Commission would make the finding. But, the finding is neither necessary nor appropriate in these premises. The public is afforded adequate relief by the order as it now stands. The additional protection sought by complaint counsel can only be obtained at the

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risk of harming the business of all bakers, a risk not worth the gain.

It is the Commission's conclusion that no showing of error or injustice has been made by either party and that the proposed order to cease and desist should remain unchanged and issue as the final order of the Commission.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

FINAL ORDER

APRIL 10, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondent was served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondent having made timely filing of its exceptions to the order proposed which were opposed by a reply filed by counsel supporting the complaint and the Commission upon review of these pleadings having determined that respondent's exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread," or any other products of substantially similar composition, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

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

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives

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from the fact that its thinner slices enables the consumer to conveniently serve and consume smaller individual portions.

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

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

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

Commissioner Anderson not participating for the reason that he did not hear oral argument, and Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

FORTE-FAIRBAIRN, INC., ET AL.

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

Docket 8453. Complaint, Nov. 17, 1961—Decision, Apr. 13, 1963

Order dismissing as not sustained by the evidence, complaint charging Boston, Mass., manufacturers of wool products with representing fiber stocks falsely on invoices as "Baby Llama".

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 Forte-Fairbairn, Inc., a corporation, and Orville W. Forte, Jr., Donald Forte, and Boyce W. Godsoe 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